

Case Nos. 85525 & 85656

In the Supreme Court of Nevada

UNITED HEALTHCARE INSURANCE COMPANY;
UNITED HEALTH CARE SERVICES, INC.; UMR, INC.;
SIERRA HEALTH AND LIFE INSURANCE COMPANY,
INC.; and HEALTH PLAN OF NEVADA, INC.,

Appellants,

vs.

FREMONT EMERGENCY SERVICES (MANDAVIA),
LTD.; TEAM PHYSICIANS OF NEVADA-MANDAVIA,
P.C.; and CRUM STEFANKO AND JONES, LTD.,

Respondents.

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Case No. 85525

UNITED HEALTHCARE INSURANCE COMPANY;
UNITED HEALTH CARE SERVICES, INC.; UMR, INC.;
SIERRA HEALTH AND LIFE INSURANCE COMPANY,
INC.; and HEALTH PLAN OF NEVADA, INC.,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT of the State
of Nevada, in and for the County of Clark; and the
Honorable NANCY L. ALLF, District Judge,

Respondents,

vs.

FREMONT EMERGENCY SERVICES (MANDAVIA),
LTD.; TEAM PHYSICIANS OF NEVADA-MANDAVIA,
P.C.; and CRUM STEFANKO AND JONES, LTD.,

Real Parties in Interest.

Case No. 85656

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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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1 vs.

2 UNITED HEALTHCARE INSURANCE
3 COMPANY, a Connecticut corporation; UNITED
4 HEALTH CARE SERVICES INC., dba
5 UNITEDHEALTHCARE, a Minnesota
6 corporation; UMR, INC., dba UNITED
7 MEDICAL RESOURCES, a Delaware
8 corporation; SIERRA HEALTH AND LIFE
9 INSURANCE COMPANY, INC., a Nevada
10 corporation; HEALTH PLAN OF NEVADA,
11 INC., a Nevada corporation; DOES 1-10; ROE
12 ENTITIES 11-20,

13 Defendants.



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I. INTRODUCTION

Defendants United Healthcare Insurance Company (“UHIC”), United Health Care Services Inc. (“UHS”, which does business as UnitedHealthcare or “UHC” and through UHIC), UMR, Inc. (“UMR”), Sierra Health and Life Insurance Company (“SHL”), and Health Plan of Nevada, Inc. (“HPN”) (collectively, “Defendants”), bring this Motion for Judgment as a Matter of Law (“Motion”).

TeamHealth Plaintiffs¹ have concluded their case in chief without presenting any relevant evidence related to several of the Defendants, and no evidence related to key elements of nearly every cause of action in their Second Amended Complaint (“SAC”). This Court should direct a verdict on all claims but the TeamHealth Plaintiffs’ claim for unjust enrichment, and even those against SHL, HPN, and UMR.² The other claims fail as a matter of law:

- TeamHealth Plaintiffs presented no evidence on the conduct of SHL, HPN, or UMR. Without such proof, all claims against these Defendants fail as a matter of law.
- All Defendants are entitled to judgment as a matter of law on TeamHealth Plaintiffs’ claim under the Unfair Claims Practices Act. Because they are not insureds, TeamHealth Plaintiffs lack standing to bring this claim against Defendants. And two Defendants (UHS and UMR) are not insurers at all, so this statute does not apply to them. In addition, TeamHealth Plaintiffs failed to present evidence on key elements of this cause of action: (1) whether Defendants’ liability was “reasonably clear”; (2) whether Defendants failed to effectuate a prompt, equitable, and fair settlement; (3) whether officers or directors knowingly permitted the violations; and (4) whether TeamHealth Plaintiffs were actually

¹ The “TeamHealth Plaintiffs” collectively refers to the three Plaintiffs that initiated this action, each of which is owned by and affiliated with TeamHealth Holdings, Inc.: Fremont Emergency Services (Mandavia), Ltd. (“Fremont”), Team Physicians of Nevada-Mandavia, P.C. (“TPN”), and Crum, Stefanko and Jones, Ltd., d/b/a Ruby Crest Emergency Medicine (“Ruby Crest”).

² Even this cause of action is preempted by ERISA, *see infra* Section III.F. If this Court holds that ERISA preempts TeamHealth Plaintiffs’ unjust enrichment claim, no claims should reach the jury.



1 harmed by Defendants' claims process.

- 2 • TeamHealth Plaintiffs have not presented any evidence that could support
3 punitive damages. The only cause of action for which TeamHealth Plaintiffs seek
4 punitive damages is their claim under the Unfair Claims Practices Act.³ Because
5 only insurers can be liable under that Act, punitive damages cannot be awarded
6 against non-insurer Defendants UHS and UMR. Punitive damages cannot be
7 awarded against any Defendant because TeamHealth Plaintiffs' claim under the
8 Act sounds in contract, not tort. And even if punitive damages could be awarded
9 on this claim, TeamHealth Plaintiffs have presented no evidence that Defendants
10 acted with malice, fraud, or oppression.
- 11 • All Defendants are entitled to judgment as a matter of law on TeamHealth
12 Plaintiffs' cause of action for breach of an implied-in-fact contract because
13 TeamHealth Plaintiffs have failed to present any evidence the jury could consider
14 on basic questions of contract formation: (1) whether the parties intended to
15 contract, (2) whether promises were exchanged, and (3) whether the terms of the
16 contract were reasonably clear.
- 17 • All Defendants are entitled to judgment as a matter of law on TeamHealth
18 Plaintiffs' Prompt Pay Act claim. Only insureds have standing to bring a suit
19 under that Act, and TeamHealth Plaintiffs are not the Defendants' insureds. In
20 addition, TeamHealth Plaintiffs failed to exhaust available administrative
21 remedies under the Insurance Code, rendering their claims nonjusticiable as a
22 matter of Nevada law.
- 23 • All of TeamHealth Plaintiffs' causes of action are subject to conflict preemption
24 under ERISA § 514, and Defendants are therefore entitled to judgment as a matter
25 of law on every cause of action.

26
27 ³ This week, TeamHealth Plaintiffs asserted for the first time that they were seeking punitive damages in
28 connection with their unjust enrichment cause of action. This is inconsistent with both their Second Amended Complaint and the Joint Pretrial Memorandum ("JPTO").



1 For the reasons discussed in this Motion, this Court should grant Defendants judgment as a
2 matter of law.

3 **II. LEGAL ARGUMENT**

4 “If a party has been fully heard on an issue during a jury trial and the court finds that a
5 reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that
6 issue, the court may: (A) resolve the issue against the party; and (B) grant a motion for
7 judgment as a matter of law against the party on a claim or defense that, under the controlling
8 law, can be maintained or defeated only with a favorable finding on that issue.” NRCP 50(a).
9 A defendant may move for judgment as a matter of law after the close of the plaintiff’s case in
10 chief. NRCP 50(a)(2) (“any time before the case is submitted to the jury”).

11 This Court may enter judgment as a matter of law “when ‘the evidence is so
12 overwhelming for one party that any other verdict would be contrary to the law.’” *Grosjean v.*
13 *Imperial Palace, Inc.*, 125 Nev. 349, 362, 212 P.3d 1068, 1077 (2009) (quoting *M.C. Multi-*
14 *Family Dev., L.L.C. v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 910, 193 P.3d 536, 542 (2008)).
15 Such a determination requires the establishment of clear, uncontradicted, self-consistent, and
16 unimpeached evidence. *Sheeketski v. Bortoli*, 86 Nev. 704, 708, 475 P.2d 675, 677 (1970). The
17 court determines whether there are any issues of fact remaining for the jury. *See M & R Inv.*
18 *Co. v. Mandarino*, 103 Nev. 711, 748 P.2d 488 (1987); *Connell v. Carl’s Air Conditioning*, 97
19 Nev. 436, 634 P.2d 673 (1981); *Bliss v. De Prang*, 81 Nev. 599, 407 P.2d 726 (1965). In
20 considering a motion for judgment as a matter of law, the court must view the evidence and all
21 inferences from the evidence in a light most favorable to the party against whom the motion is
22 directed; it must not weigh the evidence or evaluate the credibility of the witnesses. *State Univ.*
23 *& Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 986, 103 P.3d 8, 18 (2004); *Banks v. Sunrise Hosp.*,
24 120 Nev. 822, 839, 102 P.3d 52, 64 (2004); *Connell*, 97 Nev. at 438, 634 P.2d at 674. “[A]
25 nonmoving party can defeat a motion for judgment as a matter of law if it presents sufficient
26 evidence such that the jury could grant relief to that party.” *D&D Tire v. Ouellette*, 131 Nev.
27 462, 466, 353 P.3d 32, 35 (2015).

28 Defendants are entitled to judgment as a matter of law on most of TeamHealth



Plaintiffs' remaining claims.⁴ Judgment should enter in favor of SHL, HPN, and UMR for all claims, for the simple reason that TeamHealth Plaintiffs failed to present any evidence related to these Defendants on key elements of their causes of action. All Defendants are entitled to judgment as a matter of law on TeamHealth Plaintiffs' claim under the Unfair Claims Practices Act; not only because TeamHealth Plaintiffs lack standing under that Act, but also because they have presented no evidence on key elements of that claim. And because TeamHealth Plaintiffs seek punitive damages only under that cause of action, their claims for punitive damages must also fail. Every Defendant is entitled to judgment as a matter of law on TeamHealth Plaintiffs' claim for breach of implied-in-fact contract because TeamHealth Plaintiffs presented no evidence showing the basic elements of contract formation. Every Defendant is also entitled to judgment on TeamHealth Plaintiffs' claim under the Prompt Pay Act, both because TeamHealth Plaintiffs do not have a private right of action under that Act and because they failed to exhaust available administrative remedies.

A. There Is No Evidence to Support Any of TeamHealth Plaintiffs' Claims Against SHL, HPN, or UMR

TeamHealth Plaintiffs produced *no evidence* to establish any claim against SHL, HPN, or UMR. Almost no testimony came in regarding the history of any relationship between SHL, HPN, or UMR on the one hand, and any of the TeamHealth Plaintiffs on the other. There is no evidence about any interactions or course of dealing between TeamHealth Plaintiffs and SHL, HPN, or UMR. The evidence that TeamHealth Plaintiffs did present concerned SHL, HPN, or UMR out-of-network savings programs. 11/15/2021 Tr. 188:22–189:7 (Mr. Ziemer testified that UMR earns a fee based on clients using programs that do not pay claims at billed charges); *id.* 194:20–205:2 (eliciting testimony from Mr. Ziemer about claims being paid based on UMR's out-of-network programs and UMR's fees); *id.* 211:8–11 (questioning related to UMR's use of MultiPlan but not with respect to a specific At-Issue claim); *id.* 221:10–224:16 (questioning

⁴ In fact, because all of TeamHealth Plaintiffs' causes of action are preempted by ERISA, *see infra* Section F, Defendants are entitled to judgment as a matter of law on all claims.

1 based on how summary plan documents administered by UMR determine At-Issue Claim
2 reimbursement); 11/16/2021 Tr. 158:14-18 (Ms. Hare testified that SHL and HPN do not use
3 “cost reduction or savings programs”); *id.* 177:13-16 (same). Nor have TeamHealth Plaintiffs
4 introduced a single document that evidences a contract manifested by conduct. *See, e.g.*, P159
5 (UMR’s administrative services agreement with a client); 11/15/2021 Tr. 197:21–203:23
6 (questioning related to P159 and how it relates to claims reimbursement). Without specific
7 evidence apart from the list of claims itself (which purports to show the amounts billed and
8 amounts allowed, and little else, *see* Exhibit P473), TeamHealth Plaintiffs have not proved their
9 causes of action against these Defendants. This complete failure of proof makes any verdict
10 against these Defendants contrary to law.

11 TeamHealth Plaintiffs’ causes of action require proof of something more than a disparity
12 between their billed charges and the amounts they received in reimbursement. Without evidence
13 of a course of dealing between TeamHealth Plaintiffs, on the one hand, and SHL, HPN, and
14 UMR on the other, there are no facts from which jurors could infer an implied-in-fact contract.
15 *Smith v. Recrion Corp.*, 91 Nev. 666, 668, 541 P.2d 663, 664 (1975) (terms of an implied-in-fact
16 contract are “manifested by conduct”). Without specific evidence about the individual claims
17 submitted to these Defendants, their liability could not be “reasonably clear” for the purposes of
18 TeamHealth Plaintiffs’ Unfair Claims Practices Act claim. NRS 686A.310(e) (unlawful for
19 insurer to “fail[] to effectuate prompt, fair and equitable settlements of claims in which liability
20 of the insurer has become reasonably clear”). And without evidence about these Defendants’
21 conduct in retaining a benefit, there cannot be sufficient proof that they were unjustly enriched
22 by paying TeamHealth Plaintiffs what they did on the reimbursement claims that were submitted
23 to them. Judgment should be entered in favor of UMR, SHL, and HPN on all causes of action.

24 **B. Defendants Are Entitled to Judgment as a Matter of Law on TeamHealth**
25 **Plaintiffs’ Cause of Action Under the Nevada Unfair Insurance Practice Act**

26 TeamHealth Plaintiffs bring a cause of action against all Defendants under the Unfair
27 Claims Practices Act. That Act confers standing only on an *insured* as against its *insurer*.
28 TeamHealth Plaintiffs are not insureds, and several of the Defendants are not insurers. Even if



they were, TeamHealth Plaintiffs have failed to offer evidence on several of the elements of this cause of action. Defendants are entitled to judgment as a matter of law.

1. TeamHealth Plaintiffs Lack Standing to Assert a Cause of Action Under the Unfair Claims Practices Act

Under the text of the Unfair Claims Practices Act, under the many decisions of the Nevada Supreme Court and other cases, and under the guidance of the Nevada Insurance Commissioner, no private right of action exists in favor of TeamHealth Plaintiffs against any Defendant.

The text of the Unfair Claims Practices Act is conclusive on this subject. The private right of action, added by the Nevada Legislature in 1987, is created by the following language:

In addition to any rights or remedies available to the Commissioner, *an insurer is liable to its insured* for any damages sustained by the insured as a result of the commission of any act set forth in subsection 1 as an unfair practice.

NRS 686A.310(2) (emphasis added); *see also* 1987 St. of Nev., Ch. 470 p. 1067 A.B. 811. The Nevada Legislature in 1989 considered language to “expressly provide for action by a third party claimant for violation of the unfair claims settlement practices act by insurance companies,” but no such enactment has ever been added. *Crystal Bay Gen. Imp. Dist. v. Aetna Cas. & Sur. Co.*, 713 F. Supp. 1371, 1377 (D. Nev. 1989). There is, therefore, no text supporting a cause of action in favor of a third-party claimant against any defendant.

TeamHealth Plaintiffs, as service providers, are mere third party beneficiaries to an insurance contract, and have no right to file claims for breach under the Unfair Claims Practices Act. The seminal case on this subject, *Tweet v. Webster*, 610 F. Supp. 104 (D. Nev. 1985), held that the Act did not create a private cause of action. In that case, Chief Judge Reed extensively canvassed the text and history of the Act, similar enactments in California and elsewhere, the model code upon which these acts are based, and legislative history, and concluded that no private right of action existed under the Act. “Where Nevada’s insurance code has *no* language relating to other liability of insurers,” other than those expressly provided, “none can be read in.”



1 *Id.* at 1194. “[W]here a legislature writes an insurance code with specific penalties and remedies
2 for violation thereof, the code is as the legislature intended.” *Id.*⁵

3 Case after case since *Tweet* and since the 1987 enactment of a private right of action have
4 consistently refused to find an extra-textual right of action in favor of third-party claimants or
5 medical providers. In *Crystal Bay*, where the district court did find an implied right of action for
6 an insured in a case arising prior to the 1987 amendment, the court nonetheless noted that there
7 was “no reason to disagree with [Chief Judge Reed’s] conclusion that the Act created no private
8 right of action in favor of third party claimants against the insurer.” 713 F. Supp. at 1376. This
9 consistent and clear statement of law has been repeated through the decades. *See, e.g., Burley v.*
10 *Nat’l Union Fire Ins. Co. of Pittsburgh PA*, No. 315CV00272HDMWGC, 2016 WL 4467892, at
11 *2 (D. Nev. Aug. 22, 2016) (“It is well established that third party claimants have no private
12 cause of action under NRS 686A.310.”); *Talbot v. Sentinel Ins. Co.*, No. 2:11-CV-01766-MMD,
13 2012 WL 3995562, at *4 (D. Nev. Sept. 10, 2012) (“The law in Nevada is clear: third-party
14 claimants may not bring claims against insurers or their insured under NRS § 686A.310.”);
15 *Weast v. Travelers Cas. & Sur. Co.*, 7 F. Supp. 2d 1129, 1132 (D. Nev. 1998) (“[T]he [Nevada
16 Unfair Practices] Act created no private right of action in favor of third party claimants against
17 the insurer.”); *Hunt v. State Farm Mut. Auto. Ins. Co.*, 655 F. Supp. 284, 287 (D. Nev. 1987)
18 (“Nevada does not recognize a right of action on the part of a third-party claimant against an
19 insurance company for bad-faith refusal to settle.”).⁶

20 These federal diversity cases are reinforced by decisions of the Nevada Supreme Court,
21 holding that individuals in far closer privity than TeamHealth Plaintiffs to the underlying

23 ⁵ As noted above, the Nevada Legislature enacted a new provision of the Unfair Claims Practices Act two
24 years after *Tweet*, that provided for a private right of action where “an insurer is liable to its insured.”
25 1987 St. of Nev., Ch. 470 p. 1067 A.B. 811. As also noted, the Nevada Legislature considered and
rejected a private right of action in favor of third-party claimants like TeamHealth Plaintiffs. *Crystal Bay*,
713 F. Supp. at 1377.

26 ⁶ Defendants acknowledge that this Court was unpersuaded by these authorities at the motion to dismiss
27 stage. However, with the benefit of a fully developed record, it is now clear that TeamHealth Plaintiffs
28 are not insureds and are the type of third-party beneficiary that the *Tweet* court held lacked standing under
the Unfair Insurance Claims Act.



insurance contract lacked standing to sue. In *United First Ins. Co. v. McClelland*, 105 Nev. 504, 780 P.2d 193 (1989), Mrs. McClelland was a dependent medical insured under her husband's health policy and sued for emotional distress due to denial of benefits to her husband. The Court held that even though Mrs. McClelland *was* an insured under the policy, she lacked standing to sue. Although *McClelland* involved a common law claim, the Supreme Court in *Gunny v. Allstate Insurance Co.*, 108 Nev. 344, 346, 830 P.2d 1335, 1336 (1992), applied its reasoning. In *Gunny*, the plaintiff was injured when he was struck by a boat propeller being operated by his father. The son made a claim against the boat liability carrier of his father. The Court held that the son lacked standing on the bad faith claim because of the absence of a contractual relationship between the son and the insurer and held that the son had "no private right of action as a third-party claimant under NRS 686A.310," citing the federal decisions in *Tweet* and *Crystal Bay*. 108 Nev. at 346. The absence of a contractual relationship precluded standing for the common-law bad faith claim and third-party claimant status precluded liability under the Act.

Cases since *Gunny* have consistently applied its holding to permit only an insured with an insurance contract with the insurer to pursue claims under the Act. *See, e.g., Fulbrook v. Allstate Ins. Co.*, Nos. 61567, 62199, 2015 WL 439598, at *4 (Nev. Jan. 30, 2015) ("This statute, however, does not provide a private right of action to third-party claimants."); *Wilson v. Bristol W. Ins. Grp.*, No. 209-CV-00006-KJD-GWF, 2009 WL 3105602, at *2 (D. Nev. Sept. 21, 2009) ("No private right of action as a third-party claimant is created under NRS 686A.310.").⁷

It may be, as some federal district courts have suggested, that where the insured assigns its benefits to a third-party claimant such as a medical provider, that third-party claimant may step into the shoes of insured. But that is irrelevant to this case. "Without an assignment,

⁷ In *Bergerud v. Progressive Casualty Insurance*, 453 F. Supp. 2d 1241 (2006), the court permitted a claim under the Act to survive a motion to dismiss where the plaintiff "is an insured, had a contractual relationship with [the insurer-defendant], and is a first-party claimant." *Id.* at 1250. The district court also makes comments in *dicta* that "Nevada does not exclude non-contracting parties from asserting a private right of action for violation of the ... Act. Instead, only third-party claimants and parties without a contractual relationship with an insurer cannot assert a claim under the ... Act." *Id.* This *dicta*, however, was unrelated to the case and inconsistent with *Gunny*, insofar as it confuses *Gunny*'s holding on the common-law bad faith claim with the holding on the Unfair Claims Practices Act claim.

voluntary or forced,” TeamHealth Plaintiffs “still lacked standing to proceed directly against” Defendants for liability under the Act.⁸ *Bell v. Am. Fam. Mut. Ins. Co.*, 127 Nev. 1118, 373 P.3d 895 (2011); *see also Hetly v. Am. Equity Ins. Co.*, No. 208CV00522PMPLRL, 2008 WL 11389200, at *3 (D. Nev. Nov. 14, 2008) (“However, generally, a valid assignment confers a right of standing upon the assignee to sue in place of the assignor.”); *cf. Wilson*, 2009 WL 3105602, at *2 (finding no assignment of benefits to support common-law bad faith claim). For instance, in *Hicks v. Dairyland Insurance Co.*, No. 2:08-CV-1687-BES-PAL, 2009 WL 10693627 (D. Nev. Apr. 27, 2009), the Court held that a third-party claimant lacked standing under the Act where he was not an insured and lacked an assignment of benefits from the insured. *Id.* at *3. TeamHealth Plaintiffs have not only not proven such an assignment, they have disclaimed reliance on such an assignment. SAC at 2 n.5.⁹

Although TeamHealth Plaintiffs seek relief only under 686A.310(1)(e), *see* SAC ¶ 92–93; JPTO at 5 (citing SAC ¶¶ 90–97), other prongs under the heading of NRS 686A.310 refer to practices directed generally at “claimants.” But even if TeamHealth Plaintiffs sought relief under those other prongs, they would lack standing there too. That service providers such as TeamHealth Plaintiffs are excluded is bolstered by the implementing regulations promulgated by the Nevada Department of Insurance and the Insurance Commissioner. The implementing regulations for the Unfair Claims Practices Act contemplate only two valid categories of claimants. A first-party claimant is defined as one “asserting a right to payment under an

⁸ Defendants have always contended—and continue to contend—that the Plaintiffs in fact received assignments of benefits from all of Defendants’ plan members and by virtue of those assignments, stand in the shoes of Defendants’ plan members which must result in all of Plaintiffs’ claims being subject to preemption under ERISA. However, Plaintiffs have disclaimed any reliance on these assignments and the Court has repeatedly rejected Defendants’ argument. Therefore, Plaintiffs are estopped from now changing course and accepting the benefit of receiving an assignment (potential standing as a third party claimant) while avoiding the consequences of such an assignment (ERISA preemption).

⁹ If Plaintiffs chose to rely on assignments to manufacture standing for their Unfair Insurance Practice Act claim, then the claim would be preempted by ERISA. *See DB Healthcare, LLC v. Blue Cross Blue Shield of Ariz., Inc.*, 852 F.3d 868, 873 (9th Cir. 2017) (valid assignment of benefits confers standing to bring claim under ERISA); *Aetna Health Inc. v. Davila*, 542 U.S. 200, 210 (2004) (“[I]f an individual, at some point in time, could have brought his claim under ERISA § 502(a)(1)(B), and where there is no other independent legal duty that is implicated by a defendant’s actions, then the individual’s cause of action is completely pre-empted by ERISA § 502(a)(1)(B).”).



1 insurance contract or policy arising out of the occurrence of the contingency or loss covered by
 2 the contract or policy.” Nev. Admin. Code 686A.625. A first-party claimant “does not include a
 3 person who provides service to an injured party.” *Id.* A third-party claimant is “one asserting a
 4 claim against any person, corporation, association, partnership or other legal entity insured under
 5 an insurance contract or policy.” *Id.* 686A.650. Likewise, a third-party claimant “does not
 6 include a person who provides service to an injured party.” *Id.*¹⁰ TeamHealth Plaintiffs do not
 7 qualify as first-party or third-party claimants under the Act. Indeed, TeamHealth Plaintiffs are
 8 categorically and specifically excepted from the definition of claimant.

9 In short, the consistent law, as developed by the Nevada Legislature, the Nevada
 10 Supreme Court, the Nevada federal district courts, and the Nevada Commission of Insurance
 11 excludes service providers such as having a private right of action under the Act. If this Court
 12 sent this claim to the jury, it would be the first to do so and it would do so standing up against
 13 copious and undisputed authority.

14 **2. Several Defendants Are Not Insurers and Cannot Be Held Liable** 15 **Under the Unfair Claims Practices Act**

16 The plain text of the Unfair Claims Practices Act, the consistent and unanimous case law,
 17 and the implementing regulations apply the Act to insurers only. The text provides only that “an
 18 insurer is liable to its insured.” NRS 686A.310(2). The title of NRS 686A.310 makes clear that
 19 it provides for the *liability of [an] insurer* for damages.” (emphasis added). Nevada law defines
 20 an “insurer” as “every person engaged as principal and as indemnitor, surety or contractor in the
 21 business of entering into contracts of insurance.” NRS 679A.100. The Nevada Supreme Court
 22 in *Albert H. Wohlers & Co. v. Bartgis* held that a plan administrator is *not* an insurer for the
 23 purposes of NRS 686A.310 because they are not in the business of entering into insurance
 24 contracts. 114 Nev. 1249, 1264, 969 P.2d 949, 960 (1998).

25
 26 ¹⁰ The only contract contemplated by these definitions would be the “insurance policy or contract” which
 27 is defined as an “insurance policy, plan or written agreement for or affecting insurance by whatever name
 28 called and includes all clauses, riders or endorsements offered by any person or entity engaged in the
 business of insurance in this State.” Nev. Admin. Code 686A.627. This definition cannot encompass the
 unwritten implied-in-fact contract alleged in this case.





Claims under the Unfair Claims Practices Act against UHS and UMR fail because those two Defendants are not insurers as to all claims, and UHIC is not an insurer with respect to some claims. 11/2/2021 Tr. 164:21–25 (Mr. Haben testified that some Defendants perform third party administrator services for ASO clients); 11/3/2021 86:19–87:2 (Mr. Haben testified that defendants performing third-party administrator services pay claims based on the directives of the self-insured client because defendants only “administer the funds”); 11/8/2021 Tr. 152:23–153:1 (Mr. Haben testified that UMR is a third-party administrator); 11/9/2021 Tr. 130:19–131:10 (Mr. Haben testified that “UMR is the third-party administrator” and “UnitedHealthcare itself is a third-party administrator . . . [f]or self-employed groups”); 11/10/2021 Tr. 21:11–22 (Mr. Haben testified that third-party administrators “do[] not incur the medical cost risk”); *id.* 24:10–17 (Mr. Haben testified that UHIC is a third-party administrator and an insurer); *id.* 29:16–19 (Mr. Haben testified that an administrative services agreement is between “the employer group, with the third-party administrator to perform services on their behalf”); *id.* 29:20–30:10 (Mr. Haben testified that certificates of coverage are only associated with fully insured plans and summary plan documents and administrative services agreements are associated with a self-insured plan). These Defendants act as plan administrators for employer self-funded plans. As an administrator of an employer self-funded plans, UHS and UMR are not insurers. The employers are insurers and UHS, UMR, and UHIC provide administration services. In *Albert H. Wohlers*, an insured argued that the plan administrator was liable because an administrator fits within the statutory definition of a “person,” but the Nevada Supreme Court held that “when considering unfair claims practices” the Act “proscribes unfair practices in settling claims by an insurer, which [a plan administrator] is not.” 114 Nev. at 1265.

Because UHS and UMR are plan administrators and not insurers with respect to all the At-Issue Claims, the Court should direct a verdict in favor of UHS and UMR with respect to all claims under the Unfair Claims Practices Act. Because UHIC is a plan administrator with respect to 119 At-Issue Claims, the Court should direct a verdict in favor of UHIC with respect to those claims. In total, Defendants are entitled to a judgment as a matter of law on TeamHealth

Plaintiffs' cause of action under the Unfair Claims Practices Act with respect to 4,636 of the At-Issue Claims because they were submitted to self-funded plans.

3. TeamHealth Plaintiffs Have Presented No Evidence That Any Defendant's Liability Was "Reasonably Clear" Prior to Trial

The Unfair Claims Practices Act delineates and proscribes many unfair practices, but TeamHealth Plaintiffs' complaint and Joint Pretrial Memorandum restrict their claim to the practice described in NRS 686A.310(1)(e): "Failing to effectuate prompt, fair and equitable settlements of claims in which liability of the insurer has become reasonably clear." *See* SAC ¶ 92; JPTO at 5 (citing SAC ¶¶ 90–97). "This statute concerns the manner in which an insurer handles an insured's claim." *Patel v. Am. Nat'l Prop. & Cas. Co.*, 367 F. Supp. 3d 1186, 1193 (D. Nev. 2019) (emphasis added).

To prevail on this claim, TeamHealth Plaintiffs must prove that Defendants failed to fairly settle payment of an insurance claim after the Defendants' liability was reasonably clear. *Yusko v. Horace Mann Servs. Corp.*, No. 2:11-cv-00278-RLH-GWF, 2012 WL 458471, at *4 (D. Nev. Feb. 10, 2012) (granting summary judgment where plaintiff had not presented any evidence that an officer, director, or department head was aware of the conduct in question); *Tweet*, 614 F. Supp. at 1194 ("Furthermore, in the present case, plaintiffs do not present probative evidence supporting their allegation that their claim against CSAA had become 'reasonably clear.'").

Here, there is no probative evidence that Defendants' liability for the At-Issue Claims had become "reasonably clear" prior to trial. In most cases, the "reasonably clear" requirement is established by the fact the insurer had concluded internally that a particular claim should be paid but did not pay the claim. But the evidence at trial **confirmed** that Defendants in fact paid each of the At-Issue Claims. *See* 11/16/2021 Tr. 226:23-227:10 (Mr. Leathers testified that Defendants' data for the At-Issue Claims includes reimbursement amounts); *id.* 233:12-22 (Mr. Leathers testified that he analyzed claims that were allegedly underpaid as opposed to not paid). Defendants paid those claims based on methodologies designed to arrive at a reasonable reimbursement amount. And while the record is clear that Plaintiffs would like to have received



1 a higher reimbursement, where the specific amount owed in dispute as to any one claim is not
2 reasonably clear to the insurer, that is sufficient to defeat this claim. *See, e.g., Clifford v. Geico*
3 *Cas. Co.*, 428 F. Supp. 3d 317, 325 (D. Nev. 2019). In general, this claim is satisfied where the
4 insurer waited an “inordinate amount of time” to provide information about a particular claim.
5 *See, e.g., Fries v. State Farm Mut. Auto. Ins. Co.*, No. 3:08CV00559LRH-VPC, 2010 WL
6 653757, at *4 (D. Nev. Feb. 22, 2010); *Turk v. TIG Ins. Co.*, 616 F. Supp. 2d 1044, 1052 (D.
7 Nev. 2009). But there is no evidence that any Defendant waited an inordinate amount of time
8 before communicating about a claim. In fact, there is no evidence in the record about any
9 Defendant’s handling of any particular one of the At-Issue Claims.

10 Liability never became reasonably clear; indeed liability is still not reasonably clear. To
11 be sure, Defendants “acknowledged coverage, which is different from acknowledging liability.”
12 *Schmall v. Gov’t Emps. Ins. Co.*, 240 F. Supp. 3d 1093, 1098 (D. Nev. 2016). The Court is
13 sending the issues of liability and damages to the jury. Where experts disagree, for instance, on
14 the amounts of damages, courts have granted judgment to defendants because “liability has not
15 become reasonably clear.” *Lubritz v. AIG Claims, Inc.*, No. 217CV02310APGNJK, 2018 WL
16 7360623, at *7 (D. Nev. Dec. 18, 2018). Courts regularly hold that where there are genuine
17 issues of material fact regarding the existence or scope of liability of an insurer, liability has
18 perforce not become reasonably clear. *Big-D Constr. Corp. v. Take It for Granite Too*, 917 F.
19 Supp. 2d 1096, 1118 (D. Nev. 2013). In other words, unless the Court is of the opinion that it
20 could enter judgment as a matter of law in favor of TeamHealth Plaintiffs in a specific amount
21 on the underlying At-Issue Claims, liability for those claims is not reasonably clear. *Sherwin v.*
22 *Infinity Auto Ins. Co.*, No. 2:11-CV-00043-APG, 2013 WL 5918312, at *4 (D. Nev. Oct. 31,
23 2013) (“Whether Plaintiff is entitled to any additional amount is a disputed question of fact for
24 the jury, and is the crux of Plaintiff’s breach of contract claim. Because it is not reasonably clear
25 that Infinity is liable to pay more under the policy, Plaintiffs allegations do not support a claim of
26 Unfair Trade Practices under NRS 686A.310.”).

27 The Unfair Claims Practices Act does not prohibit good faith disagreements over the
28 valuation of claims in the course of settling those claims. The Act targets delays in settlement



1 where liability, not coverage, has become reasonably clear. At the close of TeamHealth
2 Plaintiffs' case, liability has not become reasonably clear. Whether TeamHealth Plaintiffs are
3 entitled to any additional payment on the 11,563 At-Issue Claims depends on the jury's
4 evaluation of those claims. Based on the statutory text and the case law, liability for these At-
5 Issue Claims is by definition not reasonably clear.

6 **4. TeamHealth Plaintiffs Have Presented No Evidence that Defendants**
7 **Failed to Effectuate a Prompt, Equitable, and Fair Settlement**

8 TeamHealth Plaintiffs contend that Defendants failed to "effectuate a prompt, equitable,
9 and fair settlement" because they did not negotiate with TeamHealth Plaintiffs on each of the At-
10 Issue Claims. That is not what the Act requires. TeamHealth Plaintiffs presented no evidence
11 that, *where an individual claim was appealed and negotiated*, Defendants were unreasonable in
12 negotiating a fair settlement. Indeed, they presented no evidence at trial that the parties
13 negotiated reimbursement rates *at all*. TeamHealth Plaintiffs offered no evidence that they
14 communicated with Defendants and sought to negotiate a higher reimbursement on the disputed
15 claims, and that Defendants rejected their reasonable demands for additional payment.

16 Without such evidence, TeamHealth Plaintiffs have failed to prove that Defendants
17 violated the Unfair Claims Practices Act as a matter of law. *See, e.g., Harter v. Gov't Emps. Ins.*
18 *Co.*, No. 2:19-CV-1330 JCM (EJY), 2020 WL 4586982, at *4 (D. Nev. June 11, 2020) (granting
19 summary judgment where evidence showed defendant "negotiated in good faith"); *Matarazzo v.*
20 *GEICO Cas. Co.*, No. 219CV529JCMVCF, 2020 WL 1517556, at *4 (D. Nev. Mar. 30, 2020)
21 (granting summary judgment where insurer "promptly responded to plaintiff's requests and
22 communications" and "had a basis for disputing plaintiff's demands for the full policy limit");
23 *Amini v. CSAA Gen. Ins. Co.*, No. 2:15-cv-0402-JAD-GWF, 2016 WL 6573949, at *6 (D. Nev.
24 Nov. 4, 2016) (granting summary judgment where insurer "reasonably and promptly responded
25 to claim communications and engaged in settlement negotiations").



5. TeamHealth Plaintiffs Have Presented No Evidence That an Officer, Director, or Department Head of Defendants Knowingly Permitted the Alleged Violations

For there to be liability under NRS 686.310, TeamHealth Plaintiffs must prove that an “officer, director, or department head of the insurer has knowingly permitted such an act or has had prior knowledge thereof.” NRS 686A.270. Without evidence that an officer, director, or department head permitted the unfair insurance practices, TeamHealth Plaintiffs’ claim fails as a matter of law. *Hackler v. State Farm Mut. Auto. Ins. Co.*, 210 F. Supp. 3d 1250, 1255 (D. Nev. 2016) (finding “Claims Teams Managers” did not qualify under the statutory requirements of NRS § 686A.270); *see also Yusko*, 2012 WL 458471, at *4 (granting summary judgment where plaintiff had not presented any evidence that an officer, director, or department head was aware of the conduct in question).

To be sure, TeamHealth Plaintiffs have presented testimony from officers of Defendants. TeamHealth Plaintiffs questioned John Haben on the stand on five separate court days. 11/10/2021 Tr. 13:5-7 (Mr. Haben was the “Vice President of the out of network programs”). At no time did TeamHealth Plaintiffs ask Mr. Haben about his *prior* knowledge of any one of the At-Issue Claims. 11/2/2021 Tr. 123:13–128:22 (questioning based on *hypothetical* payment of \$254 for treatment of a gun-shot victim); 11/9/2021 Tr. 27:18–40:12 (questioning of Mr. Haben related to one At-Issue Claim based on purported plan documents Exhibits P444 (EOB), P120 (SPD), P290 (COC) elicited testimony based on documents, not prior knowledge); *id.* 40:15–45:10 (questioning related to Ruby Crest’s purported appeal of the At-Issue Claim depicted in Exhibit P444 (related testimony at 11/9/2021 Tr. 27:18–40:12) made clear that Mr. Haben had no knowledge of the claim appeal exhibit, P470, including Plaintiffs’ counsel’s assertion that Defendants would not engage with them during the appeal); *id.* 101:11–107:16 (questioning based on a MultiPlan document, P413, related to how Data iSight works made clear that Mr. Haben lacks knowledge of whether every At-Issue Claim priced by Data iSight amounted to 250–350% of Medicare); *id.* 126:16–129:20 (questioning related to the P444 At-Issue Claim and why the Data iSight pricing came out to 250% of Medicare but refusing to elicit Mr. Haben’s understanding of that claim); 11/10/2021 Tr. 175:6–176:6 (questioning Mr. Haben based on



hypothetical, but not At-Issue, claim); *id.* 176:7–181:12 (Mr. Haben read the billed charge and allowed amount from document regarding one At-Issue Claim but providing no testimony about his prior knowledge of the claim); *id.* 208:17–214:13 (Mr. Haben testified that P290 and P470 may not relate to the At-Issue Claim contained in P444). TeamHealth Plaintiffs did not elicit any testimony from Daniel Rosenthal regarding any particular At-Issue Claim. Rosenthal Tr. 10:05-06, 21:11-15 (Mr. Rosenthal testified that he was the former President of UnitedHealth Networks and the current CEO of Commercial Business for UnitedHealth Group’s West Region). Rebecca Paradise, Vice President of Out-of-Network Payment Strategy, was questioned on a small number of At-Issue Claims, but she did not have prior knowledge of any of them. See 11/15/2021 Tr. 51:10-12; *id.* 7:22–8:4 (Ms. Paradise testified that claims in general may be paid at a higher amount than what would be remitted by MultiPlan based on direction of client); *id.* 10:4–12:12 (Ms. Paradise testified about an email regarding the experience of a United employee regarding an unknown claim priced by MutliPlan); *id.* 17:7–19:8 (questioning related to P444 that did not elicit Ms. Paradise’s prior knowledge of the claim); *id.* 20:2–9 (Ms. Paradise testified that it would “untenable” for her to determine whether every claim using Data iSight was priced at 250% of Medicare); *id.* 117:5–15 (Ms. Paradise testified that she is “unaware of a specific situation” in which Defendants paid “ER claims at usual and customary”); *id.* 123:21–124:3 (Ms. Paradise testified that she does “not review[] any claim. I didn’t review any of the thousands of claims that are at—at issue in this case.”). Similarly, Scott Ziemer, UMR’s Vice President of Customer Solutions, was questioned on a small number of claims, but he did not have any prior knowledge of them. 11/15/2021 Tr. 244:8-11; *id.* 194:20–205:2 (failing to elicit testimony from Mr. Ziemer about his prior knowledge of the specific At-Issue Claims despite showing him a demonstrative based on P473 because Plaintiffs focused on Defendants’ fees); *id.* 211:8–11 (Mr. Ziemer testified that “to [his] knowledge we have not told MultiPlan or Data iSight” how to reimburse claims because “[w]e rely on their tool. They use publicly available information. They have their own algorithm to determine their reasonable amount.”); *id.* 221:10–224:16 (questioning Mr. Ziemer on how a summary plan document relates to At-Issue Claims, but

1 failing to elicit any testimony regarding his prior knowledge of those claims); *id.* 236:11–12 (“I
2 am not a plan document person.”).

3 Not a single officer, director, or department head has been presented for SHL or HPN.
4 Leslie Hare, the sole SHL and HPN witness, testified explicitly that she is not a department head.
5 11/16/2021 Tr. 199:11-15 (testifying that she reports to another person and does not consider
6 herself a department head). Ms. Hare also testified that she did not have any prior knowledge
7 regarding the At-Issue Claims. 10/16/2021 Tr. 135:6-18 (testifying that she is generally aware
8 that the At-Issue Claims were submitted by TeamHealth Plaintiffs, but nothing else); *id.* 142:24-
9 143:6 (failing to elicit testimony regarding the specific At-Issue Claims, but instead eliciting
10 testimony that out-of-network claims in general get reimbursed pursuant to plan documents).

11 In sum, TeamHealth Plaintiffs presented no evidence that demonstrates that any officer,
12 director, or department head permitted the unfair insurance practices that TeamHealth Plaintiffs
13 allege.

14 **6. TeamHealth Plaintiffs Have Presented No Evidence of Damages from**
15 **Defendants’ Claims Process as Opposed to the Underlying At-Issue**
16 **Claims**

17 TeamHealth Plaintiffs have no claim under the Unfair Claims Practices Act unless they
18 prove they suffered a harm that is distinct from the underlying At-Issue Claims. *See Safety Mut.*
19 *Cas. Corp. v. Clark Cty. Nev.*, No. 2:10-CV-00426-PMP, 2012 WL 1432411, at *2 (D. Nev. Apr.
20 25, 2012) (“Clark County does not identify any evidence raising a genuine issue of material fact
21 that it suffered any damages from these two alleged claims handling failures apart from the
22 denial of coverage itself.”); *Sanders v. Church Mut. Ins. Co.*, No. 2:12-CV-01392-LRH, 2013
23 WL 663022, at *3 (D. Nev. Feb. 21, 2013) (damages under Unfair Claims Practices Act must be
24 “costs which are separate and apart from damage caused by the underlying accident”); *Yusko*,
25 2012 WL 458471, at *4 (“Here, Yusko has not presented evidence of any damages resulting
26 from Horace Mann’s conduct. The only damages for which the Court has evidence are a result of
27 the underlying accident, not the claims process or any conduct by Horace Mann.”). That is, to
28 have a valid claim under the Unfair Insurance Practice Act, TeamHealth Plaintiffs must have



1 been separately harmed by the *claims process itself*, and not just through the performance of
2 emergency medicine services that went uncompensated or undercompensated.

3 To the extent TeamHealth Plaintiffs have presented any evidence at all that they were
4 harmed by Defendants' conduct, that harm is limited to the plain fact that they received less than
5 their full billed charges in Defendants' adjudication of the At-Issue Claims. They do not allege,
6 and they have not proved, a harm that is distinct from the underpayments themselves.
7 11/16/2021 Tr. 65:7-10 (Lief Murphy, TeamHealth's CEO, testified that billed charges should be
8 awarded because "[w]e perform the service"); *id.* 86:20-23 (TeamHealth "entitled to billed
9 charge"); **Exhibit 1**, Pls.' Response to Interrogatory No. 5 ("[I]t is implicit and expected that
10 [Defendants] will pay ... for the billed charges."); *see also* Dep. of Kent Bristow (Ruby Crest
11 NRCP 30(b)(6)) at 91:8-14 ("[P]laintiffs are claiming damages as the difference between what
12 was reimbursed—whatever it was reimbursed at or allowed at, and full billed charges? A.
13 Correct."); Dep. of Kent Bristow (Fremont NRCP 30(b)(6)) at 30:24-31:10 ("Plaintiffs' theory
14 that they were entitled to full billed charges for the services that they billed for United members
15 on an out-of-network basis was limited by a determination of whether those charges were or
16 were not reasonable. Is that a fair summary of your statement of the plaintiffs' position? A.
17 Yes"). There is no evidence that TeamHealth Plaintiffs suffered "costs which are separate and
18 apart from damage caused by the underlying accident." *Sanders*, 2013 WL 663022, at *3. For
19 that reason, Defendants are entitled to judgment as a matter of law on TeamHealth Plaintiffs'
20 claims under the Unfair Claims Practices Act.

21 **C. There Is No Evidence That Supports an Award of Punitive Damages**

22 Based on the evidence submitted at trial, Defendants are entitled to judgment as a matter
23 of law on TeamHealth Plaintiffs' claim for punitive damages under the Unfair Claims Practices
24 Act.¹¹ Punitive damages are available only to punish or deter "conduct that is outrageous,

25
26 ¹¹ TeamHealth Plaintiffs do not seek punitive damages in connection with any other cause of action. Joint
27 Pre-Trial Memo at 5-6; *see also* SAC ¶¶ 80-89 (no allegation of entitlement to punitive damages in
28 Second Claim for Relief for unjust enrichment). Because in the Joint Pretrial Memorandum TeamHealth
Plaintiffs did not request punitive damage in connection with the unjust enrichment cause of action, they
have waived the right to seek those damages on that cause of action. "As a general proposition a pretrial
order does control the subsequent course of the trial and supersedes the pleadings." *Walters v. Nev. Title*



because of the defendant's evil motive or his reckless indifference to the rights of others." Restatement (Second) of Torts § 908(2); *see Coughlin v. Hilton Hotels Corp.*, 879 F. Supp. 1047, 1050 (D. Nev. 1995) (citing *Turnbow v. Dep't of Human Res.*, 109 Nev. 493, 853 P.2d 97, 99 (1993)) ("[P]unitive damages are not designed to compensate the victim of a tortious act but rather to punish and deter oppressive, fraudulent or malicious conduct."); *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (factors that indicate outrageous conduct: "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident").

In analyzing whether conduct is outrageous or reprehensible in a way that permits an award of punitive damages, economic harms are considered less reprehensible as threats to the "health or safety of others." *Bains LLC v. Acro Prods. Co.*, 405 F.3d 764, 775 (9th Cir. 2005); *see also Calloway v. Reno*, 116 Nev. 250, 993 P.2d 1259, 1267 (2000) ("Purely economic loss is generally defined as 'the loss of the benefit of the user's bargain ... including ... pecuniary damage for inadequate value, ... or consequent loss of profits.'). Also, "socially valuable task[s]" or "conduct that might have some legitimate purpose" is considered less reprehensible than conduct that is discriminatory. *Bains LLC*, 405 F.3d at 775.

The only harm for which TeamHealth Plaintiffs presented evidence is that they received less payment than they demanded as reimbursement for certain out-of-network emergency medicine services. There is no evidence that these "underpayments" threatened anyone's health or physical safety; to the contrary, the only harm appears to be purely economic, in that TeamHealth Plaintiffs' parent company and investors received less of a windfall than they might have anticipated. Moreover, the Defendants' motive in paying less than TeamHealth Plaintiffs' full billed charges was not "evil" or fraudulent—the only testimony on this subject consistently

Guar. Co., 81 Nev. 231, 234, 401 P.2d 251, 253 (1965); *see also* EDCR 2.67(b)(2) (pretrial memorandum must present "a list of all claims for relief ... with each category of damage requested").

1 affirmed that Defendants intended to control skyrocketing healthcare costs for their clients and
 2 members. On the evidence presented, TeamHealth Plaintiffs cannot be awarded punitive
 3 damages on their Unfair Claims Practices Act claim as a matter of law.

4 **1. Punitive Damages Cannot Be Applied Against UHS or UMR Because**
 5 **They Are Not Insurers**

6 The only cause of action for which TeamHealth Plaintiffs contend the jury can award
 7 punitive damages is their claim under the Unfair Claims Practices Act. *See* Joint Pre-Trial
 8 Memo at 5–6. As explained above, this Act applies only to insurers and not to administrators of
 9 self-funded health benefits plans. For that reason, punitive damages cannot be awarded against
 10 UHS or UMR, who are not insurers and cannot be liable under the Act.

11 **2. Punitive Damages Cannot Be Awarded on a Cause of Action that**
 12 **Sounds in Contract**

13 TeamHealth Plaintiffs cannot obtain punitive damages against *any* Defendant because
 14 their cause of action under the Unfair Claims Practices Act sounds in contract, not in tort. NRS
 15 42.005 permits punitive damages only “in an action for breach of an obligation not arising from
 16 contract,” and the Nevada Supreme Court has ruled that punitive damages cannot be awarded
 17 under NRS 42.005 where an action “sounds in contract, and not in tort.” *Rd. Highway Builders,*
 18 *LLC v. N. Nev. Rebar, Inc.*, 284 P.3d 377, 384 (Nev. 2012); *see also Sprouse v. Wentz*, 105 Nev.
 19 597, 602, 781 P.2d 1136, 1140 (1989) (“[P]unitive damages must be based on an underlying
 20 cause of action *not based on a contract theory*.” (emphasis added)). This prohibition applies not
 21 just to breach of contract claims, but broadly to any cause of action that “arises from” or “sounds
 22 in” contract. *Frank Briscoe Co. v. Clark County*, 643 F. Supp. 93, 100 (D. Nev. 1986) (breach of
 23 warranty claim cannot support an award of punitive damages); *e.g., Desert Salon Servs., Inc. v.*
 24 *KPSS, Inc.*, No. 2:12–CV–1886 JCM (CWH), 2013 WL 497599, at *5 (D. Nev. Feb. 6, 2013)
 25 (contract-based causes of action for intentional interference with contractual relations, intentional
 26 interference with prospective economic advantage, and breach of the implied covenant of good
 27 faith and fair dealing cannot support an award of punitive damages); *Franklin v. Russell Rd.*
 28 *Food & Beverage, LLC*, No. 14A709372, 2015 WL 13612028, at *13 (Nev. Dist. Ct. June 25,



2015) (claims alleging failure to pay Plaintiffs Nevada’s minimum wage do not “sound in tort, and in fact, are based on a contract theory”).

It is not disputed that TeamHealth Plaintiffs’ Unfair Claims Practices Act sounds in contract: they have *conceded* that their claim sounds in contract, and this Court *agreed*. See Ps’ Opp. to Mot. to Dismiss at 25–26 (May 29, 2020); Order Denying Mot. to Dismiss FAC ¶ 68. For that reason alone, punitive damages cannot be awarded as a matter of law.¹² NRS 42.005.

Because TeamHealth Plaintiffs’ Unfair Claims Practices Act claim sounds in contract, and because that claim is the *only* predicate for punitive damages in this case, TeamHealth Plaintiffs as a matter of law cannot recover punitive damages.

3. TeamHealth Plaintiffs Have Presented No Evidence of Oppression, Fraud, or Malice

NRS 42.005 requires “clear and convincing evidence” of “oppression, fraud or malice.” NRS 42.005(1); see also *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 512, 780 P.2d 193, 198 (1989) (to obtain punitive damages, plaintiff must show evidence of “oppression, fraud, or malice”). Far from “clear and convincing” evidence, TeamHealth Plaintiffs have presented *no* evidence of fraud, oppression, or malice, that would permit a reasonable jury to award punitive damages under NRS 42.005.

a. No Evidence of Fraud

To prove fraud, TeamHealth Plaintiffs must prove (1) a false representation, (2) Defendants’ knowledge or belief that the representation is false, (3) Defendants’ intention to induce TeamHealth Plaintiffs’ reliance on that representation, (4) TeamHealth Plaintiffs’

¹² Were this cause of action to sound in tort rather than contract as this Court has held, then TeamHealth Plaintiffs would have no standing to bring a cause of action under the Unfair Claims Practices Act. The Nevada Supreme Court has held on multiple occasions that NRS 686A.310 does not create a private right of action in favor of third-party claimants—as opposed to insureds—like TeamHealth Plaintiffs. See, e.g., *Fulbrook*, 2015 WL 439598, at *4 (“This statute, however, does not provide a private right of action to third-party claimants.”); *Gunny*, 108 Nev. at 346 (“[W]e conclude that [plaintiff] has no private right of action as a third-party claimant under NRS 686A.310.”); see also Mot. to Dismiss FAC at 23–24. TeamHealth Plaintiffs are judicially estopped from now arguing that this claim sounds in tort after convincing this Court that the claim was based on contract.



justifiable reliance on the representation, and (5) damages. *Nev. State Educ. Ass'n v. Clark Cty. Educ. Ass'n*, 482 P.3d 665, 675 (2021).

TeamHealth Plaintiffs presented no evidence of any of these elements at trial, and therefore punitive damages cannot be awarded based on fraud. At most, TeamHealth Plaintiffs presented evidence that Defendants made some representations about Data iSight. *See* P363 (United Website Showing Fair Health Used as Benchmark); Tr. 11/3/2021 27:24–37:4; 11/10/2021 Tr. 92:14–100:3, 104:6–109:23; 11/12/2021 Tr. 79:20–82:19, 85:6–88:6 (Mr. Haben’s testimony that this P363 did not reveal any misrepresentations); P488 (United Healthcare Member Rights & Responsibilities Page). There is no evidence showing these representations were false, no evidence that TeamHealth Plaintiffs justifiably relied on these representations, and no evidence that these representations caused them to be harmed in any way.

The jury has discretion to award punitive damages only if it finds by clear and convincing evidence that the defendant was guilty of malice, fraud, or oppression in the conduct that provides the basis for liability. NRS 42.002. That is, to award punitive damages, the jury must find that Defendants acted fraudulently *in their failure to negotiate* equitable, fair, and prompt settlements in violation of the Unfair Claims Practices Act. The websites that TeamHealth Plaintiffs have offered into evidence have no connection with any failure to negotiate claims; those websites were published long before the dates of service on the At-Issue Claims. TeamHealth Plaintiffs therefore have not offered any evidence of fraud that could support an award of punitive damages.

b. No Evidence of Oppression or Malice

Oppression or malice requires that the defendant “knows of the probable harmful consequences of a wrongful act and willfully and deliberately fails to act to avoid those consequences.” *Kinder Morgan Energy Partners, L.P. v. Claytor*, 130 Nev. 1205, *published at* Nos. 60131, 60667, 2014 WL 7187204, at *4 (Nev. Dec. 16, 2014). To prove oppression or malice, TeamHealth Plaintiffs must prove “despicable conduct” that shows “a conscious disregard of the rights or safety of others.” *Id.*; *see also Ainsworth v. Combined Ins. Co. of Am.*, 104 Nev. 587, 590, 763 P.2d 673, 675 (1988) (oppression is “a conscious disregard for the rights



of others which constitute[s] an act of subjecting plaintiffs to cruel and unjust hardship”). Such “conscious disregard of the rights or safety of others” cannot, as a matter of law, include underpayments to TeamHealth Plaintiffs or their corporate parents, or a “strategy to terminate ... contracts” with TeamHealth practice groups. *See* Ps’ Resp. to Ds’ Trial Br. re: Out-of-State Harms at 4. Such economic harms are not “reprehensible” in a way that could justify an award of punitive damages. *See Bains LLC*, 405 F.3d at 775.

TeamHealth Plaintiffs have submitted no evidence that could support a finding of malice, fraud, or oppression. Indeed, there is no malice or oppression as a matter of law because Defendants *paid* the insurance claims at issue. *See Pioneer Chlor Alkali Co. v. Nat’l Union Fire Ins. Co.*, 863 F. Supp. 1237, 1250–51 (D. Nev. 1994) (acknowledging “difficulty constructing a factual situation where an insurer who violated [NRS 686A.310] could have done so with an oppressive or malicious intent yet not denied, or refused to pay, the claim”). Defendants cannot have had the “evil” state of mind required to prove malice or oppression—the only evidence concerning the states of mind of Defendants’ executives shows that they were concerned about controlling costs for their clients and members, and this evidence concerns Defendants’ out-of-network programs generally rather than the settlement of any particular At-Issue Claim. *See* 11/10/2021 Tr. 45:10–47:24 (Mr. Haben testified that Defendants’ out-of-network programs are in place to help control costs and that they “continuously look at our out-of-network programs to make sure we’re paying a fair and reasonable rate, and we’re addressing costs.”); 11/10/2021 Tr. 136:13–137:1 (Mr. Haben testified that Defendants reached out to Multiplan for help in controlling costs because “[c]lients were demanding better controls on medical costs, and they were looking for better solutions.”); 11/11/2021 Tr. 23:21–24:4 (Mr. Haben testified that market intelligence revealed that Defendants were “behind our competitors” who were “doing a better job” to control client healthcare spend”); 11/15/2021 Tr. 199:14–23 (Mr. Ziemer testified that UMR has “a variety of programs under our cost reduction and savings programs that are designed to help our clients control costs.”); 11/12/2021 Tr. 215:22–23 (Ms. Paradise testified that “I’m focused on driving savings for the clients. I don’t have accountability for any revenue related to the programs”).

TeamHealth Plaintiffs both have failed to present evidence on a *harm* that could support punitive damages, and have failed to present evidence that Defendants had a state of mind that could support punitive damages.

D. Defendants Are Entitled to Judgment as a Matter of Law on TeamHealth Plaintiffs' Claim for Breach of Implied-in-Fact Contract

TeamHealth Plaintiffs claim that Defendants breached an implied-in-fact contract under which they had agreed to pay TeamHealth Plaintiffs their full billed charges for all out-of-network services indefinitely into the future. None of the evidence presented at trial even begins to prove the existence of such a contract. “[A]n implied-in-fact contract exists where the conduct of the parties demonstrates that they (1) intended to contract; (2) exchanged bargained-for promises; and (3) the terms of the bargain are sufficiently clear.” *Magnum Opes Constr. v. Sanpete Steel Corp.*, 129 Nev. 1135 (2013) (citing *Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 379, 283 P.3d 250, 256 (2012)).¹³ “The terms of an express contract are stated in words while those of an implied contract are manifested by conduct.” *Smith*, 91 Nev. at 668, 541 P.2d at 664 (citing *Youngman v. Nev. Irrigation Dist.*, 70 Cal. 2d 240, 74 Cal. Rptr. 398, 449 P.2d 462 (1969)).

The evidence that TeamHealth Plaintiffs presented at trial shows that Defendants did *not* agree to pay them their full billed charges, and that Defendants in fact almost never *did* pay their full billed charges. *See* 10/16/2021 Tr. 63:9-17 (Mr. Murphy testified that TeamHealth does “agree[] to discount to discount billed charges” to “get paid”); *id.* 65:17-22 (Mr. Murphy testified that reimbursement at less than billed charges was acceptable at time of claim submission). There is no evidence that Defendants intended to contract with TeamHealth Plaintiffs, no evidence that they promised to reimburse TeamHealth Plaintiffs at their full billed charges, and

¹³ Defendants cite *Magnum Opes* for its persuasive value, and its application of *Certified Fire*, not as precedent. NRAP 36(c)(3). Defendants note that this case has been cited by the Nevada Federal District Court as binding authority in this action. *See* *Fremont Emergency Servs. (Mandavia), Ltd. v. UnitedHealth Grp., Inc.*, 446 F. Supp. 3d 700, 705 (D. Nev. 2020).



no evidence that Defendants agreed to any of the material terms of such of a contract. Under these facts, judgment should be entered in Defendants' favor as a matter of law.

1. An Implied-in-Fact Contract Requires All Elements of Contract Formation

At the outset, an implied-in-fact contract has no different elements than an express written or oral contract, except that the elements are manifested by conduct and not words. Defendants anticipate that TeamHealth Plaintiffs will argue that an implied-in-fact contract may be found by the jury without an intent to contract, without an exchange of promises, and without clear terms of the bargain. This position flies in the face of contract law in Nevada, and indeed contract law in any state or any jurisdiction following the tradition of English common law. "The distinction between express and implied in fact contracts relates only to the manifestation of assent; both types are based upon the expressed or apparent intention of the parties." *Cashill v. Second Jud. Dist. Ct. of State ex rel. Cty. of Washoe*, 128 Nev. 887, 381 P.3d 600 (2012).

The Court need look no further than the Nevada Supreme Court's most recent pronouncements on implied-in-fact contract. In *Certified Fire Protection Inc. v. Precision Construction*, the Court reiterated the uncontroversial statement of contract law: "To find a contract implied-in-fact, the fact-finder must conclude that the parties intended to contract and promises were exchanged, the general obligations for which must be sufficiently clear." 128 Nev. at 379–80. In *Certified Fire*, the Court found there was no implied-in-fact contract because there were "simply too many gaps to fill." *Id.* at 380. The defendant general contractor "never agreed to a contract for only design-related work, the parties never agreed to a price for that work, and they disputed the time of performance." *Id.*

Cases before and after *Certified Fire* support this conclusion. The Court returned to the elements of an implied-in-fact contract in another case between a general contractor and a subcontractor in *Magnum Opes Construction v. Sanpete Steel Corp.*, 129 Nev. 1135, No. 60016, 2013 WL 7158997 (Table) (Nev. Nov. 1, 2013).¹⁴ The Court held, citing *Certified Fire*, that "an

¹⁴ See *supra* note 13.





1 implied-in-fact contract exists where the conduct of the parties demonstrates that they (1)
2 intended to contract; (2) exchanged bargained-for promises; and (3) the terms of the bargain are
3 sufficiently clear.” *Id.* at *3. In *Magnum Opes*, the Court could find an implied-in-fact contract
4 based on a clear exchange of promises where the subcontractor agreed to perform services for a
5 total price of \$1,145,021, if the general contractor accepted within ten days. *Id.* The general
6 contractor responded within that time and told the subcontractor to “proceed with any forward
7 momentum.” *Id.* Further evidence supported “an inference of the parties’ intent to contract,”
8 beyond the clear offer and acceptance. *Id.* Likewise in *Steele v. EMC Mortgage Corp.*, the
9 Nevada Supreme Court held that where a bank accepted loan payments from an individual and
10 communicated with that individual regarding the loan’s status, no implied-in-fact contract was
11 formed because the individual presented no evidence that could “manifest the parties’ intent to
12 bind [the bank] to the terms of the loan so as to give rise to an implied contract.” 129 Nev. 1154,
13 No. 59490, 2013 WL 5423081, at *1 (Nev. Sept. 20, 2013).¹⁵

14 Cases preceding *Certified Fire*, going back decades and more, establish that all the
15 traditional elements of contract formation must be present to establish an implied-in-fact
16 contract. In 1975, the Nevada Supreme Court ruled that “[i]n order to prevail on the theory of a
17 contract implied in fact, the court would necessarily have to determine that both parties intended
18 to contract, and that promises were exchanged.” *Smith*, 91 Nev. at 669, 541 P.2d at 665. Mr.
19 Smith met with the general manager of the Stardust Hotel, and told him about his idea for the
20 Stardust to establish a recreational vehicle park next to the hotel. Mr. Smith indicated he wanted
21 to be compensated for his idea, for an unspecified amount of money or participation in the
22 venture in an executive capacity. The general manager stated he was not interested in the idea,
23 but two years later the Stardust opened the recreational vehicle park known as Camperland next
24 to the hotel. The Court held that in the absence of evidence suggesting intent to contract on the
25 part of the Stardust or a promise by Stardust to compensate Mr. Smith, no contract was formed.
26 *Id.* (“There being no evidence of contractual intent or the exchange of mutual promises, express

27
28 ¹⁵ Cited for persuasive value, not as precedent. NRAP 36(c)(3).

1 or implied, there was no genuine issue of fact.”). Likewise, in *Bally’s Grand Employees’*
2 *Federal Credit Union v. Wallen*, for instance, the Nevada Supreme Court found no implied-in-
3 fact contract was formed where the plaintiff could not establish that the defendant could not
4 “establish an intention on the part of [the employer] to create anything other than an at-will
5 employment contract.” 105 Nev. 553, 556, 779 P.2d 956, 958 (1989).

6 Indeed, the Nevada Supreme Court’s decision on a writ in this very case establishes that
7 the traditional contract-formation factors are necessary. When Defendants filed a writ of
8 mandamus seeking review of this Court’s ERISA-preemption decision, the Nevada Supreme
9 Court denied the writ, but cited authority related to TeamHealth Plaintiffs’ implied-in-fact
10 contract claim. *United Healthcare Ins. Co. v. Eighth Jud. Dist. Ct. in & for Cty. of Clark*, 489
11 P.3d 915, No. 81680, 2021 WL 2769032, at *2 (Nev. July 1, 2021). The Court cited *Certified*
12 *Fire*, and quoted the language that an implied-in-fact contract requires “that the parties intended
13 to contract and promises were exchanged.” *Id.* (quoting *Certified Fire*, 128 Nev. at 379, 283
14 P.3d at 256). And the Court cited *James Hardie Gypsum (Nev.) Inc. v. Inquipco*, and quoted it
15 for the proposition that “[i]ntent to make an offer or an acceptance is a question of act,” and
16 elements in the case. *Id.* (quoting *James Hardie Gypsum (Nev.) Inc. v. Inquipco*, 112 Nev. 1397,
17 1401, 929 P.2d 903, 906 (1996)).

18 The Nevada Supreme Court’s extensive treatment of this subject is also consistent with
19 that of the Restatement and learned treatises. *See, e.g.*, Restatement (Second) of Contracts § 4
20 cmt. a (1981) (“Contracts are often spoken of as express or implied. The distinction involves,
21 however, no difference in legal effect, but lies merely in the mode of manifesting assent.”); 1
22 Williston on Contracts § 1:5 (4th ed.) (“An implied-in-fact contract requires proof of the same
23 elements necessary to evidence an express contract: mutual assent or offer and acceptance,
24 consideration, legal capacity, and a lawful subject matter.”); 1 Corbin on Contracts § 1.19 (2021)
25 (“The distinction between an express and an implied contract, therefore, is of little importance, if
26 it can be said to exist at all. The matter that is of importance is the degree of effectiveness of the
27 expression used.”).



1 In short, although TeamHealth Plaintiffs have suggested there is some disagreement
2 regarding the elements of an implied-in-fact contract claim, this is a subject with resounding
3 agreement and consistency, across all case law in Nevada, outside of Nevada, and secondary
4 sources. In order to succeed on a claim of implied-in-fact contract, TeamHealth Plaintiffs must
5 prove: (1) that all parties intended to contract; (2) that all parties exchanged bargained-for
6 promises; and (3) that the terms of the bargain were sufficiently clear.

7 2. No Intent to Contract

8 TeamHealth Plaintiffs presented no evidence at trial that shows that any Defendants ever
9 intended to enter into a contract with TeamHealth Plaintiffs—or any evidence that TeamHealth
10 Plaintiffs intended to enter into a contract with Defendants. Without this evidence, their implied-
11 in-fact contract cause of action fails as a matter of law. “To find a contract implied-in-fact, the
12 fact-finder must conclude that the parties intended to contract.” *Certified Fire*, 128 Nev. at 379–
13 80, 283 P.3d at 256; *see also Smith*, 91 Nev. at 669, 541 P.2d at 665 (citing *Horacek v. Smith*, 33
14 Cal. 2d 186, 199 P.2d 929 (1948)) (“In order to prevail on the theory of a contract implied in
15 fact, the court would necessarily have to determine that both parties intended to contract, and that
16 promises were exchanged.”).

17 There is no evidence on record on which a jury could conclude the parties intended to
18 contract. The bare fact that TeamHealth Plaintiffs provided services to Defendants’ insureds
19 does not evidence an intent to contract. In *Steele v. EMC Mortg. Corp.*, 129 Nev. 1154 (2013),
20 *published at* 2013 WL 5423081, the Nevada Supreme Court affirmed summary judgment on a
21 contract claim where the plaintiff did not present evidence that she entered into a contract with
22 the defendant, but relied only on the defendant’s acquiescence to the plaintiffs’ supposed
23 performance. *Id.* at *1 (“Although appellant presented evidence that EMC Mortgage accepted
24 loan payments from appellant and communicated with appellant regarding the loan’s status, this
25 conduct alone does not manifest the parties’ intent to bind appellant to the terms of the loan so as
26 to give rise to an implied contract between EMC Mortgage and appellant.”).¹⁶ Similarly here,

27 ¹⁶ *See supra* note 15.
28



1 TeamHealth Plaintiffs rely solely on the facts that they performed out-of-network emergency
2 medicine services, and that Defendants reimbursed them for those services on behalf of their
3 plan members. 10/16/2021 Tr. 65:7-10 (Mr. Murphy testified that billed charges should be
4 awarded because “[w]e perform the service”); 11/15/2021 Tr. 154:14-21 (Dr. Scherr only
5 testified that they have to treat patients by operation of law); 11/10/2021 Tr. 25:24-28:5 (Mr.
6 Haben testified that the allowed amount payable to providers “is defined by the benefit plan” and
7 is not the billed charges); *id.* 33:22-34:2 (Mr. Haben testified that the allowed amount for out-of-
8 network claims is paid based on what is “[d]efined in the benefit plan”); 11/16/2021 Tr. 148:12-
9 18 (Ms. Hare testified that HPN’s & SHL’s claims processing system is designed to reimburse
10 claims based on plan documents and not full billed charges). That is not enough to show
11 contract formation.

12 If anything, Defendants’ prior conduct establishes that there was ***no agreement*** to pay the
13 TeamHealth Plaintiffs’ full billed charges. TeamHealth Plaintiffs submitted evidence detailing
14 Defendants’ payments for the thousands of At-Issue Claims, which shows that Defendants rarely
15 paid TeamHealth Plaintiffs’ full billed charges. P473. “[T]he fact of agreement may be implied
16 from a course of conduct in accordance with its existence,” but the course of conduct here
17 implies exactly the opposite of what TeamHealth Plaintiffs contend. 17A C.J.S. Contracts § 375,
18 at 425 (1963). This is not a case in which a contract is implied because the parties “repeatedly
19 adhered to” the terms of a contract “in their previous course of dealing.” *Reno Club v. Young*
20 *Inv. Co.*, 64 Nev. 312, 334, 182 P.2d 1011, 1021 (1947). Defendants’ course of conduct
21 repeatedly repudiates any notion that Defendants agreed to pay TeamHealth Plaintiffs their full
22 billed charges on each reimbursement claim for out-of-network emergency medicine services.

23 There is no evidence that shows Defendants communicated by word and deed that that
24 they intended to contract with TeamHealth Plaintiffs at any specific reimbursement rate for the
25 disputed emergency medicine services, much less the TeamHealth Plaintiffs’ full billed charges.
26 In fact, TeamHealth Plaintiffs successfully moved to exclude any such evidence of contract
27 negotiations. *See* 10/20/21 Tr. at 17:21–24. Regardless, that Defendants may have been willing
28 to contract with TeamHealth Plaintiffs, had they been willing to agree to different terms, does

1 not evidence that Defendants did agree to any particular contractual terms. *See* 10/16/2021 Tr.
2 63:9-17 (Mr. Murphy testified that TeamHealth does “agree[] to discount to discount billed
3 charges” to “get paid”); *id.* 65:17-22 (Mr. Murphy testified that a certain reimbursement less than
4 billed based on a wrap arrangement was acceptable at time of claim submission). “With respect
5 to contract formation, preliminary negotiations do not constitute a binding contract unless the
6 parties have agreed to all material terms.” *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254,
7 1257 (2005). There is no evidence of such an agreement here.

8 3. No Promises Exchanged

9 Another essential element of contract formation is that “promises were exchanged”
10 through the parties’ conduct. *Smith*, 91 Nev. at 669, 541 P.2d at 665 (citing *Horacek v. Smith*, 33
11 Cal. 2d 186, 199 P.2d 929 (1948)); *see also Certified Fire*, 128 Nev. at 379–80, 283 P.3d at 256
12 (“To find a contract implied-in-fact, the fact-finder must conclude that ... promises were
13 exchanged.”); *Magnum Opes Constr. v. Sanpete Steel Corp.*, 129 Nev. 1135 (2013) (citing
14 *Certified Fire*, 283 P.3d at 256) (“Turning to the parties’ substantive arguments, an implied-in-
15 fact contract exists where the conduct of the parties demonstrates that they ... exchanged
16 bargained-for promises.”).¹⁷

17 TeamHealth Plaintiffs presented no evidence at trial that shows the Defendants
18 exchanged promises with TeamHealth Plaintiffs concerning the rate of payment for out-of-
19 network emergency medicine services. 10/16/2021 Tr. 65:7-10 (Mr. Murphy testified that billed
20 charges should be awarded because “[w]e perform the service”); 11/15/2021 Tr. 154:14-21 (Dr.
21 Scherr only testified that they have to treat patients by operation of law); 11/10/2021 Tr. 25:24-
22 28:5 (Mr. Haben testified that the allowed amount payable to providers “is defined by the benefit
23 plan” and is not the billed charges); *id.* 33:22-34:2 (Mr. Haben testified that the allowed amount
24 for out-of-network claims is paid based on what is “[d]efined in the benefit plan”). Moreover,
25 TeamHealth Plaintiffs admitted in an interrogatory response that none of the Defendants “orally
26 promised/omitted to reimburse [TeamHealth Plaintiffs] at a particular rate for the Healthcare
27

28 ¹⁷ *See supra* note 13.



claims.” **Exhibit 1** at Interrogatory No. 4 (TeamHealth Plaintiffs’ October 4, 2021 Amended Interrogatory Responses). As discussed above, evidence of the parties’ contract negotiations was excluded from evidence. TeamHealth Plaintiffs have not proved that Defendants exchanged promises.

4. No Meeting of the Minds on Material Terms

TeamHealth Plaintiffs also did not present any evidence at trial from which a jury could infer the terms of an implied-in-fact contract. “A valid contract cannot exist when material terms are lacking or are insufficiently certain and definite” for a court “to ascertain what is required of the respective parties” and to “compel compliance” if necessary. *Grisham v. Grisham*, 128 Nev. 679, 685, 289 P.3d 230, 235 (2012); *see also May*, 121 Nev. at 672, 119 P.3d at 1257 (“A valid contract cannot exist when material terms are lacking or are insufficiently certain and definite.”). Here, there are at least two material terms that TeamHealth Plaintiffs have not established through evidence: price and contract term.

Price in particular is a material term to any contract for Defendants to pay TeamHealth Plaintiffs a specific rate for their services. Courts commonly find there to be no contract formation where the parties have not agreed to a price. *E.g., Certified Fire*, 128 Nev. at 380, 283 P.3d at 256 (“There are simply too many gaps to fill in the asserted contract for quantum meruit to take hold. Precision never agreed to a contract for only design-related work, ***the parties never agreed to a price for that work***, and they disputed the time of performance.” (emphasis added)); *Matter of Est. of Kern*, 107 Nev. 988, 991, 823 P.2d 275, 276–77 (1991) (“In the case at bar, several essential elements of a valid contract are missing. ... [M]aterial terms such as subject matter, ***price***, payment terms, quantity, and quality are either altogether lacking or insufficiently certain and definite to support specific performance.” (emphasis added)). TeamHealth Plaintiffs have not presented a shred of evidence that Defendants affirmatively agreed to pay them at the full billed charges or in any other amount. Indeed, within the span of this litigation they have changed their own view of what Defendants supposedly agreed to pay for out-of-network services. *See United Healthcare Ins. Co. v. Eighth Jud. Dist. Ct. in & for Cty. of Clark*, 489 P.3d 915 (Nev. 2021) (noting that “[t]he providers alleged an implied-in-fact contract to provide



1 emergency medical services to United's plan members *in exchange for payment at a usual and*
 2 *customary rate*, and that United breached this contract by not doing so.”).

3 Nor have Plaintiffs submitted any evidence of the duration or term of the implied-in-fact
 4 contract. To the contrary, TeamHealth Plaintiffs objected to Defendants questioning witnesses
 5 on this topic. TeamHealth Plaintiffs' position appears to be that the duration is indefinite—that
 6 Defendants somehow agreed to pay them at their full rates forever into the future. Yet
 7 TeamHealth Plaintiffs cannot point to a single piece of evidence that indicates anyone acting as
 8 an agent of the Defendants, by their actions, agreed to a specific term for this contract to persist
 9 in perpetuity. To the contrary, Defendants' witnesses have denied having agreed to any such
 10 term. 11/10/2021 Tr. 168:16–21 (testifying that the only contracts that Defendants enter into
 11 “need[] to be in writing on contractual paper that was drafted by our attorneys and approved and
 12 used and available through a database”); Rosenthal Tr. 39:21–41:23. In the context of an
 13 agreement to pay Plaintiffs' full billed charges, where payors and providers typically agree to far
 14 lower rates as part of network agreements that last only a few years, the contract duration is a
 15 material term of the contract. Without a meeting of the minds on that term, there can be no
 16 implied contract. *See Kern*, 107 Nev. at 991.

17 Based on the evidence at trial, any verdict finding that Defendants formed an implied-in-
 18 fact contract with TeamHealth Plaintiffs to pay their full billed charges for out-of-network
 19 emergency medicine services would be contrary law, and Defendants are entitled to judgment as
 20 a matter of law.

21 **E. Defendants Are Entitled to Judgment as a Matter of Law on TeamHealth**
 22 **Plaintiffs' Prompt Pay Act Claim**

23 Neither the Insurance Code nor the Prompt Pay Act itself affords TeamHealth Plaintiffs a
 24 private right of action against Defendants. The Nevada Supreme Court has ruled that “the
 25 *insurance commissioner alone has authority to enforce* the insurance code,” *Joseph v. Hartford*
 26 *Fire Ins. Co.*, No. 2:12–CV–798 JCM (CWH), 2014 WL 2741063, at *2 (D. Nev. June 17, 2014)
 27 (emphasis added), and that the Insurance Commissioner has “exclusive jurisdiction in regulating
 28 the subject of trade practices in the business of insurance.” *Allstate Ins. Co. v. Thorpe*, 123 Nev.



565, 572, 170 P.3d 989, 994 (2007). No private right of action exists under the Prompt Payment Act. And even if it did, TeamHealth Plaintiffs are barred from asserting that right of action as a matter of law because they failed to exhaust available administrative remedies created by that Act.

1. TeamHealth Plaintiffs Have No Private Right of Action Under the Prompt Payments Act

No private right of action exists on the face of the Prompt Payments Act. The plain meaning of NRS 690B.012 is that an interest penalty will be imposed if an insurance company has determined that payment is owed, and failed to pay within thirty days. NRS 690B.012(4) (“If the approved claim is not paid within that period, the insurer shall pay interest on the claim ...”). The interest that accrues on the insurance claim acts as a punitive measure, which the Nevada Legislature has imposed on insurance companies to compel them to pay the policyholder's covered medical bills promptly. The statute does not impose any other liability onto insurers, and NRS 690B.012 does not create a private right of action even for policyholders, much less to third-party medical providers such as TeamHealth Plaintiffs.

If there were a private right of action implied in NRS 690B.012—and nothing in the text of the statute suggests there is—that right of action would belong to the *insured*, not to TeamHealth Plaintiffs. The statute governs how an insurer approves and pays “a claim of its insured relating to a contract of casualty insurance.” NRS 690B.012(1). The rights and duties of the statute therefore only accrue and flow to the policyholder, not to third-party medical providers. TeamHealth Plaintiffs are not insureds of Defendants under any contract, and they have repeatedly disclaimed any right to recover by standing in the shoes of insureds through an AOB. SAC at 2 n.1 (Plaintiffs “do not assert claims that are dependent on the existence of an assignment of benefits (“AOB”) from any of Defendants’ Members.”).¹⁸ TeamHealth Plaintiffs have no statutory standing to sue under the Prompt Payments Act, and Defendants are entitled to judgment as a matter of law.

¹⁸ If TeamHealth Plaintiffs were to rely on AOBs, their cause of action would be preempted by ERISA. See *supra* note 3.



2. TeamHealth Plaintiffs Failed to Exhaust Administrative Remedies

Defendants have asserted an affirmative defense of failure to exhaust administrative remedies, and the evidence shows that Plaintiffs did not exhaust the available administrative remedies for their Prompt Payment Act claim. “[A] person generally must exhaust all available administrative remedies before initiating a lawsuit, and failure to do so renders the controversy nonjusticiable. *Allstate*, 123 Nev. at 568, 571–72. Assuming the Prompt Payments Act creates a private right of action for third parties—notwithstanding the text and purpose of the statute—plaintiffs must first exhaust all available administrative remedies created by the Act.

The Insurance Code creates an administrative process that TeamHealth Plaintiffs were required to exhaust before coming to court. The Insurance Code allows a person to apply for a hearing of the Insurance Commissioner where that person is aggrieved by a “failure of the Commissioner to” enforce the Insurance Code. NRS 679B.310(2)(b); *see also Joseph*, 2014 WL 2741063, at *2 (“the insurance commissioner alone has authority to enforce the insurance code”). TeamHealth Plaintiffs were required to make such an application within 60 days of the alleged failure by Defendants to provide timely reimbursement. *See id.* On such an application, the Insurance Commission holds a hearing and makes a decision that can be appealed. NRS 679B.310(4)–(5); NRS 679B.370. Within 30 days of an adverse final ruling rendered by the Insurance Commissioner, the TeamHealth Plaintiffs had the option of seeking judicial review of the Commissioner’s decision. NRS 233B.130; *see also* NRS 233B.133 (outlining briefing process for judicial review).

TeamHealth Plaintiffs presented no evidence that they complied with any of this administrative process. TeamHealth Plaintiffs have not alleged or proven exhaustion of the available administrative remedies, Defendants are entitled to judgment as a matter of law on TeamHealth Plaintiffs’ claim under the Prompt Payments Act.

F. TeamHealth Plaintiffs’ Causes of Action Are Preempted by ERISA

Under ERISA § 514, a state-law claim conflicts with ERISA and is expressly preempted if it “relates to” an employee benefit plan governed by ERISA. 29 U.S.C. § 1144(a). This action



1 is undoubtedly related to employee benefit claims, and all of TeamHealth Plaintiffs' causes of
2 action are preempted by ERISA.

3 Plaintiffs' claims are conflict preempted because they seek to compel thousands of
4 different ERISA-governed plans administered by Defendants to pay them their unilaterally set
5 charges without reference to the specific benefit rates established by the terms of each governing
6 health plan—and without any of the plans ever having agreed to pay anything other than the plan
7 benefit rates. For instance, if the governing plan adopted an out-of-network program that limited
8 the member's benefit for out-of-network ER service to 200% of Medicare, any judgment finding
9 that Nevada common law imposes an obligation on Defendants to pay the TeamHealth Plaintiffs
10 their full billed charges, substantially above that out-of-network benefit, necessarily conflicts
11 with the terms of the ERISA plan. D5499 (plan document instructing to use OCM exclusively);
12 11/10/2021 Tr. 126:4–131:4 (Mr. Haben testified that testimony discussing the plan document
13 contained in D5499 required the OCM program to price out-of-network claims); 11/15/2021 Tr.
14 136:22-140:12 (Ms. Paradise testified that the usual and customary language in P146, a
15 certificate of coverage for a fully insured plan, did “not suggest . . . that the physician reasonable
16 and customary program established by FAIR Health would be used to reimburse an[] out-of-
17 network emergency service”); *id.* 137:25-138:7 (Ms. Paradise testified that plan document must
18 be reviewed to determine what out-of-network program applies); 11/16/2021 Tr. 142:24-143:6
19 (Ms. Hare testified that plan documents dictate out-of-network reimbursement); 11/16/2021 Tr.
20 148:12-18 (Ms. Hare testified that HPN's & SHL's claims processing system is designed to
21 reimburse claims based on plan documents and not full billed charges). But ERISA requires the
22 Defendants to “specify the basis on which payments are made to and from [their plans]” and to
23 administer their plans “in accordance with the documents and instruments governing the
24 plan[s].” 29 U.S.C. § 1102(b)(4); 29 U.S.C. § 1104(a)(1)(D). Any verdict that awards remedies
25 in excess of what Defendants owed under the governing plans would be contrary to ERISA.

26 ERISA preempts any state law that would, as Plaintiffs request, rewrite the terms of the
27 governing health plans to require payment for out-of-network ER services at amounts higher
28 than permitted by the plans. Indeed, it is well established that ERISA preempts implied-in-fact

contract claims such as the TeamHealth Plaintiffs. *Aetna Life Ins. Co. v. Bayona*, 223 F.3d 1030, 1034 (9th Cir. 2000) (“We have held that ERISA preempts common law theories of breach of contract implied in fact...”); *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1356 (9th Cir. 1984) (breach of implied-in-fact contract claim was conflict preempted), *abrogated on other grounds in Dyrtr v. Mountain States Tel. & Tel. Co.*, 921 F.2d 7889, 7894 n.4 (9th Cir. 1990); *Parlanti v. MGM Mirage*, 2:05-CV-1259-ECR-RJJ, 2006 WL 8442532, at *6 (D. Nev. Feb. 15, 2006) (breach of contract claim conflict preempted).

III. CONCLUSION

For the foregoing reasons, this Court should grant Defendants judgment as a matter of law on all causes of action apart from TeamHealth Plaintiffs’ claim for unjust enrichment against UHS and UHIC.

Dated this 17th day of November, 2021.

/s/ Colby L. Balkenbush, Esq.

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of November, 2021, a true and correct copy of the foregoing **DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Joseph Y. Ahmad (admitted *pro hac vice*)
John Zavitsanos (admitted *pro hac vice*)
Jason S. McManis (admitted *pro hac vice*)
Michael Killingsworth (admitted *pro hac vice*)
Louis Liao (admitted *pro hac vice*)
Jane L. Robinson (admitted *pro hac vice*)
P. Kevin Leyendecker (admitted *pro hac vice*)
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Case No.: A-19-792978-B
Dept. No.: XXVII

**CRUM, STEFANKO AND JONES, LTD.
dba RUBY CREST EMERGENCY'S
AMENDED ANSWERS TO
DEFENDANTS' FIRST SET OF
INTERROGATORIES**

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

Defendants.

Crum, Stefanko and Jones, Ltd. dba Ruby Crest Emergency Medicine ("Ruby Crest")
hereby serves these Amended Answers to defendants UnitedHealth Group, UnitedHealthcare
Insurance Company; United HealthCare Services, Inc.; UMR, Inc.; Oxford Health Plans, Inc.;
Sierra Health and Life Insurance Co., Inc.; Sierra Health-Care Options, Inc.; and Health Plan of
Nevada, Inc. (collectively "United" or "Defendants") First Set of Interrogatories served to
Plaintiffs' counsel pursuant to NRCP 33.

INTERROGATORIES

1. Identify and describe all of the Non-Participating Claims that Ruby Crest contends
it is asserting in this Action. Your description should include, at a minimum, the following
information: (a) the patient's name, (b) the patient's date of birth, (c) the patient's social security
number, (d) the patient/insured's I.D. number, (e) the patient's account number, (f) the name of
the medical provider, (g) the date the medical service was provided, (h) the amount billed by Ruby
Crest for the medical service, (i) the amount Defendants paid to Ruby Crest, (j) the additional
amount of reimbursement Ruby Crest is demanding from Defendants, and (k) a brief description
of the nature of the medical services at issue. This information may be provided in the form of a
list, chart, spreadsheet and/or table if that is the most convenient/efficient way to provide the
requested information.

AMENDED ANSWER:

Objection. This Interrogatory seeks information that is already in United's possession, is
not proportional to the needs of this case in that it seeks information not necessary to any element

of proof of any claim or defense and exceeds any reasonable request related to identification of the claims at issue (e.g. the patient/insured's I.D. number and the patient's account number, the name of the medical provider and a brief description of the nature of the illness or injury). In addition, this Interrogatory is not reasonably calculated to lead to the discovery of admissible evidence because certain subparts have no relevance or bearing on the claims at issue in the litigation (e.g. the name of the medical provider or a brief description of the nature of the illness or injury that was being treated) and is compound. Further, Ruby Crest objects to the request to provide a brief description of the nature of the illness or injury that was being treated because that information can be generally gleaned from the E/M Code, the Member's medical records, to the extent they are in UnitedHealthcare's possession, and documents that are within the possession of United.

Subject to and without waiving the foregoing objections, *see* 08_24_Disputed_Claims.xlsx. Ruby Crest further incorporates the expert reports of David Leathers and Scott Phillips as if fully set forth herein.

2. Paragraph 195 of the First Amended Complaint states that: "At all material times, Defendants were aware that the Health Care Providers were entitled to and expected to be paid at rates in accordance with the standards established by Nevada law." Identify all Nevada statutes and regulations that establish the rate of payment standards referenced in paragraph 195 of the First Amended Complaint.

ANSWER:

Objection. This request improperly limits the allegations in Paragraph 195 of the Complaint (Plaintiffs' breach of implied-in-fact contract claim) to statutory and regulatory authority as the term "Nevada law" encompasses common law and equitable remedies. Team Physicians further objects on the basis that this Interrogatory calls for a legal conclusion. Subject to the foregoing objections, Ruby Crest responds, that in addition to the existence of a common law implied-in-fact contract, and other common law bases which support Ruby Crest's claims, the following NRS and NAC provisions support its allegation: NRS 679B.152; NRS 683A.0879; NRS 686A.310; NRS 689A.0495; NRS 689A.410; NRS 689B.045; NRS 689B.255; NRS 689C.485;

1 NRS 695C.179; NRS 695C.185; NAC 686A.270; NAC 686A.290; NAC 686A.306; NAC
2 686A.675; NRS 695G.170.

3 3. Paragraph 205 of the First Amended Complaint refers to “the rates required by
4 Nevada law.” Identify all Nevada statutes and regulations that paragraph 205 of the First Amended
5 Complaint is referring to.

6 **ANSWER:**

7 Objection. This request improperly limits the allegations in Paragraph 205 of the
8 Complaint (Plaintiffs’ breach of implied-in-fact contract claim) to statutory and regulatory
9 authority as the term “Nevada law” encompasses common law and equitable remedies. Team
10 Physicians further objects on the basis that this Interrogatory calls for a legal conclusion. Subject
11 to the foregoing objections, Ruby Crest responds, that in addition to the existence of a common
12 law implied-in-fact contract, and other common law bases which support Ruby Crest’s claims, the
13 following NRS and NAC provisions support its allegation: NRS 679B.152; NRS 683A.0879; NRS
14 686A.310; NRS 689A.0495; NRS 689A.410; NRS 689B.045; NRS 689B.255; NRS 689C.485;
15 NRS 695C.179; NRS 695C.185; NAC 686A.270; NAC 686A.290; NAC 686A.306; NAC
16 686A.675; NRS 695G.170.

17 4. To the extent Ruby Crest contends that any of the Defendants orally
18 promised/committed to reimburse Ruby Crest at a particular rate for the Non-Participating Claims
19 that Ruby Crest contends it is asserting in this Action, please identify the individual who made the
20 oral promise/commitment, the approximate date the oral promise/commitment occurred, which
21 Ruby Crest employee the oral promise/commitment was made to, and describe in detail the nature
22 of the oral promise/commitment.

23 **AMENDED ANSWER:**

24 Objection. This request is compound and is vague and ambiguous with respect to the
25 phrase “oral promise/commitment.” Ruby Crest understands the phrase “oral
26 promise/commitment” means an “oral promise” or an “oral commitment.” Subject to and without
27 waiving the foregoing objections, and based on that understanding, none.
28

1 5. Identify and describe the actions taken by Defendants that led to the creation of the
2 implied contract alleged by Ruby Crest in paragraph 200 in the First Amended Complaint.

3 **AMENDED ANSWER:**

4 Objection. To the extent this Interrogatory calls for a legal conclusion, it is improper.
5 Subject to and without waiving the foregoing objection, Team Physicians responds as follows:
6 Team Physicians is a professional practice group of emergency medicine providers that staffs a
7 certain emergency department at Northeastern Nevada Regional Hospital in Elko, Nevada. United
8 and the defendant affiliates are health care insurance companies and/or administrators that provide
9 coverage to their Members. Federal and state laws require Ruby Crest to treat individuals who
10 present for treatment in emergency departments that it staffs, regardless of that person's ability to
11 pay. *See e.g.* Emergency Medical Treatment & Labor Act ("EMTALA"), 42 U.S.C. § 1395dd;
12 NRS 439B.410. United has opted to provide and/or administer health insurance coverage to certain
13 individuals enrolled in its health plans in Nevada. United is required legally and contractually to
14 cover and pay for emergency department services provided to its Members. Because Ruby Crest
15 has already provided emergency medicine services to United's Members and United is obligated
16 to pay for those services as a Nevada health insurer and managed care organization, it is implicit
17 and expected that United will pay Ruby Crest for the billed charges. In the simplest of terms: Ruby
18 Crest is not obligated to provide emergency services to United Members at rates that are not
19 reflective of the reasonable value of the emergency medicine services provided. For purposes of
20 this litigation, Ruby Crest seeks payment of its billed charges as fully set forth in the opinions of
21 its experts, David Leathers and Scott Phillips.

22 Moreover, Ruby Crest conferred an additional benefit on UnitedHealthcare when Ruby
23 Crest did not balance bill UnitedHealthcare's members for claims that were paid at less than billed
24 charges which had been requested by UnitedHealthcare.

25 6. Identify all individuals who are or have been involved in "business discussions
26 with the Health Care Providers to become a participating provider" as alleged in paragraph 65 of
27 the First Amended Complaint. The information should include each individual's full name,
28 address, phone number and what entity they work for or are associated with.

AMENDED ANSWER:

Kent Bristow, Senior Vice President, Revenue Management for TeamHealth Holdings, Inc., 265 Brookview Centre Way Ste. 400, Knoxville, Tennessee. Fremont is part of the TeamHealth organization.

Jennifer Shrader, Vice President of Managed Care Contracting for TeamHealth Holdings, Inc., 265 Brookview Centre Way Ste. 400, Knoxville, Tennessee.

Rena Harris is formerly an employee of TeamHealth Holdings, Inc. as a Senior Contracts Manager. Ms. Harris's address is: 8511 Fallbrook Ave, Suite 120, West Hills, CA 91304. Ms. Harris was involved with negotiations with HPN, SHO and SHL on behalf of TeamHealth Holdings, Inc.

Mark Kline was formerly employed by TeamHealth Holdings, Inc. as a Vice President, Managed Care. Mr. Kline's email address is: mgklinetexas@sbcglobal.net. Mr. Kline may be reachable by contacting his counsel, Kyle L. Dickson, Sr., Murray-Lobb, 700 Gemini, Suite 115, Houston, Texas 77058, (281) 938-1918.

Dan Schumacher, the President and Chief Operating Officer of UnitedHealthcare and part of the Office of the Chief Executive of UnitedHealth Group, Inc. Defendants have Mr. Schumacher's contact information.

Angie Nierman, a Vice President of Networks at UnitedHealth Group, Inc. Defendants have Ms. Nierman's contact information.

Dan Rosenthal, President of UnitedHealth Networks, Inc. Defendants have Mr. Rosenthal's contact information.

John Haben, Vice President of UnitedHealth Networks, Inc. Defendants have Mr. Haben's contact information.

Jacy Jefferson, Associate Director, Network Development & Contracts for Health Plan of Nevada/Sierra Health & Life, UnitedHealthcare – Nevada. Defendants have Mr. Jefferson's contact information.

Greg Dosedel, Vice President of National Ancillary Contracting & Strategy at UnitedHealthcare Services, Inc. Defendants have Mr. Dosedel's contact information.

1 DATED this 4th day of October, 2021.

2 McDONALD CARANO LLP

3 By: /s/ Kristen T. Gallagher

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13 *Attorneys for Plaintiffs*

VERIFICATION

I, Kent Bristow, on behalf of Crum, Stefanko and Jones, LTD. dba Ruby Crest Emergency, have read **CRUM, STEFANKO AND JONES, LTD. dba RUBY CREST EMERGENCY'S AMENDED ANSWERS TO DEFENDANTS' FIRST SET OF INTERROGATORIES** and I believe, based on reasonable inquiry, that the responses set forth therein are true and correct to the best of my knowledge, information, and belief.

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

Executed on: October 4, 2021.

CRUM, STEFANKO AND JONES, LTD. dba RUBY CREST

By: 

Kent Bristow Senior Vice President,
Revenue Management for TeamHealth
Holdings, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on this 4th day of October, 2021, I caused a true and correct copy of the foregoing **CRUM, STEFANKO AND JONES, LTD. dba RUBY CREST EMERGENCY'S AMENDED ANSWERS TO DEFENDANTS' FIRST SET OF INTERROGATORIES** to be served via US mail to the following:

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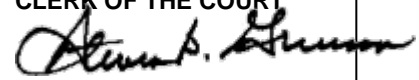
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/s/ Marianne Carter
An employee of McDonald Carano LLP

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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

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

**PLAINTIFFS' SUPPLEMENTAL
JURY INSTRUCTION
(CONTESTED)**

Plaintiffs submit the attached supplemental jury instruction.

010308

1 DATED this 17th day of November, 2021.

2 AHMAD ZAVITSANOS ANAIPAKOS ALAVI
3 & MENSING

4 By: /s/ Jane Langdell Robinson

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Attorneys for Plaintiffs

Instruction No. ____

When evidence is willfully suppressed, the law creates a rebuttable presumption that the evidence would be adverse to the party suppressing it. Willful suppression means the willful or intentional spoliation of evidence and requires the intent to harm another party or their case through its destruction and not simply the intent to destroy evidence. When a party seeking the presumption's benefit has demonstrated that the evidence was destroyed with intent to harm another party or their case, the presumption that the evidence was adverse applies, and the burden of proof shifts to the party who destroyed the evidence. To rebut the presumption, the destroying party must then prove, by a preponderance of the evidence, that the destroyed evidence was not unfavorable. If not rebutted, the jury is required to presume that the evidence was adverse to the destroying party.

In this case, the Court has determined that Defendants willfully suppressed certain evidence. Defendants' willfulness lies with the Defendants themselves and not their attorneys. Under the law, unless Defendant rebut the presumption, you must presume that evidence in the following categories was willfully suppressed, was relevant, and would have been unfavorable to Defendants:

- For Administrative Services Only (ASO) plans: Summary Plan Documents (SPDs), Administrative Services Agreements (ASAs), and similar contracts.
- For Fully Insured plans: Certificates of Coverage (COCs) and similar contracts.
- Communications with clients regarding Defendants' introduction of programs discussed in this lawsuit and whether clients' requests were a motivating factor in Defendants' introduction and use of such programs.
- [To be supplemented as appropriate]

Nev. J.I. 2.5 (2018); NRS 47.250(3); *Bass-Davis v. Davis*, 122 Nev. 442, 448, 134 P.3d 103, 106-07 (2006) (court stated "[w]hen evidence is willfully suppressed, NRS

1 47.250(3) creates a rebuttable presumption that the evidence would be adverse if
2 produced. Other courts have determined that willful or intentional spoliation of
3 evidence requires the intent to harm another party through the destruction and not
4 simply the intent to destroy evidence. We agree. Thus, before a rebuttable presumption
5 that willfully suppressed evidence was adverse to the destroying party applies, the party
6 seeking the presumption's benefit has the burden of demonstrating that the evidence
7 was destroyed with intent to harm. When such evidence is produced, the presumption
8 that the evidence was adverse applies, and the burden of proof shifts to the party who
9 destroyed the evidence. To rebut the presumption, the destroying party must then
10 prove, by a preponderance of the evidence, that the destroyed evidence was not
11 unfavorable. If not rebutted, the factfinder then presumes that the evidence was adverse
12 to the destroying party.").

Instruction No. ____

You have heard evidence regarding a rule called the “Greatest of Three.” The Greatest of Three is a method of setting a minimum permissible payment amount for out-of-network emergency services. It is not necessarily a method of determining what amount is reasonable.

2130110
McDONALD  CARANO

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PHONE 702.873.4100 • FAX 702.873.9966

010312

29 C.F.R. § 2590.715-2719A(b)(3)(i), (iii).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Ahmad, Zavitsanos, Anaipakos, Alavi and Mensing, P.C. and on this 17th day of November, 2021, I caused a true and correct copy of the foregoing **JOINTLY SUBMITTED JURY INSTRUCTIONS** to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

D. Lee Roberts, Jr., Esq.
Colby L. Balkenbush, Esq.
Brittany M. Llewellyn, Esq.
Phillip N. Smith, Jr., Esq.
Marjan Hajimirzaee, Esq.
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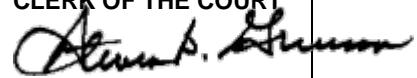
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RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES
(MANDAVIS) LTD., ET AL.,

Plaintiffs,

vs.

UNITED HEALTHCARE
INSURANCE COMPANY, ET AL.,

Defendants.

CASE#: A-19-792978-B

DEPT. XXVII

BEFORE THE HONORABLE NANCY ALLF
DISTRICT COURT JUDGE
WEDNESDAY, NOVEMBER 17, 2021

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 14

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RECORDED BY: BRYNN WHITE, COURT RECORDER

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1 Las Vegas, Nevada, Wednesday, November 17, 2021

2
3 [Case called at 8:39 a.m.]

4 [Outside the presence of the jury]

5 THE MARSHAL: -- is back in session. The Honorable Judge
6 Allf presiding.

7 THE COURT: Thanks everyone. Please be seated. Calling
8 the case of Fremont Emergency v. United Healthcare. Let's take
9 appearances real quick.

10 MS. LUNDVALL: Good morning, Your Honor. Pat Lundvall
11 from McDonald Carano on behalf of the healthcare providers.

12 MR. ZAVITSANOS: John Zavitsanos on behalf of the
13 healthcare providers.

14 MR. AHMAD: Joe Ahmad also on behalf of the healthcare
15 providers, Your Honor.

16 MR. LEYENDECKER: Good morning, Your Honor. Kevin
17 Leyendecker on behalf of the healthcare providers.

18 MS. MCMANIS: Good morning, Your Honor. Jason
19 McManis on behalf of the healthcare providers.

20 THE COURT: Thank you.

21 MS. KILLINGSWORTH: And Michael Killingsworth on behalf
22 of the healthcare providers.

23 THE COURT: Thank you. For Defendants, please?

24 MR. BLALACK: Your Honor, good morning. Lee Blalack on
25 behalf of the Defendants.

1 MR. ROBERTS: Good morning, Your Honor. Lee Roberts on
2 behalf of Defendants.

3 MS. PLAZA: Cecilia Plaza on behalf of the Defendants.

4 MR. GORDON: Good morning, Your Honor. Jeff Gordon on
5 behalf of the Defendants.

6 MR. POLSENBERG: Good morning, Your Honor. Dan
7 Polsenberg.

8 THE COURT: Thank you. All right, guys. So Mr. Zavitsanos,
9 let's have a report on this. You know, I understand that there were
10 media requests, but if they're attorney's eyes only things out there, that's
11 a problem.

12 MR. ZAVITSANOS: So Your Honor, there's much more to
13 this. And let me -- if -- with the Court's permission, what I would like to
14 do -- Mr. Killingsworth has done all the diligence. He's going to give you
15 a full report. And at the end, I would like to make a couple of comments
16 about kind of generally what's going on --

17 THE COURT: Okay.

18 MR. ZAVITSANOS: -- if I can. So let me let Mr. Killingsworth
19 walk you through the questions that the Court posed to me last night.

20 MS. KILLINGSWORTH: Thank you, Your Honor. And I don't
21 believe I was in the courtroom when the entire argument was made by
22 Mr. Roberts, but I just want to give a -- contextualize the issue. So at the
23 beginning of trial, the parties had reached an understanding that if there
24 was AEO material that they would seek to have redacted in the record
25 that were admitted exhibits, they would provide us those exhibits with

1 the redactions. On November 3rd, they provided us with 19 exhibits that
2 they have redactions, and I can provide Your Honor those exhibit
3 numbers, if you would like.

4 At that point, those documents have not been transmitted,
5 have not been given to anyone, because that redaction issue has not
6 been resolved. And after that point, as the issue was raised by Mr.
7 Roberts on November 10th, that some documents had been posted to
8 the TeamHealth website. Within an hour, all of that was pulled down.
9 Now, I believe Mr. Roberts has stated that the AEO document was posed
10 on a TeamHealth Twitter account. And I just provided these documents
11 to Mr. Roberts, and I want to provide you the Twitter account in which
12 the document was actually posted.

13 This is from a Twitter account that's named JabroniCoin, has
14 no affiliation with TeamHealth, and it is posting Exhibit 246. However,
15 this was posted on November 9th, so the day before this issues was
16 brought up and the documents were pulled down. And I just want to
17 note for the Court we can tell that this is the document that Modern
18 Healthcare used, because here's printed color copy, and I've also
19 provided this to opposing counsel, of the Modern Healthcare article and
20 it has the same boxing around Exhibit 246 as is on that Twitter account.

21 THE COURT: This is what we saw last night.

22 MS. KILLINGSWORTH: Yes. And if you notice, it has the two
23 boxes, the red boxes. And I want to also provide the Court and I
24 provided this to Mr. Roberts, this same Twitter account, he routinely puts
25 these boxes around different posts that he has over different topics. And

1 there's three different tweets in there as examples. And so the Modern
2 Healthcare pulled these two examples from the -- this gentleman's
3 Twitter account, was not provided by any TeamHealth personnel, and it
4 -- this gentleman must have downloaded it before we pulled everything
5 down. Exhibit 246 was not one of the 19 documents that Defense
6 counsel provided us that had -- that they have redactions. And on
7 November 15th, which is the say that this Modern Healthcare article was
8 posted, the writer Nona --

9 THE COURT: Tepper.

10 MS. KILLINGSWORTH: Nona Tepper reached out to
11 TeamHealth for a comment on P246 and at that point, we told him based
12 on the Court's orders, this is not to be disseminated. We will not
13 comment on it, and we ask that you not put it in anything. And
14 obviously later that day, the article was posted. And they did it with --
15 they did not take, you know, our strenuous advice not to disseminate,
16 because we were trying to follow the Court's orders. Now, I'm going to
17 hand it over to Mr. Zavitsanos, because that's the background I wanted
18 to provide --

19 MR. ZAVITSANOS: So Your Honor, the two takeaways from
20 what Mr. Killingsworth just said -- and then I've got some other things I
21 need to share with you, is number one, we relied on what the Defendant
22 told us would be AEO. It was not everything that they had stamped AEO.
23 They pared the list down, because if you remember, Your Honor, we had
24 a big discussion about whether the courtroom was going to be closed,
25 what's going to happen with the media. And so we worked very hard to

1 pare that list down. That list got pared down. Some documents were
2 put up on the TeamHealth website that were not those 19. And as soon
3 as Your Honor said take it down, we took it down.

4 Now, what did they do? They expanded the list of the 19
5 documents that they gave us, and they reverted back to anything that
6 has AEO on it is now AEO. And they did that after the stuff was posted
7 on the TeamHealth website. They took that position after that was put
8 up. Now, here's what's going on in the background. There are a lot of
9 eyes on this case. On the second day that Mr. Haben testified, the
10 MultiPlan stock price dropped almost 15 percent. They issued a press
11 release about this trial. There's all kinds of chatter going on on Wall
12 Street about this trial. The day that we began jury selection, a few days
13 before that, TeamHealth files this frivolous lawsuit in Tennessee
14 accusing us of --

15 THE COURT: TeamHealth? Us meaning TeamHealth?

16 MR. ZAVITSANOS: Us, meaning TeamHealth. They issue a
17 press release that appears in Law 360, and it appears in --

18 THE COURT: Yeah, I get the Law 360 flashes, but --

19 MR. ZAVITSANOS: Yes. And in Modern Healthcare. And by
20 the way, Your Honor, let me say this about Modern Healthcare. I don't
21 know what's going on there. Modern Healthcare is very pro-United and
22 we have been getting bashed in Modern Healthcare repeatedly. And so
23 this is -- we've been their punching bag for the last five years. And so --

24 THE COURT: That is --

25 MR. ZAVITSANOS: -- look, Your Honor, all I'm saying is you

1 know, this suggestion that we have a Twitter account that we put this up,
2 it's a little disturbing to say the least, because we're talking about this
3 because we relied on what United told us was going to be AEO. This
4 was not one of the AEO documents. And so -- now, look, in fairness,
5 TeamHealth has been issuing press releases. They've been talking to,
6 you know, to the media about what's going on here. We have not
7 disclosed any AEO stuff. We've not done anything, because look, we
8 have to exist outside of this courtroom as well. This is a public deal.
9 And I'm not participating in that. Honest. I am not -- I have no role in
10 that. I'm here in this case.

11 THE COURT: Nobody's accused you.

12 MR. ZAVITSANOS: Yeah. So that's it. And I think this really
13 much ado about nothing. We did not violate anything. I take the Court's
14 directions very seriously. We took it down --

15 THE COURT: Okay.

16 MR. ZAVITSANOS: -- immediately when Your Honor said to
17 do it and that's --

18 THE COURT: Got it.

19 MR. ZAVITSANOS: -- all I have, Your Honor.

20 THE COURT: If there's no objection, I will make the Plaintiff's
21 documents a Court exhibit.

22 MR. ROBERTS: No objection, Your Honor.

23 THE COURT: And, Mr. Roberts.

24 MR. ROBERTS: Thank you. And first of all, I'm not -- you
25 know, have not and will not accuse counsel of any --

1 THE COURT: I didn't --

2 MR. ROBERTS: -- impropriety here.

3 THE COURT: Did not think that you had.

4 MR. ROBERTS: I just want to make it clear on the record.

5 THE COURT: Yeah.

6 MR. ROBERTS: So this is the first I've seen of this tweet, and
7 it does appear that this is where the information that was posted by
8 Modern Healthcare came from. Of course, the tweet itself indicate that
9 JabroniCoin, the tweeter, uploaded it from
10 TeamHealth.com/wp/content/upload. And while this -- I accept the
11 representation that this was uploaded before the Court admonished
12 them to take it down, we still believe it was improper for them. They
13 should have known that the exhibits were locked until trial was over.

14 THE COURT: Right. And you have a motion that will be
15 resolved posttrial.

16 MR. ROBERTS: Correct. Yes.

17 THE COURT: So we're not going to resolve that today.

18 MR. ROBERTS: Correct, Your Honor. And therefore, they --
19 understand, they've taken it down, but there's still something that is not
20 addressed and that's the same article on page 1 indicates that Modern
21 Health received the transcript that they're quoting from TeamHealth.

22 And I understand the Court indicated initial inclination that
23 the transcripts were public record and fair game, but I would point out
24 that we filed a motion to seal and the Supreme Court rule applicable to
25 the motion to seal doesn't apply just to exhibits. It applies to all court

1 records, would include transcripts, including electronic media.

2 And therefore, as soon as we filed that written motion to
3 seal, all of those documents became confidential, including the
4 transcripts, until the Court can review those documents and we can at
5 the end of trial to see if there's any attorney's eyes only documents
6 where our interests would pay the public interest.

7 THE COURT: Good enough.

8 MR. ROBERTS: And therefore, we do thinks it's improper for
9 them to have provided the transcript after our motion to seal to this
10 Modern Healthcare website.

11 THE COURT: And we'll resolve that issue posttrial.

12 MR. ROBERTS: Yes, Your Honor. But in the meantime, what
13 we would request is under the Supreme Court rule that the transcripts
14 remain private until the Court rules, and we have an opportunity to seek
15 redactions. And that would include the reporter showing transcripts to
16 the general public or TeamHealth continuing to provide transcripts to the
17 media.

18 THE COURT: If the two of you need to talk about that on the
19 next break. If you can stipulate, great. If not, you have to file a motion.

20 MR. ROBERTS: Okay.

21 THE COURT: And I'll hear it on 24 hours' notice.

22 MR. ROBERTS: We will do that, Your Honor. And yesterday,
23 I did ask that we be provided a list of anyone who uploaded documents
24 from their website, and I think that is a valid request, so that we can seek
25 to notify those people that these are confidential.

1 THE COURT: If you can't agree, file a motion. I'll hear it on
2 24 hours' notice.

3 MR. ZAVITSANOS: Your Honor, I'm assuming that
4 information -- we can get that, and so if anybody did that, will provide
5 that -- we'll provide that.

6 THE COURT: Okay.

7 MR. ZAVITSANOS: Okay?

8 THE COURT: Good. Can we bring in the jury?

9 MR. ROBERTS: Thank you, Your Honor.

10 THE COURT: I don't want to lose too much time here. And
11 you're both aware of the tentative ruling with regard to David Leathers to
12 allow the new -- well, I'm being told --

13 UNIDENTIFIED SPEAKER: Kevin, please pay attention.

14 THE COURT: I'm being told that the new information from
15 Leathers is work papers with calculations. Yesterday I ruled tentatively
16 that I would allow him to testify with regard to the new information. I
17 didn't see the prejudice to the Defendant, because it actually lowered the
18 request. And their argument was that you had two days. They're going
19 to get half a day. But I wanted to protect the Defendant's rights by
20 letting you take, outside of the presence, some testimony with regard to
21 that to determine whether or not a new methodology was used.

22 MR. BLALACK: Agreed, Your Honor.

23 THE COURT: Okay. So --

24 MR. BLALACK: Do you want to do that now or do you want
25 to --

1 THE COURT: No. We're going to let him testify first. I want
2 to get going.

3 MR. BLALACK: Okay. Thank you, Your Honor.

4 MR. LEYENDECKER: Your Honor, would you like Mr.
5 Leathers to take the stand?

6 THE COURT: Yes, please. Come on up, Mr. Leathers. Good
7 morning.

8 MR. LEYENDECKER: Your Honor, I was visiting with Mr.
9 Blalack, and we've decided we're going to substitute that PDF of the
10 claim file with the actual Excel, so we're going to coordinate to get that
11 done later, so that we've got an easier more readily available, and then
12 I'll take up the admission of the summary exhibits at this time.

13 THE COURT: Thank you. THE COURT: That's correct. And --

14 MR. LEYENDECKER: And is it --

15 THE COURT: -- do you have a response yet on the
16 conditional admission or is that the resolution?

17 MR. LEYENDECKER: Well, I mean that's -- yeah. The reason
18 we're doing this, Your Honor, is --

19 THE MARSHAL: All rise for the jury.

20 [Jury in at 8:53 a.m.]

21 THE COURT: Thank you. Please be seated. Good morning,
22 everyone. Welcome to Wednesday and we're only a few minutes late
23 this time, we want you to know. We actually do work very hard to
24 respect your time.

25 So Mr. Leathers, you're under the same oath you took

1 yesterday. There's no reason to re-swear you.

2 DAVID LEATHERS, PLAINTIFFS' WITNESS, PREVIOUSLY SWORN

3 THE WITNESS: Yes, Your Honor.

4 THE COURT: Go ahead, please.

5 MR. LEYENDECKER: Thank you, Your Honor.

6 DIRECT EXAMINATION CONTINUED

7 BY MR. GORDON:

8 Q Good morning, Mr. Leathers.

9 A Morning Mr. Leyendecker.

10 Q Okay. Let's just get right into it. What do you understand
11 that the Plaintiffs are claiming about the amount they contend they're
12 owed in this case? Big picture wise.

13 A Big picture. They contend that they are owed their billed
14 charges.

15 Q Okay.

16 A Or the difference between the build -- their billed charges --
17 and the amount was actually allowed for those claims.

18 Q We spent a good bit of time yesterday talking about Exhibit
19 473. Do you recognize as that as the underlying claims file, Mr.
20 Leathers?

21 A Yes, sir, I do.

22 Q And we've looked at some summaries. And so I want to ask
23 you, did you -- does Exhibit 473 contain enough information to analyze
24 those charge numbers per claim and allowed number per claim?

25 A Yes, sir, it does.

1 Q All right. And did you prepare any summaries of the 11,563
2 claims that relate to charges and the allows on the Plaintiff via Defendant
3 nexus?

4 A Yes, sir, I did.

5 MR. LEYENDECKER: Michelle, could we see Plaintiff's
6 Exhibit 473-G?

7 BY MR. LEYENDECKER:

8 Q Mr. Leathers, do you recognize Exhibit 473-G?

9 A Yes, sir. I do.

10 Q Can you tell the jury what that is?

11 A Yes. The claim file 473 is actually an Excel file. Excel is a
12 spreadsheet function or a spreadsheet program. In that program, they
13 have a functionality called a pivot table. You can create a pivot table.
14 This is a pivot table that has been created from that Excel database of
15 numbers.

16 MR. ZAVITSANOS: Your Honor, may -- I'm sorry. I have
17 something I need to bring to the Court's attention. May I visit with Mr.
18 Blalack in person?

19 THE COURT: You may.

20 [Sidebar at 8:56 a.m., ending at 8:58 a.m., not recorded]

21 THE COURT: Please proceed.

22 MR. LEYENDECKER: Thank you.

23 BY MR. LEYENDECKER:

24 Q Okay. Let me just back up a bit here. So Exhibit 473-G is
25 something you prepared, Mr. Leathers?

1 A Yes, sir, it is.

2 Q Okay. And so you're saying -- you're using a feature in
3 Excel -- Microsoft Excel to do what? Tell us again.

4 A It's a feature called a pivot table. And essentially, what it
5 does is it allows you to extract the data and summarize it in multiple
6 different ways. And here, what that functionality was was to say show
7 me the charges, which is the first numerical column, sum of charges,
8 show me the sum of allowed. And then I go and say I want to see each
9 of the Defendants listed and I want to see each of the Plaintiffs
10 presented.

11 Q So let me ask you just a basic question here. The very first
12 row is Freemont Emergency Service. That's one of the three Plaintiffs,
13 right, sir?

14 A Yes, sir.

15 Q And then underneath that, does your table list the five
16 Defendants and then the total charges for the claims related to those five
17 Defendants and the total allowed per each Defendant accordingly on
18 those claims?

19 A That's correct. Each one of those numbers then would sum
20 up to the 12.2 million and the 2.4 million for Freemont.

21 Q So the total charges in the case are 13 million -- if I wrote it
22 down write, \$13,242,789? And the total that was allowed was
23 2,843,447.78, right?

24 A Yes, sir.

25 Q Okay.

1 MR. LEYENDECKER: Michelle, can I actually get the
2 underlying Excel file. Let's just double check the numbers if we can.

3 BY MR. LEYENDECKER:

4 Q Okay. Mr. Leathers, do you recognize this is the Excel
5 electronic version of the claim file?

6 A Yes, sir, I do.

7 Q Okay. And just --

8 MR. LEYENDECKER: Michelle, scroll over so we can get to
9 column A all the way over. Here we go.

10 BY MR. LEYENDECKER:

11 Q Just briefly orient the jury about the columns and the
12 information in there, sir.

13 A So the first column you can see is Freemont. The rows on
14 the left, row 1 through -- it goes all the way down to over 11,000.

15 Q Stop. Let me stop you there.

16 MR. LEYENDECKER: Michelle, go all the way down. Can you
17 make the window a little smaller, so that we can scroll all the way to the
18 bottom of the claim file. Touch the -- see in the upper righthand corner.
19 Let me show you. Right there. Yes. Now center. Just touch it and
20 scooch it over, please. There you go. Now, Michelle, if you would take --
21 here we go.

22 BY MR. LEYENDECKER:

23 Q Okay. Mr. Leathers, what are we looking at here on the Excel
24 version?

25 A Okay. So --

1 Q How many number rows?

2 A So the number of rows you see there's a total of 11,564.
3 We've got 11,563 claims. The reason it's additional rows because row
4 number one is the title.

5 Q Okay.

6 A So each one of those lines represents a claim. And then
7 moving in this spreadsheet from left to right are basically -- and the
8 descriptions at the top.

9 MR. LEYENDECKER: Michelle, scroll a little bit over again,
10 left to right. Like let's get over to the -- leave it there. Just -- yeah, there
11 you go.

12 THE WITNESS: So we started out with the -- where you got
13 the facility, the patient name. Date of service is an important column in
14 terms of understanding chronology. The provider, that's the doctor. The
15 billed CPT -- if you stop right there for a moment, you can see here is
16 what I talked a little bit about yesterday, where we would have a CPT
17 number on this line right here of 11558, where you have 99291;225. And
18 you've got additional information there. That's what I call or have
19 described as a bundled CPT code.

20 BY MR. LEYENDECKER:

21 Q And do similar claims just have, for example, the 99291 or
22 99285?

23 A Exactly right. That's exactly right.

24 Q What's column M represent, sir?

25 A So then M says charges. That's the billed charge for that

1 claim.

2 Q And column N represents what?

3 A The amount allowed.

4 Q Okay.

5 MR. LEYENDECKER: Now, Michelle, go all the way over to
6 the right. Just -- let's give the jury a sense of the other columns in here.
7 And so, column -- stop right there, Michelle. Go back.

8 BY MR. LEYENDECKER:

9 Q Column W, Mr. Leathers, represents what?

10 A This represents the -- well, that's the employer, which is
11 important to understand just in terms of understanding the analysis and
12 the difference in some of the amounts allowed that we looked at
13 yesterday, for example.

14 Q Let me stop you for just a second and ask a very basic
15 question. Am I right that if I'm on row 11556, that, number one, does
16 that represent a discrete claim in the case?

17 A Yes, sir.

18 Q And does all the information when you can go left to right,
19 employer group, all this other stuff, represent the information associated
20 with that particular claim?

21 A It does.

22 Q Okay.

23 MR. LEYENDECKER: And all the way to the right, Michelle.

24 BY MR. LEYENDECKER:

25 Q And does the claim file that you reviewed in this case also

1 identify each particular Defendant per claim, sir?

2 A It does, yes.

3 Q Okay. Now here's what I want to do. I want to just check the
4 math.

5 MR. LEYENDECKER: Michelle, if you'll go to the bottom
6 again. And let's go to the charge column and the allowed column and
7 see if those [indiscernible]. Go all the way to the bottom. And then, if
8 you can, yes, put the sum feature there. Let's see. Hang on. No, no. It's
9 hidden. There you go.

10 THE WITNESS: Top right. There you go.

11 MR. LEYENDECKER: And hit enter, please.

12 BY MR. LEYENDECKER:

13 Q 13242789. That's the same as on your summary chart, right,
14 Mr. Leathers?

15 A Yes, sir.

16 MR. LEYENDECKER: And, Michelle, if you would total the
17 allow column too, if you would.

18 BY MR. LEYENDECKER:

19 Q 2,843,447.78. And does that tie?

20 A Yes, sir. It does.

21 Q Okay.

22 MR. LEYENDECKER: If you could take that down and go back
23 to the summary, Michelle. Thank you.

24 Okay. At that -- this time, Your Honor, the Plaintiffs would
25 offer Exhibit 473G as the summary of the underlying claim file in the

1 case.

2 MR. BLALACK: Your Honor, just -- if I could be clear, is the
3 Excel file been moved into evidence that he just referred to?

4 MR. LEYENDECKER: I also request we move the Excel file to
5 replace the PDF that was previously marked as 473.

6 MR. BLALACK: And, Your Honor, because I haven't had a
7 chance to review the underlying Excel file, I have no -- I think I'm going
8 to have no objection once I have a chance to review it, but I'd like to
9 reserve that until -- so it can be conditionally admitted.

10 THE COURT: 473-G will be conditionally admitted. The Excel
11 spreadsheet will be conditionally admitted.

12 [Plaintiffs' Exhibit 473 and 473G admitted into evidence]

13 MR. LEYENDECKER: Perfect.

14 BY MR. LEYENDECKER:

15 Q Thank you, Mr. Leathers.

16 A Uh-huh.

17 Q Let me refocus this on the billed charge analysis that you
18 talked a little bit about yesterday.

19 A Okay.

20 MR. LEYENDECKER: And, Michelle, can I get Defendant's --
21 Mr. Blalack, do you -- Your Honor, may I ask Mr. Blalack if he has an
22 objection to Defendants' 4048?

23 MR. BLALACK: I think this is already in evidence, Your
24 Honor.

25 MR. LEYENDECKER: Okay. Thank you. Michelle, could I get

1 Defendant's 4048 at page number 11? And what I'd like you to do,
2 Michelle, is to highlight right here where it says the last three to five
3 years reflects steep growth in usual, customary, and reasonable charges.
4 Bring that out for us. Thank you.

5 BY MR. LEYENDECKER:

6 Q Okay. Mr. Leathers, were you here or were you watching
7 when Ms. Paradise was testifying before the jury?

8 A Yes. I wasn't here, but I was listening in.

9 Q Do you remember the questions about this chart with Ms.
10 Paradise where she was commenting on the steep growth or the ramped
11 up growth? I forget the word she used. But do you recall that
12 testimony?

13 A Yes, sir. I do.

14 Q Did you do anything to analyze or investigate the Plaintiff's
15 charges or all the charges by all the other ER doctors in Nevada -- excuse
16 me -- Nevada.

17 MR. LEYENDECKER: Sorry, Your Honor.

18 BY MR. LEYENDECKER:

19 Q To see whether they had steep growth in the charges during
20 the claim period?

21 A Yes, sir. I did.

22 Q Tell us what you did.

23 A Well, I took from that file that we just looked at, that Excel file
24 that we just looked at, I compared the billed charges, which was the
25 charged column that was in that Excel file, and I compared it to two

1 different sets of information. One, I compared it to data from Fair Health,
2 and I also compared it to data that I had received from what other
3 providers had charged United for the same or similar services, and then
4 did that both in total but also during the period from 2017 to 2020 that's
5 at issue in this case.

6 Q Okay. So big picture. You looked the Plaintiff's charges, the
7 charges of all other ER doctors in Nevada, whether they're down here in
8 Clark County or up in the middle part of the state, and also the Fair
9 Health concept?

10 A That's correct. Yes, sir.

11 Q Okay.

12 MR. LEYENDECKER: Michelle, could we go to -- I believe
13 that's the [indiscernible] point version of the first demonstrative.

14 MS. RIVERS: There?

15 MR. LEYENDECKER: I think so. Let me see if I'm live here.
16 Tell you what. Can you press the arrow button and let it come forward?
17 There we go. Okay.

18 BY MR. LEYENDECKER:

19 Q So, Mr. Leathers, I'll tell you -- represent to you that during
20 the opening statements, Mr. Blalack put up a chart of the 99283 CPT in
21 Clark County. And let me ask you. Do you understand that Freemont is
22 one of the three Plaintiffs -- is the one of the three Plaintiffs that's
23 provided services here in Clark County?

24 A Yes, sir. I do.

25 Q Okay. So if we look at this chart, I just -- we just populated

1 the first row. Tell the jury what that first row represents.

2 A So this is a plotting of the billed charges as reported by Fair
3 Health in its reports from May -- April -- November 2017 through May
4 2020. Fair Health has reports that come out on -- I think I mentioned that
5 yesterday, in November and May of each year. That's why you see the
6 November and May references.

7 Q So we see a pretty big incline it looks like in -- from May '19
8 to November '19, jumps up pretty good to \$1991 for this 283 Code in
9 Clark County. You see that?

10 A Yes, sir. I do.

11 Q Okay.

12 MR. LEYENDECKER: Can we look at the next one, Michelle?

13 BY MR. LEYENDECKER:

14 Q All right. What's the next line that just got populated, Mr.
15 Leathers?

16 A So these are other providers. They're not a party to this
17 case. They're other providers and what -- and it's showing the amounts
18 that they charged United in Freemont -- or for Freemont for CPT code
19 99283.

20 Q Okay. Let's see if I can unpack that. The all other -- the blue
21 line -- first of all, orange line represents the Fair Health charges charted
22 over time, where they start at 473, November '17. They got a steep
23 incline in 1991 as of May 2020; is that right?

24 A Yes, sir. That's correct.

25 Q Okay. And the blue line represents at the start of the period

1 what all other ER doctors in Clark County were charging United --

2 A Yes.

3 Q -- on averages?

4 A That's correct. Yes.

5 Q And that's the 661 number?

6 A Yes.

7 Q Okay. And that 60 -- 661 number grew to what number at the
8 end of the claim period, sir?

9 A To 725.

10 Q Okay. So the other ER doctors a little above Fair Health, and
11 then they end up modest growth, below FAIR Health in that time period.
12 Fair to say?

13 A That's right. Yes.

14 Q Okay.

15 MR. LEYENDECKER: Michelle, can I populate the --

16 BY MR. LEYENDECKER:

17 Q Now what's the green line, sir?

18 A So this represents the three Plaintiffs in this matter and what
19 their charges were here in Clark County for the same CPT code, 99283.

20 Q Okay. So the \$459 represents what on the Plaintiff's charges
21 at the beginning of the period for this 99283 code, sir?

22 A They're billed charges.

23 Q Okay. And the -- and at the end of the period, those charges
24 had grown to how much?

25 A To \$504.

1 Q Did you take a look and do any calculations to figure out how
2 much growth there had been -- how much growth there had been --

3 MR. LEYENDECKER: Is that me?

4 THE COURT: No. No. Go ahead.

5 BY MR. LEYENDECKER:

6 Q Mr. Leathers, let me back up. Did you do anything -- any
7 math equations or calculations to figure out how much growth existed
8 on a Fair Health -- all of the doctors and the Plaintiffs?

9 A Yes.

10 Q Okay.

11 MR. LEYENDECKER: Michelle, can I populate the next piece?

12 BY MR. LEYENDECKER:

13 Q All right. Tell the jury what just flashed up on the
14 demonstrative.

15 A So that is -- the 78 percent is a -- is what we call a compound
16 average annual growth rate calculation. It's essentially the average
17 growth from November 2017 to May 2020, which is 78 percent.

18 Q Okay. So let me just stop here and make sure we all know
19 what's what. Are you saying that on the Fair Health 80th, whatever Fair
20 Health reported, that what started as \$473 for 283 grew by about 78
21 percent per year to this 1991 number?

22 A That's correct. Yes.

23 Q Okay. Now do we know exactly what providers or clinicians
24 are in the Fair Health numbers?

25 A I mean there are hundreds of providers and clinicians. And

1 it's a very large database.

2 Q Let me ask perhaps a better question.

3 A There are those that are here in Clark County.

4 Q Okay.

5 A This has been adjusted for both Clark County and just for that
6 CPT code.

7 Q Do we know -- how do you feel in terms of certainty about
8 how accurate the -- all other ER doctors -- first of all, let me back up.
9 Where did that information -- tell the jury again where that information
10 came from.

11 A So that information came from United. United provided a
12 database of all of their charge -- or charges that were provided to --
13 charges that were charged to them from other providers. That data was
14 provided -- was claims, was provided just like the other file we just
15 looked at, by date, by location, by facility, et cetera, et cetera. So I was
16 able to look at that and make sure that I was comparing apples to apples
17 in terms of the date and the geographic location, meaning Clark County
18 for this example.

19 Q So big picture, would it be fair to describe those -- all other
20 ER doctors as sort of the -- competition is not the right word but the
21 other folks here in Clark County that service the other hospitals that
22 Freemont does not?

23 MR. BLALACK: Object to form. Leading.

24 THE COURT: It is leading. So you can just rephrase.

25 MR. LEYENDECKER: That's fine. Let me move on.

1 BY MR. LEYENDECKER:

2 Q What --

3 MR. LEYENDECKER: Michelle, may we have the next slide.

4 Not next slide. There you go.

5 BY MR. LEYENDECKER:

6 Q What did -- what did you study the growth of the -- all of the
7 ER doctors in Clark County, sir?

8 A So that was an average growth rate of 3.8 percent.

9 MR. LEYENDECKER: Okay. And the next one, Michelle.

10 BY MR. LEYENDECKER:

11 Q And the Plaintiffs?

12 A Approximately the same, yes.

13 Q Okay. Now, let me ask you, were you in the courtroom
14 yesterday when Mr. Murphy was on the stand?

15 A Yes, I was.

16 Q In the courtroom?

17 A Yes, I was, yes.

18 Q Did you hear the discussion about FAIR Health, that he was
19 having with Mr. Zavitsanos?

20 A I did.

21 Q Do you remember the comment he made about, yeah, we
22 looked at, but we don't chase it?

23 A That's correct, he did say that.

24 Q When you heard that, what were you thinking?

25 A Well, I mean, what I was thinking is that they don't literally

1 use FAIR Health. They look at FAIR Health as a data point for the
2 reasonableness of their billed charges.

3 Q Okay.

4 A So you can see here in this chart, for example, I mean, it --
5 where he's saying -- I don't think he was thinking about it at the time, but
6 chasing it, obviously, the Plaintiffs didn't increase their bill charges
7 following what happened to the FAIR Health data.

8 Q How about all of the other ER providers in Clark County, were
9 they chasing the FAIR Health number for the end of the period?

10 A No, sir.

11 Q Okay.

12 MR. LEYENDECKER: Let's look at the next one, Michelle, 284.

13 BY MR. LEYENDECKER:

14 Q Did you prepare Mr. Leathers to this analysis for the 283, 284,
15 and 385 CPTs, both for the providers up north and the one here in Las
16 Vegas, Fremont?

17 A Yes, sir, I did.

18 Q Okay.

19 MR. LEYENDECKER: Michelle, can I get P350 and -- excuse
20 me, P5, 384.

21 MR. BLALACK: Counsel, was there a number of some kind
22 associated with that slide that you just referenced, if I could inquire?

23 MR. LEYENDECKER: It was an interactive version. I'm happy
24 to provide it to you.

25 MR. BLALACK: Okay. Thank you.

1 MR. LEYENDECKER: This is P -- so, okay.

2 BY MR. LEYENDECKER:

3 Q What are we looking at here?

4 A So you are looking at the same type of chart from the same
5 data source. All we're doing is changing it to look at 99284, instead of a
6 99283 CPT code.

7 Q Okay.

8 A It's a -- it's a -- I'm sorry.

9 Q No, if I interrupted you, I apologize.

10 A I was just going to say, as you see from you go from three to
11 four to more severe -- more severe charge. And you can see the charges
12 increasing, compared to what we saw on the last chart.

13 Q Okay. All right. And big picture, when you look at this
14 charge -- excuse me, this chart, what do you take away from it as it
15 relates to the Plaintiff's charges here in Clark County for this 99284 CPT
16 code during the period in question?

17 A Right. Again, that the Plaintiff's charges were at or below
18 both that of what was reported by FAIR Health, as well as those other
19 providers in the same area.

20 Q Okay.

21 A Same.

22 Q Okay. We're going to get, maybe a little bit more detail later,
23 but do you have a point of view about whether, if the Plaintiff's charges
24 are at or below FAIR Health 80th, and they're at or below what
25 everybody else charges in the market, do you think that has some in half

1 of what was reasonable charges?

2 A Absolutely. Absolutely. That's, essentially, the basis for my
3 opinion, or part of my opinion in terms of the reasonableness of those
4 billed charges.

5 MR. LEYENDECKER: Michelle, let's look at 530 at 5
6 [phonetic].

7 BY MR. LEYENDECKER:

8 Q Okay. This is for the 285, the more severe code we talked
9 about yesterday. And what -- big picture, what are we seeing here, Mr.
10 Leathers?

11 A Again, consistent trend is what we had seen on the prior two
12 charts at or below both FAIR Health or the other ER providers, and again,
13 suggesting, or illustrating the reasonableness of those billed charges.

14 Q Okay. So just there here, it looks like in November 17, am I
15 reading this right that the Plaintiffs average charge for 285 was \$1,292,
16 which was a \$2 under the FAIR Health paid?

17 A Yes.

18 Q All right. Did you also do the same kind of analysis for these
19 three main codes for the team positions at Ruby Crest up there in the
20 northern part of the state?

21 A I did, yes.

22 Q Okay. This one got a little more [indiscernible] on it, what do
23 you make of it?

24 A Well, it's a different -- I mean, it's a different geographic
25 location or the two -- really, two separate geographic locations, but

1 relatively close together. But it still shows the relative consistency
2 across the time period in terms of the Plaintiff's charges being at or
3 below those of others in the market and FAIR Health.

4 Q So at times, we -- as this charge go for Ruby Crest to Team
5 Physicians, on the 283 code, does it show at all times we're below the
6 FAIR Health 80th; is that number one?

7 A Yes.

8 Q And number two, does it show times we're above all the
9 other doctors, and times we're below the other doctors?

10 A Yes.

11 Q Pretty -- you think those are pretty consistent though?

12 A I think over the time period, they are, yes.

13 MR. LEYENDECKER: Michelle, can we look at the 284 charge
14 right there?

15 BY MR. LEYENDECKER:

16 Q How about this one, Mr. Leathers, what do you see in here?

17 A So again, a little bit different than what we had looked at for
18 just Fremont, but -- and a little clearer compared to the 283 charge. But
19 again, illustrating that the Plaintiff's charges are below both during the
20 entire time period, below both the other providers as well as FAIR
21 Health, and remain at a relatively stable -- and actually, in this particular
22 case, the average charges for the Plaintiffs are declining.

23 Q Okay. This is on the 284 code for Ruby Crest and Team
24 Physicians?

25 A Yes, sir.

1 Q All right.

2 MR. LEYENDECKER: Michelle, how about we look at the --
3 the next one for the 285?

4 BY MR. LEYENDECKER:

5 Q Okay. Mr. Leathers, what is the 285 chart saying to you
6 about Ruby Crest and Team Physicians?

7 A Again, consistent with the others, the Plaintiffs remain at or
8 below both other providers, as well as FAIR Health. We see just a little
9 blip there in some of the other providers, inching up to what FAIR Health
10 was and then back down again.

11 Q Did you also look at these when you combine all three plan
12 groups together to look at, okay, we look at the Plaintiffs altogether
13 across the state, did you do that, sir?

14 A Yes, sir, I did.

15 MR. LEYENDECKER: Michelle, could we have the next one,
16 please? 530, 9.

17 BY MR. LEYENDECKER:

18 Q Okay. Here we go. So Mr. Leathers, tell the jury what we're
19 looking at here on 530, 9.

20 A So here, we are looking at the total billed charges, total
21 average billed charges for all of the core CPT codes. In other words,
22 when we go back to that data set, we're just looking at those CPT codes
23 that don't have the other bundled services to them. The reason we do
24 that is to make sure that we're on an apples-to-apples comparison to
25 FAIR Health and those other providers.

1 Q So all in soup to nuts, at the beginning of the period, does
2 this charge show that the average for all the CPTs, for CPTs, the average
3 for the Plaintiffs is \$1,005?

4 A Yes, sir.

5 Q A couple dollars below the average FAIR Health 80th?

6 A Yes.

7 Q All right. And so let me just ask you, 30,000 feet, what does
8 your investigation and analysis tell you about the Plaintiff's charges in
9 this case?

10 A This illustrates -- this analysis illustrates the reasonableness
11 of the billed charges of the Plaintiffs, or the Plaintiffs billed charges.

12 Q Did you reach any conclusions, having done the investigation
13 and the analysis, did you reach any conclusions upon a question of are
14 the Plaintiff's charges reasonable in this case?

15 A Yes. I mean, that's what I just said. It supports the Plaintiff's
16 claim that those charges were reasonable and the utilization of the billed
17 charges in terms of calculation of their damages.

18 Q And is that because, pretty much at all times, we're at or
19 below a combination of FAIR Health or what all the other ER doctors in
20 the state are doing?

21 A Yes, sir.

22 Q Okay. And you think that makes -- it's fair to say that you
23 think that suggests or indicates the charges are reasonable?

24 A Yes.

25 Q Let me switch topics on you.

1 MR. LEYENDECKER: You can take that down, Michelle.

2 BY MR. LEYENDECKER:

3 Q And ask you if you did an investigation and any analysis on
4 the allowed amount side, the same way you did on the charge side?

5 A I did, yes.

6 Q Tell us what you did there.

7 A So I used the same file of -- not the FAIR Health file. I didn't
8 have the FAIR Health information. For the other providers, as well as the
9 claim file, the Excel file we just looked at a moment ago and did a
10 comparison of the amounts allowed to understand were the amounts
11 allowed, or that the Plaintiffs were reimbursed, was that consistent, or
12 higher, or lower than what others in the marketplace were being
13 reimbursed.

14 Q Okay. So step one is we're checking to see whether our
15 charges look reasonable, relative to everybody else. And step two was
16 let's see whether we're being treated the same by the Defendants, as all
17 the other ER doctors; is that correct?

18 A Correct.

19 MR. BLALACK: Object to foundation.

20 THE WITNESS: As a point in time, as well as --

21 THE COURT: It was foundational. Overruled. Go ahead.

22 THE WITNESS: As well as over the time period.

23 BY MR. LEYENDECKER:

24 Q Did you look to see, on the Plaintiffs -- on the amounts that's
25 been allowed by the Defendants, did you look to see whether there has

1 been any change in what was going on during the time period in terms
2 of how much they're being allowed?

3 A Yes.

4 Q Tell us what you did.

5 A Well, first of all, I looked at the claim files of the Plaintiffs.
6 This was kind of an iterative process. I looked at it early on and as my
7 analysis progressed, looked at it a little bit more detail, and looked at it
8 over a period of time; did those charges remain flat? Did they go down?
9 And that's -- that was step one.

10 Q Okay. And on the allowed amount, did you do something
11 similar?

12 A Well, that's what -- I'm sorry, maybe I misspoke. I looked at
13 the allowed amount for the providers, or for the Plaintiffs in this case first
14 to see what that was at a point in time, and on a CPT-by-CPT code basis.

15 Q Okay.

16 A Then I compared that to the market.

17 Q Did you look at -- did you look at our allowed balance, sort of
18 on an annual basis to see what was happening in '17 and '18, et cetera?

19 A Yes.

20 Q Okay.

21 MR. LEYENDECKER: Michelle, can I have 530 at 13, please?

22 BY MR. LEYENDECKER:

23 Q Tell the jury what you found when you investigated and
24 analyzed what was happening with the allowed amounts to the Plaintiffs
25 during the claim period.

1 A Well, what you can see is illustrated on this chart, is this is
2 for all of the claims. There is a pretty significant decline from 2017, the
3 beginning of the period in dispute, all the way down to 2020, a decline
4 down to an average charge of \$187.

5 Q You said charge, you mean allowed?

6 A I mean allowed. I'm sorry.

7 Q Okay.

8 A This is the amount that is reimbursed to the Plaintiffs in this
9 case, to the providers in this case.

10 Q Let me -- I want to just slow it down a hair here and bring a
11 little life to the concept of allowed, because it's been a while, I think since
12 the jury heard some details about what that means, okay? Is it your
13 understanding that the allowed amount, sir, represents the combination
14 of what the insurance companies are going to pay and the patient's co-
15 insurance or whatever?

16 A That's correct, yes.

17 Q Okay. And let me ask you, between the patients who were
18 paying their share on the one hand, and these insurance companies over
19 here on the other hand, whose to determine how much they're going to
20 allow? Who's making that decision about what's going to be allowed?
21 Patients over here or the insurance companies over here?

22 A The insurance company is.

23 Q Okay. Now, when you saw this information, did you do
24 anything to further, kind of check what was going on with the other ER
25 doctors in the state?

1 A Yes.

2 Q Okay. And tell us what you found.

3 A I found that the other ER doctors in the state that does
4 charges remained relatively flat compared to the decline that we saw in
5 the Plaintiffs.

6 Q You said charges. Do you mean allow, sir?

7 A Allow. I'm sorry.

8 Q That's okay.

9 A I continue to say that. Allow, yes.

10 MR. LEYENDECKER: Michelle, can I get 530, 14, please?

11 BY MR. LEYENDECKER:

12 Q Okay. What -- tell the jury what 530, 14, somebody can't
13 spell good very good up there at the top, that's me. I'll tell you, I was
14 trying to take some notes. I don't remember one time that I wrote on a
15 chart, you know, protection from fire, and anybody's who's dyslexic --
16 and I couldn't figure out why; it's because I wrote F-I-R. This is worse.

17 So -- okay. I will -- let me just -- let get over in here. You're right,
18 this is worse. Okay. Tell the jury what you realized about the
19 Defendant's re-um-iner-amursments [phonetic] in Nevada.

20 A Taking a step back, during the entire time period, the
21 amounts allowed, or reimbursed on average for the Plaintiffs were \$245
22 per claim, whereas the other providers during the exact same time
23 period, same data, the amount allowed or reimbursed to those other
24 providers was \$528 per claim.

25 Q Now, how did you figure out what that average allow was for

1 all other ER providers in the state? What piece of information did you
2 use to figure that out, sir?

3 A Well, I had -- I had a data file that contained that information,
4 and essentially went through and sorted it and organized it in a
5 consistent way, as I did the Plaintiff's claim files, to ensure again that
6 we're on an apples-to-apples basis, both in terms of geographic location,
7 services provided, and time period.

8 Q Let me just make sure I'm on a -- I want to put it here for a
9 moment and make sure I understand what I'm looking at. Do I hear you
10 say that when you investigated and analyzed how much the Defendants
11 were allowed, and this was across all the claims, right, sir?

12 A Yes, sir.

13 Q And you figured out, and you did all that work, did they
14 have -- did they allow on average about -- during the claim period, \$246
15 to the Plaintiffs?

16 A Yes, for those 11,563 claims.

17 Q And am I seeing this right that for all the other ER doctors in
18 the state, those here in -- in Clark County, and those up there in Elko and
19 Churchill is more -- United's paying more than twice that?

20 A Yes, sir, that's what the data shows.

21 Q Does that seem right to you?

22 MR. BLALACK: Object to form. Vague.

23 THE COURT: Overruled.

24 THE WITNESS: It was surprising to me.

25 BY MR. LEYENDECKER:

1 Q Why?

2 A Because the amounts for the exact same services, during the
3 same time period, during the same geographic location is almost twice,
4 and there's no information in the data to understand or to illustrate why
5 that's the case.

6 Q You think maybe the Defendants thought our board certified
7 ER doctors just somehow don't do as good a job treating the folks that
8 are in need of care as the rest of the ER doctors in the state?

9 MR. BLALACK: Object to the form. It's argumentative. It's
10 also speculative.

11 THE COURT: Objection --

12 MR. LEYENDECKER: I'll withdraw it.

13 THE COURT: -- sustained.

14 MR. LEYENDECKER: I'll withdraw that.

15 BY MR. LEYENDECKER:

16 Q All right. Let's move on.

17 MR. LEYENDECKER: Take that down, Michelle.

18 BY MR. LEYENDECKER:

19 Q Now, a moment ago when we were talking when I stopped to
20 just give a little orientation on allow, I referenced co-insurance; do you
21 remember that?

22 A Yes.

23 Q Tell the jury what the concept of the co-insurance has been,
24 as you understand it.

25 A It's essentially the -- depending on the claim and the

1 individual, it's the percentage of that amount allowed that the patient, or
2 the member, has to pay.

3 Q Okay. I'm going to try to try to spell this right, first. Did you
4 see any of the trial at this point where, Mr. -- I believe it was Mr. Blalack
5 was giving examples, okay, there's a \$1,000 claim and a 30 percent co-
6 insurance, then your understanding would be what? If there's \$1,000
7 that's allowed and a 30 percent co-insurance, that would mean that the
8 member or the patient would be responsible for how much?

9 A \$300.

10 Q Okay, 300. And then I think we saw examples of well, okay, if
11 the average allowed was \$250, right?

12 A Right.

13 Q And we had that same 30 percent insurance, or excuse me,
14 co-insurance then he was saying -- what would the co-insurance be
15 there?

16 A So it would drop down to whatever the -- what \$75 or what
17 have you.

18 Q Okay. Now let's be honest. Strictly from a financial
19 standpoint, which of these two would be better for the patient?

20 A The \$75.

21 Q Okay.

22 A Well, I mean in a vacuum just looking at those numbers how
23 it is.

24 Q All things being equal, if you said that the community could
25 still have board-certified ER physicians staffing the hospitals, at this as

1 opposed to this, all things being equal, what's better for the patient?

2 A The lower amount of money.

3 Q Okay. Did you do anything to study what the actual co-
4 insurance was as reflected in the Defendants' claim file?

5 A Yes.

6 Q Tell us what you did.

7 A So what I wanted to look at is while these could be at issue
8 on a -- on a claim by claim basis, the question to me is what's the overall
9 size that we're talking about here. You know, is this a \$10 million knife
10 times 30 percent or is it a different number. So I looked at it overall and
11 what you find is, is that the overall co-insurance amount or co-insurance
12 present is not 30 percent. It's substantially less.

13 MR. LEYENDECKER: Michelle, can I get Defendant's --
14 excuse me, Your Honor, may I ask, was there an objection to
15 Defendant's -- I believe it's 5322.

16 MR. BLALACK: One second.

17 UNIDENTIFIED SPEAKER: Did he say no objection?

18 MR. LEYENDECKER: No, he's checking.

19 MR. BLALACK: 53 what?

20 MR. LEYENDECKER: 5322, yes, sir. 5-3-2-2. I believe you
21 had it, and it's your combined claim filed.

22 MR. BLALACK: Yeah, no objection.

23 MR. LEYENDECKER: Okay. Your Honor, we'd offer
24 Defendant's 5322.

25 THE COURT: Exhibit 5322 will be admitted.

1 [Defendants' Exhibit 5322 admitted into evidence]

2 MR. LEYENDECKER: Okay. Michelle, let me see 5322-A.

3 And zoom in on that so we can see the numbers a little bit better.

4 BY MR. LEYENDECKER:

5 Q Mr. Leathers, did you perform some investigation and
6 analysis on the Defendant's out-of-network allowed amounts for all other
7 E.R. doctors in Nevada?

8 MR. BLALACK: Object to form, Your Honor. This was not
9 part of his affirmative or supplemental report.

10 MR. LEYENDECKER: It's demonstrative, Your Honor.

11 MR. BLALACK: No, the opinion -- any analysis or opinions
12 was not part of his prior report.

13 THE COURT: If it's not part of the report, then we're not
14 going to get into your opinions.

15 MR. LEYENDECKER: Okay. You can take that down,
16 Michelle.

17 BY MR. LEYENDECKER:

18 Q Let me ask you, in the studying of the evidence in the case,
19 whether it's the Plaintiff's claim file or the Defendant's claim file, did you
20 reach any conclusions or see any trends on what the actual co-insurance
21 was?

22 A Sure.

23 MR. BLALACK: Same objection, Your Honor. This is -- none
24 of this has ever been disclosed.

25 MR. LEYENDECKER: These are facts.

1 THE COURT: Why don't you guys please approach.

2 [Sidebar at 9:36 a.m., ending at 9:37 a.m., not transcribed]

3 THE COURT: All right, so objection is sustained.

4 MR. LEYENDECKER: Okay.

5 BY MR. LEYENDECKER:

6 Q All right. Let's get down to the final subject, Mr. Leathers.

7 Tell the jury again what your big picture task was in the case.

8 A To calculate the damages suffered by the Plaintiffs as a result
9 of the Defendants actions.

10 Q Okay. And step one, tell us again what you understand what
11 the Plaintiff's claim is, about how much they think they're due in this
12 case. The concept of it.

13 A The Plaintiffs' claim that they are owed their billed charges.
14 And therefore the damages would be the difference between the bill
15 charges and the amount they were actually paid, or the amount allowed.

16 Q Okay. And did you do any calculations that would allow you
17 to assess the damages under the Plaintiffs' theory in the case?

18 A Yes.

19 Q Tell us what you did.

20 A Well, so the -- I mean I think the easiest and most recent
21 piece is the -- I forget the exhibit number, but we started out with today,
22 was just essentially taking that pivot table and looking at their bill
23 charges and the amount allowed.

24 Q Okay.

25 A But that culmination was -- started with what we discussed

1 yesterday in terms of the analysis of the claim's files, the assessment of
2 the reasonableness of the bill charges, and then essentially the
3 mathematical calculation or essentially taking the exhibit that we had
4 this morning and taking the difference between those two numbers.

5 Q Did you look at this damage question on a Plaintiff by
6 Plaintiff -- Plaintiff by Defendant basis, sir?

7 A Yes, sir, I did.

8 Q Okay.

9 MR. LEYENDECKER: And Michelle can I get Exhibit Number
10 530-16, please?

11 BY MR. LEYENDECKER:

12 Q Tell us what we're looking at here, Mr. Leathers.

13 A So this is -- this is not on a Plaintiff by Plaintiff basis, but this
14 is on a CPT by CPT code basis. And kind of goes back to some of our
15 discussion of bundled or bundled or non-bundled charges.

16 Q Okay.

17 A Would you like me to take you through this?

18 Q Yes, please, just briefly.

19 A Okay.

20 MR. LEYENDECKER: Go back to that one, Michelle. Thank
21 you.

22 BY MR. LEYENDECKER:

23 Q Just give us a little more meat on that one.

24 A So what you can see here is in the bottom left hand corner,
25 the 11,563 claims. Again, that's what we're focusing on here. And so we

1 looked at it and analyzed it. I looked at it and analyzed it, both in terms
2 of the upper part, on what I call a core CPT basis. Just that one charge.
3 And then I looked at it on a bundle basis. And the reason that that's
4 important is because there's mixing numbers. You want to make sure
5 you're on an apples to apples basis.

6 And so this calculation, this does the calculation in terms of
7 calculating the total amount billed, third column from the left. The total
8 amount allowed. And then the total charges. And what --

9 Q So when we get down to the bottom right, we add it all
10 together, the total damage under your calculation is the 10,399,000
11 number, sir?

12 A Yes, sir.

13 Q Okay.

14 MR. LEYENDECKER: Now Michelle, can I get 16-530. 16,
15 please. Right there.

16 BY MR. LEYENDECKER:

17 Q Okay. So what are we looking at here, on Exhibit 530 at 16,
18 Mr. Leathers?

19 A So this is taking the exact same information that we had in
20 the other chart, just the prior chart. And reorganizing it by Plaintiff and
21 by Defendant.

22 Q Okay, so just to get oriented here. Does that mean that -- let
23 me ask you. You understand who has the right to decide whether the
24 Plaintiffs have proved their case, and if so, whether they're entitled to
25 any damages, right?

1 A Yes, sir, it's the ladies and gentlemen of the jury.

2 Q That is correct. And so just as we're looking at this, if the
3 jury were to decide that the Plaintiffs proved their case and they were
4 entitled to what they're seeking, looking at this chart, does that indicate
5 that for, Fremont, as an example, that they would be entitled to \$102,392
6 from the Health Plan of Nevada?

7 A Yes, that's correct.

8 Q And then Ruby Crest who didn't have as many claims,
9 certainly with HPN would be entitled to \$844?

10 A That's correct.

11 Q All right. And then if we -- that same kind of concept going
12 across would get you the number that you calculated?

13 A Yes, that's correct.

14 Q Okay. By Plaintiff and by Defendant?

15 A Yes, sir.

16 Q All right. Your Honor, we'd offer Exhibit 530-16 is a summary
17 of voluminous records.

18 MR. BLALACK: Your Honor, may I have a chance to verify
19 this? I don't have a problem with it being conditionally admitted.

20 THE COURT: Exhibit 530-16 will be conditionally admitted.

21 [Plaintiffs' Exhibit 530-16 admitted into evidence]

22 MR. LEYENDECKER: Okay, Michelle, let me just go back to
23 473-G for a second.

24 BY MR. LEYENDECKER:

25 Q Now, Mr. Leathers if the jury wanted to compare, you know,

1 to check your math so to speak, could they use this Exhibit 473-G to do
2 some subtraction and addition and figure out what the difference is?

3 A Yes.

4 Q And you got any sense of what that's going to show if that
5 were to happen, as it relates to what you calculated?

6 A It would be the exact same number. Essentially taking the --

7 MR. BLALACK: I object to the form.

8 THE WITNESS: -- the chart --

9 MR. LEYENDECKER: Hang on , Mr. Leathers.

10 THE COURT: Reword, rephrase.

11 BY MR. LEYENDECKER:

12 Q Okay. Mr. Leathers, what would you expect if you -- by the
13 way, let me ask you, so did you double check your math here to see
14 whether the sum of the charges less the sum of the allowed, how that
15 compares to the chart we just looked at?

16 A Yes.

17 Q Okay. What did you find?

18 A It's the exact same number.

19 Q Okay. One final subject.

20 MR. LEYENDECKER: You can take that down, Michelle.

21 BY MR. LEYENDECKER:

22 Q Let me show you, let's see, Ms. Paradise was on the stand on
23 Monday.

24 MR. LEYENDECKER: Can I get, Michelle, the transcript of
25 Monday at 130, lines 5 through 10? See if you can go there on 130,

1 lines 5 through 10. I think that's November 12th. Right, go to the next
2 one, Michelle, please. If you look here in the middle it tells you, Friday
3 and the date. Looking for the Monday. That's Tuesday. I'll tell you
4 what. Let me -- let me -- I'll just read it, okay.

5 UNIDENTIFIED SPEAKER: Hold on.

6 MR. LEYENDECKER: It's okay. Let me just read it.

7 BY MR. LEYENDECKER:

8 Q On Monday, Ms. Paradise was asked, in this transcript at
9 page 130, lines 5 through 10. "And their rate of reimbursement" by Mr.
10 Ahmad, my colleague,

11 "Q And their rate of reimbursement, the Plaintiff's rate of
12 reimbursement has gone down significantly, has it not?" And Ms.
13 Paradise answered,

14 "A We had to adjust our reimbursement levels due to billing
15 practices of staffing companies, who are ramping up their charges and
16 specifically in relation to the efforts they make to go after our clients and
17 our members for full bill charges."

18 Do you remember hearing that when she said it, Mr. Leathers?

19 A Yes, sir, I do.

20 Q Based on everything you did in your investigation and your
21 analysis, what do you make of that statement?

22 A I don't find any support for that statement. Clearly we just
23 showed a moment ago that the bill charges are not increasing. They've
24 increased from 2017 to 2020 of approximately 3 percent. And then in
25 addition to what we heard Mr. Murphy say yesterday, I've seen the

1 documentation that the Plaintiffs have a policy of not balance billing.

2 Q Did you see or find any evidence or read any testimony in the
3 case, that indicated any of the three Plaintiffs, Ruby Crest, Team
4 Physicians balance billed a single United member on any of the 11,500
5 claims at issue in this case?

6 A No, I have not.

7 MR. LEYENDECKER: Thank you, Mr. Leathers. I pass the
8 witness, Your Honor.

9 THE COURT: All right. Now it's been about an hour since
10 you guys came into the courtroom. Let's take a recess. It's 9:47. I'll ask
11 you to be back at 10:00 a.m.

12 Do not talk with each other, or anyone else about any subject
13 connected to the trial while on your recess. Don't read, watch or listen to
14 any report or commentary on the trial. Don't discuss this case with
15 anyone connected to it by any medium of information, including without
16 limitation, newspapers, television, radio, internet, cellphone or texting.

17 Do not conduct any research on your own relating to the
18 case. Don't consult dictionaries, use the internet or use reference
19 materials. Don't talk, text, tweet or Google issues or conduct any other
20 type of research with regard to any issue, party, witness or attorney
21 involved in the case.

22 Most importantly do not form or express any opinion on any
23 subject connected to the trial until the jury deliberates. Thanks again for
24 a good start to the morning. See you at 10:00.

25 THE MARSHAL: All rise for the jury.

1 [Jury out at 9:47 a.m.]

2 [Outside the presence of the jury]

3 THE COURT: Do you guys want to confer with each other
4 and come back just a few minutes early?

5 MR. BLALACK: On what specifically?

6 THE COURT: Sorry?

7 MR. BLALACK: On what specifically.

8 THE COURT: On how to go next. Because you're going to
9 cross examine him. My inclination is to allow the cross examination to
10 continue. We'll take up the other issue after. But I'm willing to listen --

11 MR. BLALACK: I'm willing to do that, too, Your Honor. My
12 -- what I would propose is we'll just do the cross and then maybe at
13 lunch or after lunch we can do the voir dire outside the presence of the
14 jury.

15 THE COURT: Good enough. Thanks. Have a good break.

16 MR. LEYENDECKER: Thank you, Your Honor.

17 [Recess from 9:49 a.m. to 10:00 a.m.]

18 [Outside the presence of the jury]

19 THE COURT: Thank you, everybody. Please remain seated.
20 Are we ready to bring in the jury?

21 MR. BLALACK: We are, Your Honor.

22 MR. ZAVITSANOS: Yes, Your Honor.

23 THE COURT: Okay.

24 THE COURT: So that you guys know, Jury Services has
25 given them a W-9 because they have been here long enough to have to.

1 And so, there's some questions about it. They have some issues. I'm
2 going to ask them to reduce those questions to writing so I can talk to
3 the Jury Commissioner over the noon hour.

4 MR. BLALACK: Thank you, Your Honor.

5 THE MARSHAL: All rise.

6 [Jury in at 10:01 a.m.]

7 THE COURT: Thank you. Please be seated. Okay. So to the
8 members of the jury, I know that a W-9 has been passed out to you. I
9 know that a lot of you have questions about it. I don't want you to be
10 distracted during the testimony, so if you have questions, write them
11 down, give them to the marshal on the next break, and I'll talk to Jury
12 Services to get your questions answered for you.

13 And cross-examination, please.

14 MR. BLALACK: I was going to start with first to let Mr.
15 Leyendecker introduced his [indiscernible].

16 MR. LEYENDECKER: Your Honor, I neglected to mention Dr.
17 Trentini. He is the medical director up there in Elko at the Northeastern
18 hospital.

19 THE COURT: Very good. Thank you to all of them. Cross-
20 examination, please.

21 MR. BLALACK: Thank you, Your Honor.

22 CROSS-EXAMINATION

23 BY MR. BLALACK:

24 Q Mr. Leathers, good to see you again.

25 A Good morning.

1 Q We've met before, correct?

2 A We have.

3 Q And that was in connection with your deposition earlier this
4 year?

5 A Yes.

6 Q Now, I'd like to take the jury through some of the points of
7 your background before getting to the testimony you gave earlier today
8 and your opinions. Let me start by making sure the jury has a good
9 understanding of your background and qualifications, okay?

10 A Okay.

11 Q Just so we understand how you bring that experience to bear
12 on the opinions you're offering. You discussed a little about it earlier
13 with Mr. Leyendecker, correct?

14 A Yes.

15 Q All right. So just so we're starting off on the same foot, are
16 you a trained economist, sir?

17 A I'm not a Ph.D. economist, no.

18 Q You have, I believe, a bachelor's in business administration;
19 is that correct?

20 A Yes, sir. That's correct.

21 Q And so your academic degrees are not in economics,
22 correct?

23 A My formal degree is in finance.

24 Q Now, do you hold yourself out in the market as an
25 economist?

1 A I don't. I have many people refer to me as an economist.

2 Q But you, yourself, don't hold yourself out in the market as an
3 economist?

4 A No, because usually an economist would be a Ph.D., doctor
5 economist. And if you're not, you always hesitate to say you're an
6 economist.

7 Q Okay. And you had two employees at Alvarez & Marsal who
8 helped you prepare your expert reports in this case?

9 A Yes, sir.

10 Q And am I right that neither of those employees have degrees
11 in economics either, correct?

12 A That's correct.

13 Q Now, as I think you testified, you are currently a managing
14 director at -- well, and I'll shorthand it, sir. If I say A&M, will you
15 understand I'm referring to your firm?

16 A Yes, sir.

17 Q Okay. So you are currently a managing director at A&M?

18 A Yes.

19 Q Okay. And as I understand it, that's a company that assists
20 other companies that are involved in transactions, disputes, and
21 investigations; is that right?

22 A That's correct.

23 Q Okay. Am I right that your focus is in the disputes and
24 investigations area?

25 A Yes, primarily.

1 Q And there's actually a group at A&M called the disputes and
2 investigations group?

3 A Yes, sir.

4 Q And is it fair to say the large majority of your work in that
5 group relates to two areas, intellectual property and technology as well
6 as energy-related work?

7 A Yes.

8 Q Okay. And at Alvarez & Marsal, is there a healthcare project?

9 A Yes.

10 Q But you are not a part of that healthcare project, correct?

11 A Not formally, no.

12 Q Okay. Now, prior to A&M, you were a managing director at
13 something called Sirius Solutions?

14 A Yes.

15 Q And did you do the same kind of work focused on the
16 technology and energy sectors for that firm that you do for A&M?

17 A Yes.

18 Q Okay. And before that, you were a managing director at an
19 accounting firm -- consulting firm called Huron, correct?

20 A Yes.

21 Q And like Sirius, was your focus there primarily on the
22 technology and energy sector?

23 A Yes.

24 Q Now, I think you testified to Mr. Leyendecker that you had
25 given testimony as a retained expert witness before; is that right?

1 A Yes.

2 Q Okay. And how many times did you say you've done that?

3 A Probably 65 or so different matters.

4 Q Okay. Just looking at your resume, sir, I count you've been a
5 retained expert where you've actually -- not just been retained but
6 actually got to the point of giving deposition testimony or trial testimony
7 68 times. Does that sound about right?

8 A That sounds about right.

9 Q Okay. And is it fair to say that you spend about 70 percent of
10 your time either preparing to give expert testimony or actually giving
11 testimony of some kind?

12 A That's correct. Certainly in the last two years. As I
13 mentioned the other day with Mr. Leyendecker, it varies --

14 Q Okay.

15 A -- year to year.

16 Q All right. Now, did I hear you say in response to his question
17 that you've never provided expert testimony on behalf of a health
18 insurer or health -- commercial health plan?

19 A That's correct. Yes.

20 Q Have you ever given -- I thought I also heard you to say you
21 had done some consulting work for healthcare providers before but that
22 you had never testified as an expert on behalf of a healthcare provider.

23 A That's correct.

24 Q Did I understand that?

25 A Yes, sir.

1 Q Okay. Do you recall giving expert testimony for a doctor
2 named Franklin Chow?

3 A Yes.

4 Q Was he a healthcare provider?

5 A He was, yes.

6 Q Was that in connection with his role as a healthcare
7 provider?

8 A Yes.

9 Q So when you said you had never given testimony as an
10 expert before for a healthcare provider, is that consistent or inconsistent
11 with your work for Dr. Chow?

12 A Well, let me -- let me clarify that. I think Mr. Leyendecker's
13 question was more of a -- I thought it was a -- where I said no, it was
14 really more of a commercial insurance company versus a provider. So if
15 I said no, I think I was mistaken because Dr. Chow is a -- I believe he was
16 an OBGYN.

17 Q Okay. And that was back around 2002, 2003?

18 A Yes.

19 Q Okay. And of the 68 cases in which you've testified as a paid
20 expert, is it accurate that only one of those cases involved the evaluation
21 of healthcare services?

22 A Well, depending on how you want to define healthcare
23 services. The *Dr. Chow, U.S. Surgical Corp.* matter is most closely
24 related to the healthcare services we're talking about in this matter.

25 Q So when I -- and the reason I ask you that, sir, I was referring

1 to your prior deposition testimony in this case when I ask you that
2 question.

3 A Sure.

4 Q Do you remember me asking that question?

5 A I do.

6 Q And so when you indicated that you had only given expert
7 testimony on the valuation of healthcare services once, were you
8 referring to Dr. Chow?

9 A Yes.

10 Q Okay. And that was 18 or 19 years ago?

11 A Yes.

12 Q Okay. Now, that case with Dr. Chow, is it accurate to say that
13 it did not directly involve measuring the value of out-of-network
14 professional services?

15 A It did not. I mean, it was -- obviously, there are components
16 to that because he was an OBGYN providing services. But not directly,
17 as you asked me.

18 Q The issue that is squarely presented for you in this case and
19 that the jury is considering, that was not the issue you were evaluating
20 for Dr. Chow, correct?

21 A It was slightly different.

22 Q Okay. And is it accurate to say that that one case did not
23 involve the valuation of emergency medical services?

24 A Correct.

25 Q Now, sir, I believe, just so the jury has some background, in

1 addition to the work you do as a consultant for and a testifier for
2 companies as a testifying expert, you also write and present articles on
3 various subjects, correct?

4 A Periodically, yes.

5 Q And is it fair to say that a good bit of the work that you do in
6 the writing and presenting area is in connection with continuing
7 education courses for lawyers?

8 A A good portion of it is, yes.

9 Q And in fact, you have previously lectured to students at the
10 University of Houston School of Law?

11 A I have, yes.

12 Q And those lectures, are they related to disputes and
13 litigation?

14 A Yes. Most of those are related to, as I recall, trade
15 secret-related matters.

16 Q Okay. Which is not something at issue in this case, correct?

17 A It's a different claim in this case, but certainly the underlying
18 issues are the same.

19 Q Okay. And you've lectured at the Annual Conference On
20 Intellectual Property Law?

21 A Yes.

22 Q Okay. And the Institute of Energy Law, Merger, and
23 Acquisitions?

24 A Yes.

25 Q And the Texas Bar?

1 A Yes.

2 Q It's fair to say, though, sir, that none of these presentations
3 are articles related to the evaluation of out-of-network emergency
4 medicine services?

5 A That's correct.

6 Q Now, Mr. Leathers, are you based in Houston, Texas?

7 A Excuse me. Yes, sir, I am.

8 Q And that's where you met Mr. Leyendecker and some of his
9 partners, who engaged you here?

10 A Yes.

11 Q And have you been engaged by his law firm, the AZA firm, to
12 provide expert opinion testimony in other matters before this case?

13 A Yes, sir, I have.

14 Q How many times?

15 A Probably three or four times.

16 Q If you can, if you want to, you can refer to your deposition.
17 Do you recall telling me that you have been engaged by the AZA firm
18 four times, not including this case?

19 A That sounds correct.

20 Q Did any of those other engagements with the AZA firm
21 involve the valuation of healthcare services or out-of-network emergency
22 services?

23 A No.

24 Q Now, I want to talk about what you did to formulate your
25 opinions in the case and how you conducted the investigation, as you

1 call it, that you referred to earlier, okay?

2 A Okay.

3 Q I'm going to switch to that topic. And I'm not sure I heard
4 this correctly. Did you say you were engaged in July or in June of this
5 year?

6 A I think that I said July. As I sit here, I think it was probably
7 closer to June.

8 Q Okay. Do you recall me asking you in your deposition when
9 you were engaged and you telling me that you were engaged in
10 mid-July?

11 A I recall you asking me that. I don't remember if I said
12 mid-July or June.

13 Q Okay. Let me ask it to you, then, correctly, and if you don't
14 recall, we can refer to your deposition to refresh your memory.

15 A Okay.

16 Q Do you have a memory now, thinking about it, that you were
17 engaged in mid-July of this year?

18 A Yes. Generally, I recall that's the case.

19 Q Okay. And if memory serves, you issued your original report
20 in this case on June -- excuse me, July 30th, correct?

21 A Yes, that seems correct.

22 Q Okay. So is it fair to say that the work that you conducted
23 from the moment you were engaged that you issued your first report
24 was a couple of weeks?

25 A Yes.

1 Q And I wasn't sure from the back and forth you had with my
2 colleague, Mr. Leyendecker, but you kind of characterized that as a fire
3 drill. Is that how you think of it?

4 A I mean, yes. I don't know that everyone would be a fire drill,
5 but it was just -- it's just kind of sometimes we refer to something that
6 it's at the last minute, it's a -- it's a -- how we refer to it sometimes.

7 Q Completely understand that. And I'm not suggesting every
8 engagement that you have is a fire drill. I'm sure they're not. But for this
9 little party we're involved in, is it fair to say this one was a fire drill?

10 A You know, I think I would be hesitant to say it's a fire drill and
11 it be, you know, misconstrued in that it was done in some sort of, you
12 know, not with a level of rigor that was important for this level of case. It
13 was done in a very short period of time. There's no question about that.

14 Q And I'm not questioning your rigor, sir. I'm questioning the
15 time in which you had to apply your rigor. Is it fair to say that you had a
16 couple of weeks to apply all the rigor you could bring to bear?

17 A For the first report, that's correct.

18 Q Okay. Now, you issued a second report in this case on
19 September 9th of this year, right?

20 A Yes.

21 Q Okay. And am I correct, sir, that you didn't start working on
22 that second report until around September 1st?

23 A I did not begin the process of drafting that report, I believe,
24 until September 1st.

25 Q And in fact, you told me in your deposition that you didn't

1 receive the materials on which you relied for that second report until
2 around September 1st, correct?

3 A I don't recall that one way or another. I'm not disputing you,
4 but I don't recall that one way or another.

5 Q Well, I'll be glad to let you refer to your deposition if that will
6 help you refresh your memory.

7 A No. I don't -- I don't disagree with generally when it -- when
8 that was -- information was provided.

9 Q Okay. So sitting here today, do you recall that the work you
10 did to prepare your second report spanned nine days from September
11 1st to September 9th?

12 A For the preparation of that report, that seems reasonable,
13 yes.

14 Q So let's just make sure the jury has some visibility into the
15 sequence. You're engaged in mid-July, you worked really hard for a
16 couple of weeks, issued your first report on July 30, 2021, right?

17 A Right.

18 Q And on September 1st, you receive a lot of new materials
19 from Plaintiff's counsel, right?

20 A Correct.

21 Q And then you worked really hard for another eight or nine
22 days and issued a second report on September 9th; is that right?

23 A That's correct.

24 Q Now, in preparation for your second report, do you recall
25 reviewing the expert reports of the Defense expert in this case, Mr. Bruce

1 Deal?

2 A Yes. And obviously, that's what was the important piece of
3 the timing there is that, you know, it's not that we just stopped and
4 started in those short periods of time. You know, it was a function of
5 when Mr. Deal's report came out. But yes, I did review Mr. Deal's work.

6 Q Well, that's actually what we're arriving at, sir. Do you know
7 that Mr. Deal issued his first report on the same day you issued your first
8 report?

9 A On July 30th. Yes, sir.

10 Q And you didn't review that report until September -- after
11 September 1st, correct?

12 A That's correct.

13 Q So the timing of you doing your work on that second report
14 wasn't tied to when Mr. Deal issued his report, correct?

15 A That's correct.

16 Q It was tied to when the Plaintiff's lawyers in this case actually
17 sent it to you, right?

18 A Correct.

19 Q Now, have you reviewed both of Mr. Deal's reports?

20 A Yes.

21 Q And would you agree they're lengthy documents?

22 A They are, yes.

23 Q Okay. And did you review those reports closely before you
24 issued your second report?

25 A I hesitate because we're referring back to my deposition. I

1 think that I stated in my deposition that I had reviewed it once fairly
2 thoroughly. He had had two reports. He had a rebuttal report, and he
3 had his affirmative report, which was on July 30th. So I don't -- you
4 know, I don't want to say -- I mean, I reviewed it once thoroughly, but I
5 certainly reviewed it a lot more since then.

6 Q Okay. Before you issued your second report, you reviewed
7 Mr. Deal's lengthy reports once, correct?

8 A Yes.

9 Q Now, you mentioned that one of the reports Mr. Deal issued
10 was a rebuttal report, correct?

11 A Yes.

12 Q He wasn't rebutting your report, though, was he?

13 A Yes, he was.

14 Q Okay. Do you remember that he was also rebutting --

15 MR. LEYENDECKER: Your Honor, can we approach?

16 THE COURT: You may.

17 [Sidebar at 10:18 a.m., ending at 10:21 a.m., not transcribed]

18 THE COURT: Thank you all for your professional courtesy.

19 They needed some guidance on what the scope of the cross would be.
20 Go ahead, please.

21 MR. BLALACK: Thank you, Your Honor.

22 BY MR. BLALACK:

23 Q Mr. Leathers, when we broke, I was asking you about the
24 materials you relied on for that -- some of your reports. Do you
25 remember that?

1 A Yes.

2 Q Okay. And I think you had indicated just before we broke
3 that in preparing your second report, you reviewed the expert reports of
4 our expert and one of our experts, Bruce Deal, correct?

5 A Yes.

6 Q But you also relied on the expert report of another individual
7 who had been retained by the Plaintiffs to be an expert on the measure
8 of damages, correct?

9 A No.

10 Q Do you remember reviewing the expert report of Mr. Scott
11 Phillips --

12 A Yes.

13 Q -- and assigning it as a basis for your second supplemental
14 report?

15 A I reviewed -- I recall reviewing Dr. Phillips' -- or Mr. Phillips'
16 report and I think that my reference to Mr. Phillips was his damage
17 calculations, specifically, he had information with regards to FAIR Health
18 that I would have referred to in his report.

19 Q Okay. But let me try to short-circuit this for the jury's benefit.
20 When you prepare a report, it's your practice to identify in your report,
21 before you provide your opinions, the documentary information and
22 data that you reviewed to prepare to render your opinion, correct?

23 A That's correct.

24 Q And you don't put things in there that are completely
25 irrelevant to what you're doing, correct?

1 A Correct. I mean, depending on the report, I may -- we may
2 say this is what I relied upon, but I also may have a list of here's
3 everything that I received or reviewed.

4 Q All right. And so in the context of your second report -- and if
5 we need to, I can bring it up and we can show the jury. But in the
6 context of your second report, for instance, you listed the expert reports
7 of Mr. Deal as something you reviewed and relied on, right?

8 A Yes, sir. That's correct.

9 Q And you also listed the expert reports -- in fact, the
10 affirmative expert report of Mr. Phillips, right?

11 A Yes.

12 Q Okay. And you remember -- and you reviewed that report,
13 correct?

14 A Yes.

15 Q And you remember that Mr. Phillips did an analysis of data
16 and information and rendered an opinion on the Plaintiffs' alleged
17 damages in this case.

18 A Yes.

19 Q Okay. Now, in connection with that analysis and your time to
20 get ready to testify today, have you learned that Mr. Phillips is not going
21 to be an expert in this case?

22 A Yes.

23 Q You're going to be their expert, correct? On damages?

24 A Yes.

25 Q When did you learn that?

1 A I'm trying to think about exactly where we are now.

2 Q The last couple weeks?

3 A It probably would have been -- it would have been at the
4 beginning of this trial, when the trial started, and understanding who the
5 witnesses were. That would have been when I fully learned that.

6 Q So from the time you -- and in fact, at some point in your
7 preparation, you were on call with Mr. Phillips, correct?

8 A That's correct. Well, not in preparation for this trial.

9 Q In your engagement.

10 A In the -- in the -- earlier in the engagement, I was on a call
11 with counsel with Mr. Phillips.

12 Q I'm not asking for the substance of any of those
13 communications.

14 A Okay.

15 Q So you were on a call with Mr. Phillips, you reviewed his
16 report, and until a few weeks ago, meaning when we all had a chance to
17 get together and get to know each other, you were -- you did not know
18 that Mr. Phillips was not going to testify?

19 A That's correct.

20 Q And then you learned that just before you were going to
21 testify again.

22 A Yeah. A few weeks ago, correct.

23 Q Now, do you also recall reviewing the expert report of
24 another Defense expert, a man by the name of Alexander Mizenko?

25 A Yes, sir.

1 Q And tell the jury who Mr. Mizenko is.

2 A Mr. Mizenko is an employee of a company called FAIR Health
3 that we've talked a lot about here.

4 Q All right. And FAIR Health is -- issues a benchmarking data
5 on billed charges that forms the basis of the opinions you've written to
6 the jury today, correct?

7 A That's correct.

8 Q And you've reviewed his report?

9 A Yes.

10 Q And you recall that Mr. Mizenko has been -- is going to testify
11 as an expert in this case on behalf of the Defendant, correct?

12 A Yes.

13 Q Now, am I correct, sir, that in preparing to render your report,
14 you also reviewed the market data for the Defendants in this case, the
15 five Defendants in this case?

16 A Can you describe for me what you mean by the market data
17 for the --

18 Q Well, you collected data that had been produced in the
19 litigation by the Defendants in this case that contained the claims
20 information showing paid claims, denied claims, allowed claims,
21 between my clients, the five Defendants, and other ER providers in this
22 state --

23 A Yes.

24 Q -- as well as the TeamHealth Plaintiffs?

25 A Yes, sir. That's correct.

1 Q And you also got market data from the TeamHealth Plaintiffs
2 showing their -- the data and rates they accepted from other health
3 insurers other than --

4 MR. LEYENDECKER: Your Honor, there's a limine on this
5 point.

6 MR. BLALACK: There's not.

7 THE COURT: Please approach. I believe there is.

8 MR. BLALACK: There's not.

9 [Sidebar at 10:26 a.m., ending at 10:27 a.m., not transcribed]

10 THE COURT: All right, guys. There's an issue we need to get
11 resolved outside your presence. We'll need to take another recess.
12 Thank you in advance for your professional courtesy.

13 During the recess, do not talk with each other or anyone else
14 on any subject connected with the trial. Don't read, watch, or listen to
15 any report of or commentary on the trial. Don't discuss this case with
16 anyone connected to it by any medium of information including without
17 limitation newspapers, radio, internet, cell phones, television.

18 Don't conduct any research on your own relating to the case.
19 Don't consult dictionaries, use the internet or use reference materials.
20 During the recess, don't post on social media about the trial. Don't talk,
21 text, tweet, Google issues or conduct any other type of research with
22 regard to any issues, party, witness, or attorney involved in this case.
23 Most importantly, do not form or express any opinion on any subject
24 connected with the trial until the matter is submitted to you.

25 It's 10:28. I'm going to suggest that we need about 20

1 minutes. So please be lined up and ready to go at 10:50. Thank you, all.

2 THE MARSHAL: All rise for the jury.

3 [Jury out at 10:28 a.m.]

4 [Outside the presence of the jury]

5 THE COURT: All right.

6 MR. BLALACK: When you're ready, Your Honor --

7 THE COURT: So --

8 MR. BLALACK: -- I'm reviewing -- I'm referring -- and I'll find
9 the actual order that adopts this. I'm referring to 10/20/21 transcript on
10 the hearing, page 23, line 25. Actually, page 24, line 11, and I'll -- I'm just
11 quoting from an excerpt, Your Honor, so I'm going to actually pull the
12 broader language.

13 One of the 10 or 15 issues that was in their motion in limine
14 number 3 related to out-of-network reimbursement with non-party,
15 meaning other health insurers. Because remember, Your Honor, the
16 background was we wanted to offer evidence of their network rates with
17 other health insurers, and we wanted to offer evidence of their out-of-
18 network rates with other health insurers.

19 THE COURT: And I understand that, but I need to read --

20 MR. BLALACK: And we [indiscernible] --

21 THE COURT: So I'll be back by 10:45, and you guys use the
22 time however you wish, but when we finish with this, I'm going to bring
23 the jury back. I want to try to get the testimony finished this morning
24 before we break for lunch.

25 MR. BLALACK: Thank you, Judge.

1 THE COURT: Thank you, both.

2 [Recess taken from 10:31 a.m. to 10:38 a.m.]

3 THE COURT: Please remain seated. I understand that you
4 guys have figured out that whatever happened?

5 MR. BLALACK: We're good to go, Your Honor. I think the
6 parties agree that this is trivial.

7 THE COURT: Good to know.

8 MR. ZAVITSANOS: Yes, Your Honor, I put on the record that
9 it's fair game, and I stand by my --

10 THE COURT: All right. Very good. Thank you. So the
11 marshal -- we don't have a jury for ten minutes, and he may be out there
12 with them. I don't know. Do you all know where he is?

13 THE CLERK: [Indiscernible]

14 THE COURT: No?

15 THE CLERK: Do you want me to go check?

16 THE COURT: Yeah, if you don't mind. Thanks.

17 MR. BLALACK: So now that looks okay [indiscernible].

18 THE COURT: Good enough. Thank you for your professional
19 courtesy.

20 THE CLERK: He's not out there.

21 THE COURT: He's not out there --

22 THE CLERK: He may be in the back --

23 THE COURT: -- so go ahead -- let's just be back at 10:50 and
24 be ready to go to noon. Thanks, guys.

25 MR. BLALACK: So we're staying out until 10:50, Your Honor?

1 THE COURT: The marshal is not here. They're not going to
2 be back till 10:50 so enjoy a few minutes of peace.

3 MR. BLALACK: No, I'm good.

4 MR. ZAVITSANOS: Your Honor, here's the important
5 question. Who do you pull for in basketball?

6 [Recess taken from 10:40 a.m. to 10:50 a.m.]

7 [Outside the presence of the jury]

8 THE COURT: Please remain seated. Let's bring in the jury.

9 THE COURT: Oh, and so that you guys know, the case being
10 locked during the trial means you can file things. We can view it, but the
11 public should not be able to access the docket, which includes
12 transcripts.

13 MR. BLALACK: That was our understanding, Your Honor.

14 THE COURT: Okay.

15 THE COURT RECORDER: However --

16 THE COURT: However? Go ahead.

17 THE COURT RECORDER: They're requesting them for me
18 which actually we give out.

19 THE COURT: She is getting --

20 MR. BLALACK: Well, we have a motion to seal pending.

21 THE COURT: Well, she has a lot of requests for transcripts
22 coming in.

23 MR. BLALACK: Well, that's the -- I think the issue Mr. Roberts
24 may --

25 MR. ROBERTS: Is that now that we filed a motion to seal the

1 Supreme Court rules say that it should be confidential until the Court
2 rules on it; and therefore, let us know if we need an order.

3 THE COURT: You need to get a temporary seal.

4 MR. ROBERTS: Okay. It appears to be automatic under the
5 rule, but we'll move for one.

6 THE COURT: At the Clerk's office.

7 MR. ROBERTS: Okay.

8 MR. ZAVITSANOS: And, Your Honor, we would like to
9 respond to that.

10 THE COURT: Yeah.

11 MR. ZAVITSANOS: And just -- and I know counsel knows
12 this, but when we were referring to AEO stuff, I never mentioned the
13 number. We had a system in place as the Court is aware. So that is not
14 going to be factor.

15 THE COURT: Hopefully the jury will be back here soon.
16 Would you all mind bringing Mr. Leathers in?

17 MR. BLALACK: Yeah.

18 THE COURT: Save some time.

19 MR. BLALACK: And we're going to break at noon, Your
20 Honor, just so I figure out where to stop?

21 THE COURT: Right. I think we --

22 THE MARSHAL: All rise for the jury.

23 [Jury in at 10:52 a.m.]

24 THE COURT: Thank you. Please be seated. Mr. Blalack,
25 please proceed.

1 MR. BLALACK: Thank you, Your Honor.

2 BY MR. BLALACK:

3 Q So hello again, Mr. Leathers.

4 A Hello.

5 Q I just want to pick up where we left off.

6 A Okay.

7 Q I had asked you about some of the material you reviewed in
8 preparing your opinion; do you remember that?

9 A Yes.

10 Q And I believe you testified you reviewed the public
11 Defendants' market data file?

12 A Yes.

13 Q With respect to the jury's memory, that's a file containing
14 claims data for United Healthcare -- well, the Defendants in this case, the
15 five Defendants, and the payments they made on various out-of-network
16 claims to the TeamHealth Plaintiffs and other ER providers?

17 A Correct.

18 Q Then you also reviewed what's called the Plaintiffs' market
19 data file, which contains the same kind of information except for the
20 TeamHealth Plaintiffs showing the amounts that they received for out-of-
21 network claims from United Healthcare and other health insurers?

22 A Yes. I believe I reviewed that very early on in this case.

23 Q In fact, you cited it as some of the material you relied on in
24 forming your opinion in your first report?

25 A That's correct.

1 Q Now, all these data files that were sent to you for the -- well,
2 let me back up. Leave the supplemental reports out of it. Let's go back
3 to your first report. Was the one issued on July 30th of this year, okay.
4 Am I right, sir, that you received from Mr. Leyendecker a risk of
5 reimbursement claim that the TeamHealth plaintiffs dispute in this case?

6 A Yes.

7 Q And that list contained 19,065 disputed claims, correct?

8 A Yes.

9 Q We'll put this on this whiteboard so the jury can follow it. I
10 hope my spelling is better than Mr. Leyendecker's but I --

11 MR. LEYENDECKER: Your Honor, I object to that. That's an
12 unfair shot at me.

13 MR. BLALACK: Don't worries, Kevin, I'll put you right back at
14 some point.

15 BY MR. BLALACK:

16 Q All right. So you received your first list of disputed claims in
17 July, correct?

18 A Correct.

19 Q And that had 19,065 disputed claims, correct?

20 A Yes.

21 Q And then sometime before your second report which you
22 issued on September 9th, you received a new list of disputed claims,
23 correct?

24 A Correct.

25 Q Do you remember how many claims were in dispute on the

1 second list?

2 A I have a vague recollection of maybe around 17,000 claims
3 maybe, something like that.

4 Q Let me see if I can refresh your memory, sir. Do you
5 remember that it was 12 thousand --

6 A 12? Okay --

7 Q -- 558? Does that ring a bell for your second report?

8 A I don't have a reason to dispute it.

9 Q Okay. I have your report available, so anytime you feel like it
10 would help you and the jury to consult it to refresh your memory, you let
11 me know, okay?

12 A Okay. I will. Thank you.

13 Q So sitting here today, you have no reason to dispute that
14 your second list of disputed claims you worked with for your second
15 report was 12, 558?

16 A Correct.

17 Q And you used this second report because you were told the
18 plaintiffs in this case were no longer disputing 6,507 of the previously
19 disputed claims, correct?

20 A I don't recall the specific reason. Oftentimes, there's a legal
21 -- as you know, legal reasons why things are included or excluded. I just
22 understood and was directed to remove those claims.

23 Q Okay. By counsel?

24 A By counsel, yes.

25 Q Okay. Now, do you recall that just before you issued your

1 second report -- the one on September 9th, you received a third version
2 of this report -- of this list?

3 A Yes, I do recall that.

4 Q And do you remember that that list had 12,081 disputed
5 claims on it, correct?

6 A Correct.

7 Q So another almost 500 claims were removed, correct?

8 A Okay. Math is correct.

9 Q Does that sound about right?

10 A Yes.

11 Q Now, that's the list you used for your second report, correct?

12 A Correct.

13 Q Now, between your -- let's see your -- after you finished the
14 second report on September 9th -- let me just put here, second report.
15 After that, you were provided a file version of disputed claims, correct,
16 the one you're working with now?

17 A Yes.

18 Q And I believe this is Plaintiffs' Exhibit 473; do you recall
19 looking at that document with Mr. Leyendecker?

20 A Yes, we looked at it this morning.

21 Q Do you know how many claims are on that list?

22 A 11,563.

23 Q So between the third list which you used for your second
24 report, the 12,081, the list you're using now another almost 500 claims
25 were removed?

1 A Yes.

2 Q So over the course of your engagement since the middle of
3 July when you had your -- you were retained to prepare your first report
4 and you reviewed the first list, and when you finally supplemented your
5 analysis with a file list, am I correct that you reviewed four different
6 versions of the disputed claims list?

7 A That's correct.

8 Q And each time, the list changed, it changed because the
9 TeamHealth claims were dropping more claims from the dispute,
10 correct?

11 A I don't know that one way or another. Like I said, there could
12 be legal things involved in that as well.

13 Q Okay. Well, to be clear, sir, I'm not asking for your motives --
14 I'm asking as a matter of that what you thought was in dispute or
15 evaluating when you started and what you ended, it went down each
16 time, correct?

17 A Yeah. That's correct. Yes.

18 Q Okay. Now, in that first list, the list my clients underpaid
19 19,065 claims. And from that list, the one they presented to this jury,
20 they've withdrawn 7,502 claims; does that sound about right?

21 A The math seems correct.

22 Q So if my math is right, the TeamHealth Plaintiffs have
23 withdrawn their overpayment allegations for almost 40 percent of the
24 emergency room out-of-network claims that were originally disputed,
25 correct?

1 A Yes.

2 Q And by the way, Mr. Leathers, you recalled that when you
3 were engaged, Mr. Phillips had already been engaged and been working
4 on this case for awhile, right?

5 A Yes.

6 Q Okay. Do you know from your work and your discussion
7 with Mr. Phillips, whether there were any versions of this list that
8 predated the first one you got?

9 A No.

10 Q You don't know that?

11 A I do not.

12 Q So you have no knowledge that the original list of disputed
13 claims are over 25 -- 3,000 disputed claims?

14 MR. LEYENDECKER: Your Honor, may we approach briefly?

15 THE COURT: You may.

16 [Sidebar at 11:02 a.m., ending at 11:04 a.m., not transcribed]

17 THE COURT: I've overruled an objection.

18 BY MR. BLALACK:

19 Q Well, let me just restate that, sir, so the record's clear. You
20 have no knowledge that there was an earlier version of the list before
21 you were engaged that was used by another expert that had 23,000
22 disputed claims?

23 A Correct.

24 Q Did you ever ask anyone at TeamHealth if that was the case?

25 A No.

1 Q So during that investigation, you described to get to the
2 bottom of the facts, that's not something you brought up with
3 [indiscernible]?

4 A No.

5 Q All right. I want to talk about some of the -- I've got some
6 things I want to cover with you, but I thought Mr. Leyendecker's
7 examination highlighted some important points. So let's go through
8 what he covered with you first, and then I'll come back to some of the
9 issues that I want to cover. Okay?

10 A Okay.

11 Q And let me start by showing the jury Plaintiff's Exhibit 473.
12 Which, again, this is the final list of disputed claims. And I'm going to
13 ask that we show the -- I guess the newest one, the electronic version
14 that Mr. Leyendecker used with you today.

15 MR. BLALACK: Let's bring up the electronic version, Shane.
16 Do you have that?

17 MR. GODFREY: I only have 473A and B.

18 MR. BLALACK: Okay. Kevin, can you --

19 MR. LEYENDECKER: Yes.

20 MR. BLALACK: -- forward that again, please? That would
21 just make it faster with the electronic version.

22 THE WITNESS: Sure.

23 BY MR. BLALACK:

24 Q And that's the one you worked with, correct?

25 A Yes.

1 Q Okay. That PDF is -- we actually had somebody up here the
2 other day with a magnifying glass that's a hard way [indiscernible].
3 While he's doing that, I don't want to keep the jury waiting, I'm going to
4 ask you a couple of foundation questions while he's bringing that up. Do
5 you remember you were asked about CPT codes?

6 A Yes.

7 Q You're not a CPT code expert, are you?

8 A No.

9 Q There's an actual profession of people that are clinical --
10 clinically certified and hopefully certified people that work with CPT
11 codes, correct?

12 A Correct.

13 Q So you wouldn't be offering opinions about what the nature
14 of the severity is of any particular code beyond how they are severe --
15 meet severe relative to the other in intensity?

16 A Correct.

17 Q And just so we use the term intensity correct, intensity
18 means the level of activity that the provider is expending for the
19 engagement, for the encounter, correct?

20 A I don't believe it's limited just to that.

21 Q Okay. What do you think intensity refers to?

22 A Well, intensity -- I mean there could be a defined term for
23 intensity. If there is and you want to --

24 Q The CPT codes.

25 A -- provide that to me from the CPT manual, I could -- I could

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1 answer that differently.

2 Q Do you know what that term means in the CPT codes?

3 A I don't know the definition as it's written in the manual.

4 Q So when I'm -- when I'm referring to intensity I'm using the
5 concept that's used in the CPT manual to distinguish a lower level code
6 from a higher level code, and that that reflects different levels of effort
7 and expense.

8 A Okay.

9 Q Does that sound right to you, based on the limited
10 experience you have with CPT codes?

11 A No. I mean I'm familiar that there are defined terms within
12 the manual. But I have not -- I mean if we have it in front of me, we can
13 go through it. But that's all I can answer on that.

14 Q That's all you can do --

15 A Right.

16 Q -- as to your knowledge, correct?

17 A Well, other than -- no, that's not entirely correct, I mean,
18 because the -- you know, the evidence that's in this case, the
19 presentations, things to that nature provide a lot of information that is
20 simplified in terms of the intensity and how the intensity is described to
21 the market and to doctors and to payers.

22 Q Did you review any clinical records in connection with your
23 work in this case?

24 A No, sir.

25 Q So you don't know what actual medical services were

1 rendered by a clinician with respect to each of these services, correct?

2 A I do not.

3 Q What you looked at is the spreadsheet that has numbers on
4 it, which are CPT codes?

5 A Incorrect.

6 Q And you have not gone through the exercise, because you're
7 not a CPT expert, of defining what actual services occurred in each of
8 these accounts?

9 A I've not gone through and defined it. But certainly as part of
10 my work -- my work was a lot more than just looking at the CPT code on
11 the spreadsheet. It was understanding, you know, what does that mean,
12 and most importantly, what does that mean when they're bundled
13 together so I could understand the economic impact of that.

14 Q Right. So, in other words, so you could compare one type of
15 code to another type of code or a group of codes?

16 A That's correct, yes.

17 Q But I'm asking a slightly difficult question, sir. Because
18 there's been some suggestion -- I actually thought you said something
19 about these being very severe claims regarding -- referring to CPT codes
20 that ended in 5.

21 A Yes.

22 Q Do you remember saying that?

23 A Yes.

24 Q When you were severe, you were not making a clinical
25 statement about whether they were severe, correct?

1 A No. I was -- I was interpret -- not interpreting, but I was
2 essentially restating what I had learned, what I knew from my
3 experience, and what I saw in the documents.

4 Q Okay. So if there's testimony in this case that what a 5
5 represents is that it's the code relative to a 4, 3, 2, and 1 with the most
6 amount of effort has to be expended by a provider, you'd have no reason
7 to disagree with that?

8 A Not the way that you presented it.

9 Q Okay. And you are not offering an opinion about whether a 5
10 actually involved a clinically severe encounter?

11 A Not from a clinical standpoint, no.

12 Q Now --

13 MR. BLALACK: Shane, do you have that spreadsheet now?

14 MR. GODFREY: I do not.

15 MR. LEYENDECKER: I sent it to you and --

16 MR. BLALACK: Oh.

17 MR. LEYENDECKER: -- and Jeff.

18 MR. GORDON: He sent it to you, he sent it to me, but it
19 hasn't come up yet.

20 MR. BLALACK: Could you forward that, please, to Shane
21 and --

22 MR. GORDON: No. It's not in my email. You may be in your
23 computer.

24 MR. BLALACK: The Court's indulgence.

25 [Counsel confer]

1 MR. BLALACK: Here, I just sent it to you, Shane.

2 [Counsel confer]

3 MR. BLALACK: Okay. Let's hopefully get to practice.

4 BY MR. BLALACK:

5 Q While we're doing that, one other concept you mentioned.

6 You mentioned a median versus an average. Do you remember --

7 A Yes --

8 Q -- that?

9 A -- I did.

10 Q And I'm not a statistics guy, but as I understood it, these are
11 statistical terms, an average and a median?

12 A I don't know that I would define them as a statistical term per
13 se. I mean there are --

14 Q You don't know if median, mode, and average are concepts
15 and statistics?

16 A They are concepts and statistics, yeah.

17 Q All right.

18 A Sure.

19 Q So my question is, you understand median and average, and
20 you mentioned a third, mode, are forms of statistics or a measurement?

21 A Yes.

22 Q Okay. Now, I think you indicated that you thought the
23 average was the appropriate way to look at the data in this case; is that
24 right?

25 A Yes. Ultimately. Certainly you should look at both the

1 median and the average as part of your analysis.

2 Q Okay. So you considered both, but thought average was a
3 better measurement?

4 A That's correct, yes.

5 Q Okay. And I believe you told the jury that you reason you
6 reached that judgment is because you wanted to avoid a situation where
7 outliers might skew the result. Did I understand you correctly?

8 A Well, I think that that -- the outlier was an example of why
9 you may use an average over a median. There were other factors in
10 terms of using the average for comparability purposes and things of that
11 nature. That was the basis for me ultimately using average.

12 Q Well, I was going to ask you, how do you define the outlier
13 for your determination that an average is a better statistic to use than
14 median?

15 A I didn't create a specific definition.

16 Q Well --

17 A I gave the example of a neighborhood situation, and, you
18 know, where there was one or two large homes that skew the results.

19 Q Right. And so that the jury knows how to apply your
20 definition to your testimony, I'd like you -- whether you intended to give
21 me your definition of this term as it relates to your opinions in this case.

22 A So the definition of the term -- of the term outlier is that you
23 have a set of data that is -- look like my hands, and then you have one or
24 two components that are very large. It --

25 Q Have you ever heard of a bell curve?

1 A Yes.

2 Q How does a bell curve relate to these statistics and how to
3 use them?

4 A So a bell curve -- theoretically, a bell curve looks like just kind
5 of a smooth mountain. And basically what it has is it speaks to kind of
6 the area of central tendency, kind of in the middle of that. And so,
7 theoretically, when you want to use the average, you would say that I
8 have a very smooth bell curve that is -- that's consistent, right, there's
9 not -- it's consistent on the left and it's consistent on the right. I'm going
10 backwards here. Okay?

11 Q And in that example, so using the concept of a bell curve --
12 so is that what you would look for in a bell curve, a standard bell curve?

13 A That's correct, yes.

14 Q And that you said the point of central tendency. Would that
15 be this point here on the top of the bell curve?

16 A That's correct, yes.

17 Q And when you referred to outlier, were you meaning
18 something out on the end of the curve, either end of the curve?

19 A Yes.

20 Q So when you used this concept, you were referring to if the
21 data has evidence of this dynamic, that's heavily influenced and does not
22 have this bell curve, in that situation, which of the statistics is the
23 appropriate?

24 A Well, if you have a outlier that could heavily influence the
25 number and then ultimately you're ending conclusion, then you would

1 consider using the mean.

2 Q The mean or the median?

3 A The mean. I mean the median. I'm sorry. The median.

4 Q The median. Okay.

5 A Yes.

6 Q I want to make sure I understand what you just said because
7 I'm not sure I followed. What if you didn't have a normal -- this is called
8 a normal distribution?

9 A That's correct.

10 Q If you didn't have a normal distribution such that it -- there
11 was a nice lead here with a central tendency, and so the data was more
12 scattered, and particularly if you had outliers, as you've described, in
13 that scenario, the median would be a better measure than the average?

14 A In theory.

15 Q Okay.

16 A That doesn't mean that it's automatic situation to --

17 Q Okay.

18 A -- to shift from an average to a median.

19 Q But if the data looked more like this, normal distribution with
20 less influence of outliers, as you've described, then the average would
21 be a more useful statistic?

22 A That's, again, the textbook example.

23 Q Right. Okay.

24 A It depends on the situation you're doing and the -- and the
25 data that you're analyzing.

1 Q Thank you. And based on -- by the way, in your analysis of
2 the data you reviewed, which would have been the market data from my
3 client's files, correct?

4 A Yes.

5 Q -- did you look to see what the distribution of the data was?

6 A Yes.

7 Q And did you look to see what the distribution of the data was
8 on the disputed claims file?

9 A Yes.

10 Q And was it a normal distribution?

11 A It does not look like that, as the way that you've drawn it. If
12 you look, for example, at CPT code, I think, 285, which makes up the
13 largest component of the damages, what you'll actually see is is on that
14 chart that kind of that -- the further end --

15 Q Uh-huh.

16 A -- of the range, you have the large majority of those claims,
17 kind of a bell curve, to the end.

18 Q So let me make sure I understand what you're saying
19 because I'm not sure how to draw this. I haven't done this much
20 drawing in quite a while. Are you saying that it looks like more like that?

21 A Yes, that's correct.

22 Q Which would not be what you'd call a normal distribution,
23 like this?

24 A It wouldn't -- I'm sorry should be difficult. It's just from -- in
25 my world, it's hard to kind of answer that as a yes or no. But that has a

1 more normal distribution than what you may see or if you had numbers
2 scattered, you know, all along that bottom line.

3 Q Okay. Thank you, sir. All right. Let me show you the
4 Plaintiff's disputed claims sheet.

5 MR. BLALACK: And, Shane, could you go to the --

6 BY MR. BLALACK:

7 Q Or, actually, I think you called this a pivot table; is that right,
8 sir?

9 A Yes, sir.

10 Q So this summarizes the data in the Plaintiff's disputed claims
11 sheet, that last one that we talked about that you received in the last few
12 weeks, correct?

13 A Yes.

14 MR. LEYENDECKER: Mr. Blalack?

15 MR. BLALACK: Yes.

16 MR. LEYENDECKER: Are you working on the summary or
17 the underlined file?

18 MR. BLALACK: Right now I'm on the summary of the
19 document you showed him.

20 MR. LEYENDECKER: Okay.

21 MR. BLALACK: And tell me if I'm not reading it correctly.

22 BY MR. BLALACK:

23 Q But I want to show the underlined data which
24 Mr. Leyendecker walked through.

25 MR. BLALACK: So, Shane, could you put the -- there we go.

1 BY MR. BLALACK:

2 Q Do you remember looking at this file, sir, with
3 Mr. Leyendecker?

4 A Yes.

5 Q And let's just -- I want to run through this file. So just --

6 MR. BLALACK: Let's stop right here.

7 BY MR. BLALACK:

8 Q And so I'm just going to take the --

9 MR. BLALACK: Are we all the way to the left, Shane?

10 BY MR. BLALACK:

11 Q Okay. I just want to walk through it show the jury can see
12 what's on this file and understand it, because this is an important
13 document. So column A, that's the name of the Plaintiff that's bringing a
14 claim in this case, correct?

15 A Correct.

16 Q Column C is the facility where that service was rendered,
17 right?

18 A Yes.

19 Q Is there a reason there's not a column B?

20 A It's hidden.

21 Q It's hidden. Okay.

22 MR. BLALACK: Can we bring that up? Is there a way to bring
23 that up, Shane? Okay. Well, we'll figure that out. Let's not waste time
24 with that.

25 BY MR. BLALACK:

1 Q All right. Then there is a -- column D is missing. Do you
2 know, sir?

3 A It's hidden.

4 Q Column E says county. Oh, there we go. So that -- B is the
5 tax ID of the entity?

6 A Correct.

7 Q C is the facility, D is the zip code, E is the county where the
8 service is rendered, correct?

9 A Yes.

10 Q So you see Clark County there. And then there's a patient
11 name and then there's a date of birth, and then there's a policy number,
12 correct?

13 A Correct.

14 Q And then there is the DOS under column I. What does DOS
15 stand for?

16 A Date of service.

17 Q All right. So we have numbers in some of these entries but
18 not in others. Do you know why?

19 A What are you referring to, sir?

20 Q Well, if you -- can you see on the screen for, let's say, row 21.
21 Do you see there's a date of service of 11/5/2019 there?

22 A I'm sorry. My screen does not show the row numbers.

23 Q Oh. If you would like, I think you can come down --

24 THE COURT: You could --

25 BY MR. BLALACK:

1 Q -- and look at it --

2 THE COURT: -- step around.

3 BY MR. BLALACK:

4 Q -- if it would help you. And we'll walk through this together.

5 THE CLERK: Just please stay near a microphone or speak up
6 a little louder.

7 THE WITNESS: Okay. Okay.

8 MR. BLALACK: If you want to lean into my lapel, you're
9 welcome to.

10 THE WITNESS: No. I would prefer not to do that.

11 MR. BLALACK: So you're going to be buzzing by me before
12 this trial's over, so.

13 MR. LEYENDECKER: Mr. Blalack, if it helps, your fellow there
14 was just expanding the column widths. I think if he does that, then you'll
15 get to where you want to be.

16 MR. BLALACK: That would be great. There we go.

17 BY MR. BLALACK:

18 Q Now, does that answer why there wasn't an entry in the
19 earlier column for I, for date of service?

20 A Yeah. I mean the column was too small.

21 Q Okay. So for date of service, this is the date when the service
22 on the claim was performed?

23 A Correct.

24 Q And column J, account, what does that represent?

25 A I believe that's the provider's account.

1 Q Okay. And then Bill provided us the name of the physician
2 that actually --

3 A Yeah.

4 Q -- did the service?

5 A Yes.

6 Q And this is column L, this billed CPT, that's what described
7 when Mr. Leyendecker --

8 A Yep.

9 Q -- termed it, correct?

10 A Correct.

11 Q And some of these have a single code on them?

12 A Correct.

13 Q And some have multiple codes on them?

14 A Yes.

15 Q What's the difference -- what is -- what does it represent on a
16 claim form when there's one code as compared with five?

17 A So five codes would have you have an initial service to
18 perform and then you have additional codes where there's some sort of
19 follow-up service that's in addition to what the patient initially came in
20 for.

21 Q In other words, you might have the evaluation in
22 management service, which is one of these 99281, 282 --

23 A Right.

24 Q -- 283 where there's an evaluation and management of the
25 patient; but that might actually be a procedure as well, correct?

1 A Correct.

2 Q And that procedure would be included on the claim form
3 separately?

4 A Could be, yes.

5 Q And it would have a separate billed charge?

6 A Yes, it could be.

7 Q And it would be a separate line amount?

8 A Correct.

9 Q Okay. Now, let's go across here in, you know -- do you see
10 where it says charges?

11 A Yep.

12 Q These charges are the billed charges from the claim form,
13 correct?

14 A Yes.

15 Q And this represents the charges for all services and
16 procedures on the claim form, and whether it's 1, 5, or 50, correct?

17 A I believe so. I think there are some instances in the market
18 data where they're separated.

19 Q Okay.

20 A But [indiscernible] --

21 Q [Indiscernible - witness and Mr. Blalack talking over each
22 other]

23 A -- connect here since the raw data in this file, they're all
24 combined together.

25 Q Okay. And then there's an allowed amount?

1 A Yes.

2 Q Okay. And, again, this is the amount for the entire claim that
3 was allowed by the Defendant in the case?

4 A Correct.

5 Q Okay. And then there's a payment amount, which is what?

6 A That's the amount that's paid by the insurance company.

7 Q Okay. And then you have a deductible, copay, coinsurance,
8 and total payments. What's reflected on those columns?

9 A So I mean you could see total payments ties into the amount
10 allowed. And essentially what we're doing here is it's spreading it out
11 between the amount that's paid by the insurance company right here,
12 there's a deductible so that the patient or the members pay in the
13 deductible, or in some cases, not all cases, there is coinsurance, which is
14 the percentage of the amount allowed that the patient, you or I, would be
15 paying.

16 Q And then column T, impact, that's the difference between the
17 billed charge column and the allowed column, correct?

18 A I believe so. I didn't really focus on that column. We can
19 probably click it on, and I could tell you the calculation maybe.

20 Q Okay. And then plan name, you've got a listed name, that's
21 one of the Defendants in the case?

22 A Yes.

23 Q Okay. And then this has a list for employers. These are the
24 employers who sponsor the health plan that the employee received care
25 from, correct?

1 A That's correct. Essentially the employer of the individual B
2 were being cared for.

3 Q Okay. And so we have the number of different entities that
4 are referenced here that are employers of the people who received care
5 that are reflected in the -- in the claim form?

6 A Yes, sir.

7 Q All right. Then you have a claim date, other claims format,
8 and then you have a column that reads ADASO?

9 A Yes.

10 Q What does that refer to?

11 A That is administrative services. In other words, in this
12 particular claim, UnitedHealthcare Services is providing -- managing the
13 claim for an employer who is self-insured.

14 Q So, in this case, for example, looking at row -- I'll just pick
15 Apple -- row 20, the employee is an Apple employee who received care
16 under a self-funded plan operated by -- sponsored by Apple?

17 A That's correct, yes.

18 Q United --

19 A That's -- yes.

20 Q UnitedHealthcare Services was the administrator of that?

21 A That's correct.

22 Q So the money used to pay the allowed amount did not come
23 from the bank account of UnitedHealthcare Services but from Apple?

24 A That's correct.

25 Q Okay. And the damages that are being sought here are being

1 sought from UnitedHealthcare Services, not Apple?

2 A Correct.

3 Q Now, in these lines that don't have the ASO, what does that
4 reflect?

5 A This means that this is a fully insured claim whereby -- for
6 example, here, UnitedHealth Insurance Company would be the one that's
7 on the hook for providing the check.

8 Q Okay. And then you have a column that says iSight. Do you
9 see that?

10 A Yes.

11 Q And there's a bunch of listings, non-DIS. What does that
12 mean?

13 A Okay. What that means is, is that these claims were
14 processed without using the Data iSight process.

15 Q Okay. And you know that -- we'll talk about this in more
16 detail later. You know that Data iSight is an out-of-network pricing tool
17 offered to the market by MultiPlan?

18 A Yes.

19 Q Okay. And then the last column, that's just the Defendant?

20 A That's correct.

21 Q All right. Thank you. You can sit down. Now, sir, let me ask
22 you this. This information that's in Plaintiffs' Exhibit 473, what is it?

23 A All this information came from -- well, actually, this
24 information, I believe, is a combination of the Plaintiff's claim file and
25 information from the Defendants.

1 Q What information do you think is on this file that came from
2 the Defendants?

3 A The identification of the claims that are being processed
4 through Data iSight.

5 Q That one column you showed me?

6 A Yes, sir.

7 Q Would you agree with me, sir, that other than the column
8 that you annotated for Data iSight, all of the other data on the claim file,
9 or Exhibit 473, comes from the Plaintiffs?

10 A Generally, that's my recollection. There may have been
11 some exceptions. It's been a long time since I've put that together, but
12 generally, that's correct.

13 Q Sitting here today, other than the Data iSight column, can
14 you tell this jury if there is a single other data on here that came from the
15 Defendants?

16 A No.

17 Q Okay. Now, you had underlying market data produced by
18 the five Defendants in this case, showing what their claims records
19 actually were with respect to these Plaintiffs in the case, correct?

20 A I don't understand your question.

21 Q You had the market data from the claims systems of the
22 Defendants accessible to you to review with respect to each of these
23 claims, correct?

24 A The underlying file for each one of these claims?

25 Q Correct. That shows from the United or Sierra or UMR

1 claims system. You had the data for each of these claims?

2 A I don't recall that I did.

3 Q You don't know that you had the data for each of these
4 claims in that system?

5 A I don't recall that I do now.

6 Q That's news to you?

7 A Well, I don't want to say it's news to me. It may not be --

8 Q It seems like you're hearing it for the first time from me.

9 A Well, we have a lot of data and I'm trying to be very specific
10 in answering my question because I had a deposition, and I don't --

11 Q And I agree.

12 A -- want to be different than what I told you in my
13 deposition --

14 Q I agree.

15 A -- and that sort of thing. And also trying to understand your
16 question. I do not recall reviewing any further detail or additional detail
17 behind these individual claims.

18 Q And that's getting at what I wanted to ask, sir. Did you
19 undertake the exercise of taking each of these claims, 11,563 of them, did
20 you go through each one of them, on each row, and match each of the
21 data elements in the claims file marked as Plaintiff's Exhibit 473 and
22 compare it to the actual raw data in the claims produced in this case, raw
23 data claims information produced in this case by the Defendants?

24 A No.

25 Q Is there a reason you didn't do that?

1 A No.

2 Q All right. So sitting here today, the accuracy of the
3 information in Plaintiffs' Exhibit 473, you've accepted for the sake of your
4 analysis?

5 A Yeah. That's correct, and that's what we would do in an
6 ordinary sort of situation is we would assume the validity of the
7 underlying data. We didn't perform a separate audit, if you will.

8 Q Okay. So you don't know, for example, whether there are
9 allowed amounts --

10 MR. BLALACK: Shane, could you find the column that has
11 bill charges and allowed amounts? There we go.

12 BY MR. BLALACK:

13 Q So you don't know -- so I'm looking at column M and column
14 N. You don't know whether the numbers reflected in these two columns
15 match the numbers in the underlying claims data for every one of these
16 entries for the claims produced by each of the five Defendants in this
17 case?

18 A That's correct. I assume that the numbers are consistent.

19 Q Now, if any of these -- let's take one at a time. Your method
20 of tackling damages is to take the charge, subtract the allowed amount
21 and measure that as damage, correct?

22 A Correct.

23 Q So if we're, again, using row 30 as an example for these,
24 your calculation would be 508 minus 112.44, and that would produce the
25 damage, right?

1 A Correct.

2 Q If you're getting into the underlying claims data produced by
3 the Defendants in this case and you find out that the charge is 508, that
4 it's something different, or you get in and find out that the allowed
5 amount is not 112.44, but it's something different, then for that claim,
6 your calculation damage would be off, correct?

7 A Well, you'd have to understand -- if you want to make the
8 assumption that the 508 is incorrect --

9 Q That's the premise I'm asking.

10 A Okay.

11 Q In a world where the underlying claims data produced by the
12 actual Defendant shows that the charge was something different or the
13 allowed amount is something different, at least for that claim, your
14 measured damaged in this, that's been given to the jury, is off?

15 A Yes, only if you assume that that underlying claim data, that
16 the reason that there is a difference is some sort of key punch error or
17 what have you.

18 Q Well, it doesn't matter what the reason is. It could've been
19 an alien could've come down and put them in. If the number for charges
20 allowed is something other than 508 for charges and \$112.44, the
21 measure of damages that you've got on this spreadsheet as you've
22 described to the jury, so that 100 would be wrong, correct? Whatever
23 the reason.

24 A I'm sorry. I don't mean to argue with you.

25 Q Sure.

1 A But there could be a lot of reasons why there are -- you look
2 at a claims file and there could be updates to the claims file, adjustments
3 to the claims file, but if you assume that, ultimately, the number that
4 should be represented as the charge is incorrect for whatever reason --

5 Q Correct.

6 A -- then yes, then that would mean that the amount of
7 damages attributed to that claim would need to be revisited.

8 Q And that would be the case if the charge was correct, but the
9 allowed was wrong, either way?

10 A That's correct, yes.

11 Q Because you have a simple charge [indiscernible] allowed?

12 A That's correct, yes.

13 Q Okay. Now, I want to ask you a little bit about the
14 investigation. You described to the jury conducting an investigation in
15 this case; is that right?

16 A Yes.

17 Q Do you consider that investigation a felony investigation?

18 A For purposes of the calculations that I needed to perform,
19 yes.

20 Q What do you mean by for the purposes of the calculations?

21 A Well, because when you do an investigation or you do an
22 audit or review of financial information, you do it to a certain point to
23 where you determine that the additional work you do is not going to
24 have a material impact on the ultimate results.

25 Q Okay. Let me ask -- well, let me -- I want to understand what

1 you found on a couple points in your investigation, okay?

2 A Okay.

3 Q Let me ask you this. Tell me the names of the five
4 Defendants in the case.

5 A They are --

6 Q Just tell me. I know you've looked at a lot of paper and did
7 months and months of investigation. Tell me the name of the
8 Defendants.

9 A So, United Insurance Company Services.

10 Q What's the next one?

11 A United Health Plan of Nevada.

12 Q Okay.

13 A Sierra.

14 Q Okay.

15 A UMR.

16 Q Okay.

17 A I say that because that's how it's been referred to here.

18 Q Yep.

19 A And I've got one more, which would just be United
20 Healthcare, I believe.

21 Q And these are the five Defendants in the case; is that right?

22 A Yes. I think that the United Healthcare is -- I'm not recalling
23 the exact name of that, but there is a fifth name there that's not exactly
24 correct there.

25 Q What do you want me to change, sir?

1 A No. I'm just saying my recollection is of those five, but I'm
2 just trying to identify for you that when I say United Healthcare, that's a
3 general name. There is a -- you can look in my report and I can tell you
4 the specific name of that.

5 Q I appreciate that, sir, but the jury is being asked to rely on
6 your investigation when deciding this case; do you know that?

7 A Yes.

8 Q And you've represented that you've spent, what? Over
9 \$100,000 doing an investigation on this?

10 A Yes.

11 Q You understand who the five Defendants are without looking
12 at the report, right?

13 A Yes.

14 Q Okay. So you don't need to check the report to know the
15 names of the five Defendants in the case, right?

16 A There's a lot of information that's in here and the analysis --

17 Q But beyond the names of the parties?

18 A That's correct, but I think that you could look at the full
19 names of the parties, and I think it'd be difficult for many in this room to
20 transcribe exactly the full names of those parties.

21 Q Now, you noted on the spreadsheet which of the Plaintiffs
22 were self-funded ASO plans, and which were fully insured, correct?

23 A Can you repeat the question?

24 Q For each of the claims you've got in the spreadsheet?

25 A Yes, they're in there.

1 Q Okay.

2 A That's correct.

3 Q So I want you to tell me, does Sierra do self-funded ASO
4 business, fully insured business, or both?

5 A I believe they do fully insured business.

6 Q What about United Health Plan of Nevada?

7 A Same. Fully insured.

8 Q What about United Insurance Company Services?

9 A Mostly ASO.

10 Q What about UMR?

11 A I believe UMR is also mostly ASO.

12 Q What about the United Healthcare?

13 A They are a mix, I believe.

14 Q Okay. When you say mostly ASO for United Health
15 Insurance Company and UMR, what do you mean?

16 A Well, what I mean is there are two of the five -- there are two
17 of the Defendants that are primarily administrative services only, and I
18 recall those to be United Insurance Services and UMR.

19 Q Do you have some --

20 A Again, we can look at the spreadsheet and I can tell you for
21 sure.

22 Q Do you have some doubt as to whether United Insurance
23 Company services and UMR also offer fully insured product?

24 A I wouldn't call it doubt. I would say that this is my best
25 recollection, but we can avoid that by simply looking at the spreadsheet.

1 Q Okay. Well, I'll definitely -- you're going to have a chance to
2 do that, but right now, I'd like the jury to understand what the quality of
3 your understanding is based on the extensive investigation you've
4 been --

5 A Okay.

6 Q Now, with respect to the Data iSight tool -- you remember
7 that?

8 A Yes.

9 Q Okay. Which of these companies utilize the Data iSight tool?

10 A You know, I think I would have to look back at my report to
11 tell you exactly. There were --

12 Q Right now we're just going to -- we're going to see what you
13 recall --

14 A Okay.

15 Q -- from your --

16 A Sure, sure, sure. So United Insurance Services would have
17 utilized Data iSight.

18 Q Okay.

19 A UMR would've used Data iSight. And I believe those are the
20 only two that --

21 Q Okay.

22 A -- used Data iSight.

23 Q Have you heard the term shared savings program?

24 A Yes.

25 Q Okay. Do you know if any of these Defendants used the

1 shared savings program?

2 A I'm hesitation because of the initial claims in this case that --

3 Q All I'm asking you, sir -- I'm just asking a simple question.

4 Based on your investigation, do you know whether any of these five
5 Defendants utilized what you understood to be the shared savings
6 program?

7 A Based on my understanding of the case, all of those
8 Defendants, in some way, shape, or form, utilized a shared savings
9 program, and that only two of them, as I recall, utilized the Data iSight
10 service.

11 Q Okay. So just to summarize, based on your investigation, all
12 five Defendants utilized the shared savings program and two of the
13 Defendants utilized Data iSight?

14 A That's correct.

15 Q Okay. Have you heard the name of the program ENRP?

16 A Yes.

17 Q Okay. Which of the Defendants use ENRP?

18 A I don't recall.

19 Q Okay. Have you heard the term physician reasonable and
20 customary?

21 A Yes.

22 Q Which of the Defendants used the physician reasonable and
23 customary method?

24 A Are you talking about the program or that the charges should
25 be based on reasonable and customary?

1 Q I'm asking about the out-of-network programs which you
2 looked at as part of your investigation. That's the question.

3 A Okay.

4 Q You understand it?

5 A Yes, and I -- it's a -- that particular question is difficult. My
6 understanding is that each one of those charges, prior to the alleged
7 actions in this case, were all based on a reasonable and customary basis
8 or program.

9 Q So --

10 A A reimbursement program.

11 Q So you think all five Defendants utilized a physician
12 reasonable and customary program to pay for out-of-network ER
13 services before the period of dispute?

14 A That's correct.

15 Q Okay. Does that capture basically your summary of what you
16 investigated?

17 A Well, it's my recollection of this component of the
18 investigation.

19 Q Okay. Now, do you know, by the way, if there is a difference
20 between the out-of-network programs used by UMR and the out-of-
21 network programs used by, let's say, United Healthcare?

22 A There could be.

23 Q I appreciate that. I'm asking a different question. Not
24 whether it could be. Whether you know that to be true?

25 A I mean, the -- I know that each of these use very out-of-

1 network programs, number one. Number two, the information regarding
2 which ones were used, and even when they were purportedly to use and
3 the resulting information where that differs, makes it difficult to be able
4 to say yes or no to that.

5 Q Is the answer, you don't know?

6 A For example, the information we saw yesterday, how the
7 numbers were all over the map, even though both were based on an
8 iSight program.

9 Q So is it fair to say you can't answer that question I just asked?

10 A I can't fully answer that question you asked --

11 Q Okay.

12 A -- based on without getting back into the data.

13 Q Okay. For Sierra Health, what's the out-of-network programs
14 they use?

15 A I don't recall the out-of-network programs specifically that
16 Sierra Health does because they essentially have been charging a flat
17 fee.

18 Q Okay. In fact, did you listen to testimony of Ms. Hare who
19 testified in front of the jury?

20 A I did; yes.

21 Q Do you remember her testifying under oath that Sierra
22 doesn't have any out-of-network program?

23 A I don't recall that.

24 Q You missed that part of her testimony?

25 A No. I just don't recall her saying specifically, they had no

1 out-of-network programs.

2 Q Okay. So we'll let the jury decide, based on a reading of the
3 transcript, whether that's true or not. Now, let me show you -- I want to
4 show you some things that Mr. Leyendecker showed you.

5 MR. BLALACK: Could you bring up his presentation, please?
6 Can you bring it up? There we go. Thanks a lot. Keep going. Keep
7 going. Okay. Let's stop here, sir.

8 BY MR. BLALACK:

9 Q Do you remember being questioned by Mr. Leyendecker
10 earlier today about this charge that's, I think, identified as 530-004?

11 A Yes.

12 Q And I just want to make sure the jury understands what
13 they're looking at here, okay? And what it means. First of all, the time
14 period that's being measured here is November 2017 and May 2020,
15 correct?

16 A Yes.

17 Q And at the time, it says, Fremont's charges, correct?

18 A Correct.

19 Q And it says, 99284, right?

20 A Correct.

21 Q Now, so this is the plotting of Plaintiff Fremont's, bill charge
22 from November 2017 to May 2020. Am I right about that?

23 A Correct.

24 Q And that's the green line?

25 A That's correct.

1 Q And then there is a blue line that purports to chart the bill
2 charges of all over ER providers, and that runs from the same period,
3 correct?

4 A Correct.

5 Q And then there's an orange or brown line that plots the bill
6 charges reflected at the FAIR Health 80th percentile in the Benchmark
7 database over the same period, correct?

8 A Correct.

9 Q Okay. Now, I want to make sure I understand what you're
10 saying here, sir. Now, you know that the FAIR Health benchmark is a
11 plotting of all bill charges reported by providers for that service in a
12 certain area called a geo, correct?

13 A Correct.

14 Q So when we say all other ER providers include, that's not
15 referring to all other ER providers in this area. That's just referring to
16 other ER providers reflected in the claims data of one of the Defendants?

17 A Yes, for that particular --

18 Q Right.

19 A -- geo.

20 Q So if you wanted to capture what the billed charges were and
21 how they were changing over time for all ER providers who reported
22 99284, the FAIR Health benchmark would be a more complete measure,
23 correct?

24 A No, this is apples to apples in terms of -- yes, you're exactly
25 right. The other ER providers are those that have provided information

1 to -- or what they charged United. It's United's data, so there is a --
2 there's a set whereas you're correct. The FAIR Health data is a broader
3 set of data.

4 Q Right. And so when you compare the Plaintiff's charges and
5 how they grew to the growth of the charges of all other ER providers in
6 this region in the 80th percentile, what you found was that the
7 TeamHealth Plaintiffs charges were roughly in line with FAIR Health until
8 2019 when the charges for all other ER providers in this area spiked in
9 November of 2019, and continued at that next level.

10 A Correct.

11 Q Is that right?

12 A Yep.

13 Q And let's just make sure I've got the math right on this. So
14 for the FAIR health charge database, can you tell the jury how much of a
15 total increase there was for the 80th percentile, the benchmark from
16 November of 2017 to May 2020?

17 A Well, if you could give me a calculator, I would do it. The
18 number that I calculated was kind of an average growth rate, compound
19 average growth rate, that I think was about 70 percent, 75 percent.

20 Q Well, let me -- I'm not the finance guy you are, but let me
21 give it a shot. According to my math, over that period, the 80th
22 percentile benchmark of all charges in this area grew from 883 to 1266,
23 which is \$383. Does that sound right?

24 A Sounds right.

25 Q And you measured that at over that entire period. That's --

1 what's that? You said -- what was the number you used? Seven what?

2 A 75 percent.

3 Q You said 75 percent measured from November '17 to May
4 2020, or is that 75 percent on an annual basis?

5 A It's on an annual basis.

6 Q So you're saying it went up 75 percent between November of
7 2017 and November of 2018? And then 75 percent from November '18
8 to November '19?

9 A No, no, actually that the 75 percent must have been the
10 entire time period. Because 75, that would go -- be quite a bit larger.

11 Q Right. So what you're saying is when it went from 883 to
12 1,276, that was a 75 percent increase?

13 A That's correct.

14 Q Would you agree with me that's a steep increase?

15 A It is, yes.

16 Q Okay. So if you had a -- if you offered a health plan, an
17 employer, in Nevada, self-funded employer in Nevada, and was trying to
18 determine what the reasonable rate for an out-of-network emergency
19 service was, and you were measuring that based on whether it was at or
20 below the 80th percentile, you would have a program that would take in
21 a 75 percent increase in the charge, over two years, correct?

22 A No.

23 Q Tell me why.

24 A Because you would look at the Fair Health data, like I did, and
25 you would understand that there were changes in the Fair Health data in

1 terms of the number -- increased number of claims that were submitted
2 to that data base. That then created essentially an anomaly during that
3 particular period of time. And you would have adjusted for that.

4 Q So you would -- the administrator --

5 MR. LEYENDECKER: Excuse me, Your Honor. I'm not sure
6 Mr. Leathers was finished with his --

7 MR. BLALACK: Oh, I'm sorry.

8 MR. LEYENDECKER: -- commentary there.

9 MR. BLALACK: My apologies. I'm sorry.

10 MR. LEYENDECKER: No, all I was simply doing was you
11 would -- you would not put it right into a computer program. You would
12 see that there was an anomaly or something that was going on. And
13 then you would seek to understand what that is. And when you did, for
14 example, in this one, you would see that there were a significant
15 increase in the number of claims that were provided into that data base
16 during that --

17 Q So you --

18 A -- period of time.

19 Q I'm sorry.

20 A That's okay.

21 Q So if you were the administrator of the self-plan and you
22 were trying to decide how you're going to reimburse these claims based
23 on the 80 percentile, which is what you were using, you would say you
24 know what, I know the plan says used this 80th percentile, but for this
25 time, we're going to disregard it.

1 A Well, I think my understand from Mr. Murphy yesterday, and
2 from the documentation is, it's not a literal here's what Fair Health says,
3 and we put that in our plan document. It's a basis for assessing what
4 charges they're going to make and the reasonableness of those charges.

5 Q I understand and Mr. Murphy doesn't work for the Defendant
6 in this case, right?

7 A Correct.

8 Q He's the head of employment.

9 A Correct.

10 Q So I'm talking about the Defendants in the case who have to
11 settle have reimbursement program for their employer sponsors. And I
12 understood your opinion in this case to be that when determining what
13 the reasonable rate of reimbursement for an out-of-network emergency
14 service is, it was the correct thing to do to rely on the Fair Health 80
15 percentile benchmark; is that right?

16 A No.

17 Q Okay, so you do not agree with anyone arguing that the Fair
18 Health 80th percentile benchmark should be the measurement of what is,
19 or is not a reasonable charge?

20 A No, I do believe, and the evidence supports the fact that Fair
21 Health should be a basis for a reasonable charge.

22 Q But in this case, if you were the health plan sponsor, you
23 would not rely on this data that you just pointed to the jury because it
24 has an anomaly in it, right?

25 A You would rely upon it, but you would understand what was

1 going on in that data.

2 Q So this data would not be -- at least this one charge for this
3 period would not be reliable for that purpose, in your view?

4 A I don't -- I don't want to say that it's not reliable. I think it's
5 reliable once you go and do the analysis and understand what the
6 impact is.

7 Q Now the Plaintiffs charges during this period went from \$880,
8 this is Fremont.

9 A Right.

10 Q To \$965, correct? Is that right?

11 A Yes.

12 Q So that's about an \$85 increase over that -- over little two
13 year period.

14 A Yes.

15 Q And that runs, comes out to about -- what about a ten
16 percent increase over that time span?

17 A Yes.

18 Q So --

19 A That's just taking the difference between the numbers.

20 Q Yeah. And have you looked at the rate of inflation issued by
21 the U.S. Bureau of Labor Statistics for this period in this region for
22 physician services?

23 A I don't recall if they have the data for this particular region,
24 but I have looked at it, because there is a sub-component of that for
25 healthcare services.

1 Q There's actually a subcomponent for physician services?

2 A There is, yes.

3 Q Right.

4 A And hospitals.

5 Q Did you look at what that percentage of increase is for
6 physician services in this period in this area?

7 A Yes.

8 Q What is that?

9 A So it is, depending on the particular period that you look to, it
10 goes from maybe 1.5 percent to a little over four and a half percent.

11 Q So an increase in charges --

12 A Excuse me, that's a -- that's not a period to period. Because
13 the way that it's reported is it's reported on a monthly basis.

14 Q Uh-huh.

15 A So every year when you look at that to say the inflation is 1.5
16 to 4.5 --

17 Q Uh-huh.

18 A -- that would be comparable to looking at a compound
19 average annual growth rate that would be more in line with like a 3
20 percent growth rate.

21 Q Let's get you -- make sure the record is really clear on this.

22 A Okay.

23 Q Before I pass you to the Plaintiffs. Was the increase of 10
24 percent that's reflected on this chart in Fremont's charges over this
25 period above or below the U.S. Bureau of Labor Statistics inflation rate

1 for physician services?

2 A It is consistent with and maybe slightly above.

3 Q Whoa. We'll take that and move on. See, I have another
4 witness that's going to speak to that question.

5 A Okay.

6 Q Let's look at the next chart, please. All right, so here again,
7 sir, got a different charge for Fremont, same period and this time we
8 have a big spike in November, don't we, of 2018?

9 A That's correct.

10 Q So is this data, data that is an anomaly?

11 A It's driven by an anomaly related to the volume of claims
12 submitted to Fair Health.

13 Q Right. And that anomalies in your view makes this data not
14 appropriate as a sole basis to measure a benchmark for damages in this
15 case, correct?

16 A Without understanding that anomaly and recognizing that in
17 your calculation.

18 Q Right. So the answer to my question is yes?

19 A No.

20 Q What's the answer to my question?

21 A The answer to your question is, is that -- is that you cannot --
22 you can't -- you couldn't go and say hey, there's a difference between
23 1,423 and 1,888 without explaining to somebody the understanding of
24 why that increased.

25 Q Yeah, but the number I'm interested in, sir, is the difference

1 between 1,295 and 1,888. That's the number I'm interested in.

2 A Okay.

3 Q You characterize that as an anomaly, correct? In the data.

4 A That's correct, yes.

5 Q So my question to you is does that anomaly in the data that
6 you are showing, your counsel showed the jury, render this data for this
7 charge unreliable by itself as a benchmark on reasonable value?

8 A No.

9 Q Okay. So you would still recommend the jury, when it's
10 evaluating reasonable value, look at this chart and say you know what.
11 Even though it rose from 1,295 to 1,888 in one year, that's reasonable.
12 That's your position. Correct?

13 A Yes.

14 Q Okay. Let's look at the next one. Now this one was
15 interesting, sir. You didn't -- you showed Fremont by itself. But you
16 showed Ruby Crest and Team Physicians together. Why did you do
17 that?

18 A Really for two reasons. One is you mentioned Mr. Mizenko,
19 who works for Fair Health. And in the Fair Health data, they
20 recommended those geo zip codes be combined together.

21 Q Uh-huh.

22 A Because of the nature of the -- of the practices and the
23 volume of data. So essentially what I was doing is again, we kind of go
24 back to being comparable in each of our data sets. So I adopted that
25 same -- that same approach.

1 Q Okay. You saw his reports, sir, and you know there's no
2 chart like this in his report; correct?

3 A That's correct.

4 Q And in his report, he did an analysis of the Plaintiffs' --
5 TeamHealth Plaintiff's billed charges and co-foundation by Plaintiff,
6 right?

7 A Yes.

8 Q And you're aware from looking at the records produced by
9 the TeamHealth Plaintiffs in this case, that the bill charges for Team
10 Physician and the bill charges for Ruby Crest for each of these codes are
11 different, correct?

12 A They're not exactly the same.

13 Q Not exactly the same. They're substantially different, aren't
14 they?

15 A We can go back and look exactly what they are.

16 Q Well, here's the thing, sir. You did this very substantial
17 investigation. And my question is, do you know, based on the months of
18 work you did, that those charges for those two Plaintiffs are substantially
19 different.

20 A I know that they're different. I don't know that I would define
21 them as substantially different.

22 Q We'll let the jury decide what substantially means. Now in
23 this case, you've got this all other E.R. provider line. Do you see that?

24 A Yes.

25 Q So if I'm -- if I'm looking -- this is, again E.R. providers who

1 submitted a claim to United Health -- one of the Defendants, correct?

2 A Correct.

3 Q In this case, you've got in your data, a charge going up and
4 if I'm right, between May of 2018 and November of 2018, kind of went
5 down a little bit?

6 A That's correct, yes.

7 Q And then it spiked up quite a bit for November of 2018 and
8 May 2019, correct?

9 A Correct.

10 Q And then it came down quite a bit, right? After that?

11 A Yes.

12 Q And then it went down a little more, right?

13 A Yes.

14 Q Do you consider that line for 384 up to 412 to reflect a
15 reliable representative set of data to measure reasonable value?

16 A Yes.

17 Q And I take it, when you look at the TeamHealth Plaintiff's
18 charges, you've got their charges starting at 463 in November, dropping
19 down at or below 400 in May, going back up close to 500 in November,
20 and coming down to a little over 400 in November of 2019. And popping
21 back up in May 2020. Am I right about that?

22 A Yes.

23 Q So to believe your data, the Ruby Crest and Team Physicians
24 bill charges on the charge master, changed from November 2017 to May
25 2018, went down. And then between May 2018 and November 2018,

1 went up. So within the same year, right?

2 A Yes.

3 Q So literally within six months the charges shot up. And then
4 within another year, went down some more, right?

5 A Correct.

6 Q And then went back up six months later.

7 A That's right.

8 Q Is that level of charge activity consistent with reasonable
9 value in your view?

10 A Yes.

11 Q Okay. Let's go to the next one, please. All right. Here we
12 have another one. Where we have the Fair Health data relatively stable
13 and then all of a sudden spiking. In that last six months, correct?

14 A Yes.

15 Q And then we have the other E.R. providers in the United
16 Health -- well the Defendant's data. Stable, spiking, going down and
17 then stable again, correct?

18 A Correct.

19 Q Okay. And again, I take it you think this represents a
20 reasonable representative data set for measuring reasonable value,
21 correct?

22 A Yes.

23 Q Let's see if we can finish one more thing before we break,
24 Your Honor. Oh, okay, well, this is a good one. Ruby Crest and Team
25 Physicians, 99285. So for the other E.R. providers that you're using as a

1 benchmark, their -- their data starts in May. So you don't have any data
2 that you're showing for these Plaintiffs before that. Is that right?

3 A That's right.

4 Q So in your investigation, you didn't ask the --

5 A No, no, no. It -- there is -- there are -- there are no charges --
6 there are no claims in dispute that are 99285 for these entities prior to
7 the May time period.

8 Q Oh, I see. So your point is you took these values from the
9 disputed claim sheet?

10 A That's correct.

11 Q Did you actually for and look at the charge masters that were
12 produced by the TeamHealth Plaintiffs in this case?

13 A No.

14 Q Do you know what a charge master is?

15 A I do.

16 Q What is a charge master?

17 A A charge master is what the providers have that they use to
18 charge for a particular code. Like a 99285 code.

19 Q Can it be called a price list?

20 A I think that's a reasonable explanation, yes.

21 Q Well, let's make sure that we've got this straight. You were
22 asked to render an expert opinion on the reasonable value of 11,500
23 claims in this case, correct?

24 A Correct.

25 Q And you were told that the TeamHealth Plaintiffs claim that

1 bill charges was what they were due?

2 A Yes.

3 Q And you knew what a charge master was when you were
4 engaged, correct?

5 A Yes.

6 Q And you didn't ask the TeamHealth Plaintiffs to provide you a
7 copy of their price list to see what those charges were?

8 A Correct.

9 Q You just simply relied on the disputed claims list that had
10 numbers written in it that were provided to you by Plaintiffs' counsel,
11 correct?

12 A Yes, that's correct.

13 Q Do you know that the charge masters were actually produced
14 in this case?

15 A I don't recall one way or another.

16 Q Now this last one before we break, Your Honor, is 99285
17 went for the other E.R. providers. Am I correct that literally between
18 November 2018 and November 2019, that the average bill charges that
19 you're using for your measure of benchmark increased from something
20 north of 1,100 to something around 1,500 and then back down to
21 something around 1,300 in the span of one year?

22 A That's correct, yes.

23 MR. BLALACK: Your Honor, this is probably a good time to
24 break.

25 THE COURT: Okay. Now we'll take our noon recess. During

1 the recess you're instructed not to talk with each other, or anyone else
2 about any subject connected to the trial. Don't read, watch or listen to
3 any report of or commentary on the trial. Don't discuss this case with
4 anyone connected to it by any medium of information, including without
5 limitation, newspapers, radio, internet, cellphone or texting.

6 Do not conduct any research on your own relating to the
7 case. Don't consult dictionaries, use the internet or use reference
8 materials. Don't use social media. Don't talk, text, tweet or Google
9 issues or conduct any other type of research with regard to any issue,
10 party, witness or attorney in the case.

11 Most importantly do not form or express any opinion on any
12 subject connected to the trial until the matter is submitted to you. It's
13 11:59. Will you please ready at 11:35.

14 THE MARSHAL: All rise for the jury.

15 THE COURT: Oh, 12:35. I did that again.

16 [Jury out at 11:59 a.m.]

17 [Outside the presence of the jury]

18 THE COURT: I printed out the policy of the scope for you. I
19 had it done with regard to the locking of the case.

20 MR. LEYENDECKER: Okay.

21 THE COURT: So that you'll know the policy. Four copies for
22 each side. Now, Mr. Blalack, how do you intend to proceed after lunch?

23 MR. BLALACK: Here's what I propose, Your Honor. I don't
24 want to waste the jury's time. If Plaintiff's counsel is amenable, I'll finish
25 my examination. They can take their redirect. If Mr. Leathers would be

1 willing to wait until the end of the day, I can do that at the end of the day.

2 MR. LEYENDECKER: We can do that, Your Honor. I would
3 like to revisit the substantive argument, whether it's really necessary at
4 this point in time.

5 THE COURT: Okay.

6 MR. LEYENDECKER: And other stuff I have in the deposition
7 speaks directly to the question at hand.

8 THE COURT: Good enough. So we'll see after your redirect.
9 You guys come back at 12:30.

10 MR. LEYENDECKER: Thank you, Your Honor.

11 THE COURT: In case there's any housekeeping matters.

12 MR. ZAVITSANOS: We do, Your Honor. We're going to need
13 to take up the issue about Mr. Bristow.

14 THE COURT: 12:30. I did four sets for each side because you
15 have multiple lawyers.

16 MR. BLALACK: Thank you.

17 THE COURT: Have a good lunch, everybody.

18 [Recess taken from 12:01 p.m. to 12:35 p.m.]

19 [Outside the presence of the jury]

20 THE COURT: Let's take up those issues.

21 MR. BLALACK: Which issues, Judge?

22 THE COURT: I don't know. There was one issue I was told.

23 MR. ZAVITSANOS: Oh, yes, Your Honor.

24 MR. BLALACK: Mr. Bristow.

25 MR. ZAVITSANOS: Where's Louis? Can you get Louis,

1 please?

2 Your Honor, so apparently one of the first witnesses that the
3 defendants want to call is Kent Bristow. They also had subpoenaed him
4 by the way. Okay. So Mr. Bristow gave in all the depositions. What
5 they want to do instead of playing Mr. Bristow and calling Mr. Bristow by
6 deposition and playing it, they want to basically kind of sprinkle it
7 throughout the fire. So a little bit here, a little bit there, a little bit here.
8 That's very unorthodox and -- just so you know, Your Honor, we -- Mr.
9 Bristow is here. We're going to call him directly. When they pass him
10 on video -- so what are we going to do? We're going to have him come
11 up and off the stand three times? Now, the law on this is it's 100 percent
12 in your discretion and this is --

13 THE COURT: I'm just looking for the time schedule.

14 MR. ZAVITSANOS: Yeah. This is --

15 MR. BLALACK: Just to be clear, he wasn't on their list of
16 witnesses.

17 THE COURT: That's why I'm looking.

18 MR. ZAVITSANOS: No, I mean -- well, we get to cross him.

19 MR. BLALACK: Let me clarify. On the list of witnesses they
20 provided me, and we provided to the Court, Mr. Bristow was not
21 identified as a witness in their case as part of this -- getting the trial done.
22 He's not on their list. The only witness they have left on that is Dr. Frantz
23 who is sitting outside. So the question we were debating is whether we
24 bring Mr. Bristow here live or we play by deposition. We've opted to
25 play by deposition because it's the most efficient way to get the case in

1 and finished on time. I want to be clear. We are not going to cut up Mr.
2 Bristow's deposition. There are four different depositions. One of Mr.
3 Bristow as a 30(b)(1) witness; and, three, the corporate depositions of
4 each plaintiff. So he happens to be the person they designated as the
5 corporate witness, so our plan is to play his 30(b)(1) -- we told you about
6 that --

7 THE COURT: Uh-huh.

8 MR. BLALACK: -- and then to play the corporate depositions
9 of each Plaintiff throughout the balance our time in the case. So we're
10 not -- it could be Mr. Bristow; it could be Joe Smith; it could be whatever.
11 The point is I'm presenting the deposition testimony of each plaintiff
12 separately. That's the issue. And Your Honor, I don't think they have
13 any standing to ask me to present those witnesses which are four
14 different individuals -- one individual, and three different entities and
15 their testimony in any particular order in my case.

16 So I think there's two issues. One, are they going to call Mr.
17 Bristow live because if so, that just blows our whole plan -- scheduling
18 and timing. Two, if they're not, they're going to finish with the schedule
19 they laid out which is Dr. Frantz and then rest, then we would play Mr.
20 Bristow's 30(b)(1) and then the corporate deposition of each of the three
21 Plaintiffs.

22 MR. ZAVITSANOS: Okay. Your Honor, first of all, we did
23 identify him as a witness. We're talking about calling Mr. Bristow during
24 their case in chief, not during ours.

25 THE COURT: Then let's deal with it when we get there and

1 bring the jury in now. Why do we have to get there now? Now, there
2 was one question from one juror about the W9.

3 Do you want to see that? Just -- there is a juror who is going
4 to -- that had to -- everybody got a W9.

5 MR. POLSENBERG: I can guess. What is it?

6 THE COURT: And the other thing to let all of you know is the
7 W9s were scanned and sent to jury services. They told us to throw them
8 away. We're not comfortable with that because I'm not sure that their
9 information is protected. I just wanted to give them back to the
10 individual jurors unless there's an objection.

11 MR. POLSENBERG: No, not at all, Judge.

12 MR. ZAVITSANOS: No.

13 MR. LEYENDECKER: Perfect.

14 THE COURT: All right.

15 MR. MCMANIS: Your Honor, I have one question about jury
16 instructions from Ms. Robinson. She had proposed to the other side
17 earlier this morning the possibility of coming in early in the morning to
18 continue to sort of tackle that project. I just wanted to raise that to the
19 Court. I believe the defendants are still considering that. I don't know
20 whether they're available but --

21 THE COURT: I haven't --

22 MR. BLALACK: I haven't spoken to them, but we can do
23 whatever you want.

24 THE COURT: We will get there. I have been on the breaks
25 reviewing proposed verdict forms, the jury instructions, but I didn't get a

1 chance to look at the deposition today that I was asked to rule on
2 objections because I had a meeting with another judge today earlier.
3 Ongoing training with our new civil judges.

4 MR. POLSENBERG: Gotcha. But you just let us know what
5 you want to do.

6 THE COURT: I will.

7 MR. POLSENBERG: Thank you, Your Honor.

8 THE COURT: Thanks.

9 MR. MCMANIS: Thank you, Your Honor.

10 THE COURT: And I'm not a morning person. So after work is
11 always better for me.

12 MR. MCMANIS: And that's fine too. We just wanted to ask
13 and to make sure that we were making ourselves available at whatever
14 time is best for Your Honor.

15 MR. BLALACK: We'll do whatever you prefer.

16 THE COURT: Thank you. Let's bring them in.

17 THE MARSHAL: Yes, ma'am.

18 THE COURT: I got it. There is a rule that everything here is
19 supposed to be shredded but I'm not --

20 MR. ZAVITSANOS: I'm sorry, Your Honor?

21 THE COURT: There is a rule that everything from the
22 courthouse is supposed to be shredded but I've never seen it happen.

23 MR. ZAVITSANOS: Mr. Leyendecker keeps a lighter so I
24 don't know if that would help.

25 MR. LEYENDECKER: You know what, I don't smoke.

1 THE COURT: So for the civil bench bar once when George
2 Bochanis sponsored it, he offered to dig a hole to cook a lamb on a spit
3 and he was really shocked when we said no.

4 THE MARSHAL: All rise for the jury.

5 [Jury in at 12:42 p.m.]

6 THE COURT: Thank you. Please be seated. A couple of
7 housekeeping matters. We do have a note from the juror about the W9.
8 You should be able to work that out to avoid a double taxation issue. If
9 you don't have an accountant, talk to your employer about that. And
10 with regard to you guys had to fill out W9s, they have been scanned and
11 sent to jury services; however, they instructed us to just throw them
12 away. I'm concerned about your personal information. We made the
13 choice instead that they'll be given back to you at the end of the day for
14 your safekeeping. Okay. Good.

15 Please proceed.

16 MR. BLALACK: Thank you, Your Honor.

17 BY MR. BLALACK:

18 Q Good afternoon, Mr. Leathers.

19 A Good afternoon.

20 Q Welcome back, and we're just going to pick up a little bit
21 where we left off. We were talking about FAIR Health and your analysis
22 of FAIR Health data.

23 A Okay.

24 Q I think you testified earlier that one of the things you
25 reviewed in preparing your opinions in the case was the expert report

1 and data analysis conducted by Mr. Mizenko of FAIR Health, correct?

2 A Yes.

3 Q And do you recall that he did was he took the plaintiffs billed
4 charges in this case and then he plotted them against the various
5 benchmarks through the FAIR Health data for this area?

6 A Yes.

7 Q And then he identified in his analysis whether the plaintiffs
8 billed charge for these three -- these codes -- how they compared to
9 three benchmarks in the FAIR Health data; do you remember that?

10 A Yes.

11 Q One of those benchmarks is the one you've been talking
12 about, the 80th percentile, correct?

13 A Yes.

14 Q And one was the median of the FAIR Health data?

15 A Yes.

16 Q And again, remind the jury the median is the 50-yard line,
17 right?

18 A Correct.

19 Q So that means half the observations are below that spot, half
20 are above?

21 A Correct.

22 Q And then the third one he looked at was the average, which
23 is one of the [indiscernible] you used?

24 A Yes.

25 Q And then he added those up and showed how the

1 TeamHealth plaintiffs' billed charges on their charge master compare to
2 those benchmarks; you remember that?

3 A I do.

4 Q I want to show you a summary of -- actually, before I get to
5 that summary, let me show you something else. Do you remember --

6 MR. BLALACK: Shane, could you bring up the
7 demonstrative, please?

8 BY MR. BLALACK:

9 Q All right. So here's my question. Sir, take a look at this
10 summary here of Mr. Mizenko's analysis and tell me if it corresponds in
11 terms of claims that he examined and the three benchmarks that he
12 looked at in FAIR Health data?

13 A If it corresponds to his -- what he has in his report?

14 Q Correct.

15 A Well, I mean, I don't recall the exact percentages that he used
16 but I don't disagree that he compared it to those three different amounts.

17 Q Okay. So and you looked at his report because obviously,
18 you're relying on FAIR Health as a benchmark in this case and so seeing
19 this testimony -- or the expert opinion and testimony of Mr. Mizenko
20 about the FAIR Health data and his analysis wasn't told to you, correct?

21 A It was a data point.

22 Q I mean, he's the one that works on the FAIR Health data itself,
23 right?

24 A Well, the FAIR Health data was more important to me but
25 putting some of that in context, it was -- it was helpful to take a look at

1 Mr. Mizenko's report.

2 Q Would you agree with me, sir, that Mr. Mizenko as the
3 person who is the data manager for FAIR Health probably has as good or
4 better of an understanding of that data than you do?

5 A Well, he may have some understanding in terms of where
6 the data comes from, I come up with different results than he does in
7 terms of data analysis.

8 Q Oh, you do? Okay. So you disagree with Mr. Mizenko from
9 FAIR Health's analysis of the FAIR Health data?

10 A Exactly which analysis?

11 Q Well, you said you disagreed with him. I don't know which
12 analysis --

13 A Well, so for example, in my analysis, I went through, and I
14 looked at on a claim-by-claim basis, was this particular claim on a geo
15 basis, on an exact same time period basis, was that claim greater or less
16 than what FAIR Health was. And if you go and look at all of the 11,000
17 claims that are -- actually, not the 11,000 I just looked at, the core CPT
18 codes which I think are about 8,000, and if you look at those 8,000 CPT --
19 CPT codes what you find is is that only I think three or four percent are --
20 of claims are over the FAIR Health 80th percentile --

21 Q That's a --

22 A -- so it's a very, very small percentage are over.

23 Q That's a great comparison. So that's a good segue, Mr.
24 Leathers. So Mr. Mizenko as you know, took the claims that are in
25 dispute in this case, geozip -- was it a geozip?

1 A Geozip is the geographic area surrounding a particular
2 hospital.

3 Q So there's a geozip around Clark County, for example?

4 A Correct.

5 Q And then there's one that addresses the other parts of the
6 state, correct?

7 A We talked about that earlier. He combined those together
8 like I did.

9 Q So he looked at those codes from the TeamHealth plaintiffs'
10 billed charges for the disputed claims and then plotted them against
11 these benchmarks from the FAIR Health data, and you recall that he
12 determined that 32 percent of those codes exceeded the FAIR Health
13 80th percentile, correct?

14 A Generally, that's my recollection.

15 Q And then he looked at the median which again is the 50-yard
16 line and determined that 69 percent, almost 70 percent, of the codes on
17 the disputed claims when plotted against the FAIR Health benchmark
18 data for this area, exceeded the 50-yard line, exceeded the median,
19 correct?

20 A Correct.

21 Q Okay. Now, notwithstanding that finding, it is still your view
22 that the TeamHealth plaintiffs' bill charges are reasonable even for those
23 codes that were identified as exceeding the 80th percentile, correct?

24 A Yes.

25 Q Now --

1 A Assuming -- I mean, I'm not making the assumption that that
2 information is correct.

3 Q Assuming FAIR Health accurately analyzed the FAIR Health
4 data, that would be what you say?

5 A All the analysis that I've done tells me without question that
6 the charges are reasonable, and that a very small percentage -- call it
7 three to four percent are actually in excess which flies in the face of the
8 analysis that Mr. Mizenko has done.

9 Q And that's because you -- as you pointed out, you looked at
10 core CPT codes; you didn't look at all the CPT codes for the disputed
11 claims against the FAIR Health value, correct?

12 A That's exactly correct.

13 Q Now, sir, do you know what a histogram is?

14 A I do.

15 Q What is a histogram?

16 A A histogram is a graphical representation of data over a
17 period of time or range of information.

18 Q Okay. Is the document -- the image I'm showing you and to
19 the jury at this moment which read FAIR Health data -- FAIR Health know
20 your source -- is that a histogram?

21 A It is.

22 Q And do you recognize that histogram as one of the exhibits
23 to Mr. Mizenko's report?

24 A I do.

25 Q And do you remember he attached a histogram like this for

1 every one of the codes initially in this case; do you recall that?

2 A He did.

3 Q There's something like 100 of these things, right?

4 A Yes, because it's a combination of the code and the
5 geographic location and the charge.

6 Q Right. So for this one, the code at issue is 99291 which is a
7 critical care code, correct?

8 A Yes.

9 Q And the geozip is 89, correct?

10 A Yes.

11 Q That's in this area of the Las Vegas, Clark County area, right?

12 A Yes, sir.

13 Q And the date of this data that's being analyzed is the charge
14 data for May 2019, correct?

15 A Correct.

16 Q Which you understand is within the period of dispute in this
17 case?

18 A Yes.

19 Q Now, you see there's some diamonds that are being plotted
20 along the lower horizontal bar there?

21 A Yes.

22 Q And they have different colors, red, green, yellow, orange?

23 A Yes.

24 Q And you see that there's a little table down at the bottom that
25 describes that yellow is the median charge; you see that?

1 A Yep.

2 Q Green means average, right?

3 A Correct.

4 Q Green means it's the 50-yard line?

5 A Correct.

6 Q 80th percentile is the percentile we've talked about before
7 which is in green?

8 A Yes.

9 Q And then there's a red diamond which is the provider charge;
10 do you see that?

11 A Correct.

12 Q And you understand from your analysis that in this case, the
13 provider charge has been plotted is the charge of the TeamHealth claim,
14 correct?

15 A As Mr. Mizenko has calculated it.

16 Q Okay. Now, you see that it says total occurrences, you see
17 the number 9,633?

18 A Yes.

19 Q You understand that to be the total number of 99291 codes
20 reported in the claims data sent to FAIR Health during the period of time?

21 A Yes, sir.

22 Q Okay. Now, if my math is right, the average charge for this
23 service during this period in this area was \$1,191.39; do you see that?

24 A Yes.

25 Q And the median charge was \$845; do you see that?

010453

010453

1 A Yes.

2 Q And then the 80th percentile charge was \$1765; do you see
3 that?

4 A Yes.

5 Q And then the TeamHealth charge which in this case would
6 have been Fremont was \$1938.59; do you see that?

7 A I do.

8 Q Okay. Now, do you see that there are well over 1100
9 providers who reported charges above the 80th percentile in this period
10 for this code in this area?

11 A I'm sorry. Can you show me where you're pointing to?

12 Q Sure. Do you see where the 80th percentile is?

13 A I do, yes.

14 MR. LEYENDECKER: Excuse me, Mr. Blalack?

15 BY MR. BLALACK:

16 Q Do you see that there's observations with the numbers on
17 them?

18 THE COURT: Hang on. Hang on just a second.

19 MR. LEYENDECKER: I didn't hear he said what the period
20 was. I heard 99291. Can you tell me what period that is?

21 MR. BLALACK: It is May 2019.

22 MR. LEYENDECKER: Okay. Thank you.

23 BY MR. BLALACK:

24 Q Do you see that to the right, sir, every one of the bars has a
25 number by it, correct?

1 A Yes.

2 Q For example, that top bar that says 1144; do you see that?

3 A Yes.

4 Q That means there were 1144 providers who reported data on
5 claims forms to TeamHealth for 99291 in May 2019 in this area at that
6 rate, correct?

7 A Yes.

8 Q So my question is, using the green diamond for the 80th
9 percentile, do you agree with me that there are at least 1200 instances or
10 more of providers reporting charges above the 80th percentile for 99291
11 in this area in May 2019?

12 A Yes.

13 Q And then there are thousands of instances where healthcare
14 providers reported charges below \$800 for the same service, for the
15 same code in the same area in the same time period which you can see
16 by all the bars underneath the orange diamond; do you see that?

17 A I do.

18 Q And in fact, that diamond represents the 50-yard line, right?

19 A Yes.

20 Q That means half of the observations are just below 850 or so
21 dollars -- what is -- the median is 845. Half of the observations are below
22 845 and half are above, right?

23 A Yep. Yes.

24 Q And by the way, on the 80th percentile, do you see that's the
25 highest bar?

1 A I do.

2 Q That means 1705 providers just happened to bill the exact
3 80th percentile charge; do you agree with me?

4 A Approximately. The 80th percentile is a little bit less than
5 that, but yes. I understand your point.

6 Q So let me ask you this, using your analysis is that 400-dollar
7 charge there reasonable?

8 A In what context?

9 Q Is that a reasonable value for that service?

10 A By just looking at the \$400 bill charge alone in a vacuum?

11 Q Yes, sir.

12 A You can't determine that one way or another.

13 Q So just looking at the data that we've got in the FAIR Health
14 benchmark by itself, you could not answer that the \$400 was a
15 reasonable value, correct?

16 A Not based on the way it's presented here.

17 Q Okay. Let me ask you this. Would the \$800 that 1,039
18 providers charge, would that be reasonable?

19 A You can't determine that just by limiting your analysis to this
20 page.

21 Q All right. What about the \$1200 that was billed by that one
22 sole provider there? Is that reasonable value?

23 A Again, you cannot and should not look at one single entry
24 like that, that is in the \$1200 range.

25 Q So I take it, based on your testimony with respect to these

1 lower values, you would tell the jury, you can't just look at the FAIR
2 Health benchmark of 80th percentile and say, well, we know everything
3 we need to know and that's the reasonable value?

4 A That's a different question. I think you have to look at, one,
5 that the Defendants in this case specifically looked at and marked against
6 the 80th percentile. That's what the evidence in this case says. It's not
7 that they looked at other pieces. They looked at the 80th percentile,
8 number one. Number two, when you look at this data that's right here,
9 when you want to compare it to the actual claims in this case, you have
10 to compare it on an apples to apples basis, which means it goes from a
11 time period perspective, as well as a CPT code basis.

12 Q Let me take that last part first, and I'll come back to your
13 second. You agree with me that the CPT code that you're comparing
14 here, 99291, is one of the core CPT codes in dispute in this case, right?

15 A It is, yes.

16 Q And you agree with me that the time period May 2019 is
17 within the time period of dispute, correct?

18 A Yes.

19 Q And you agree with me that the area that's been described
20 here, geozip 890 Las Vegas, is part of the geographic area in dispute,
21 right?

22 A Yes.

23 Q So there's nothing about the code, the location, or the time
24 period that is not an apples to apples comparison, correct?

25 A Incorrect.

1 Q What is not an apples to apples comparison?

2 A Because my understanding from what Mr. Mizenko has done
3 is he's taken all of the charges that have a starting code of 99291, for
4 example, and he lumped those with the bundled charges. And when you
5 lump those with the bundled charges, you have a wide range of charges.

6 So what you have to do if you want to do an appropriate
7 comparison to FAIR Health is you've got to go look at the actual bill
8 charges of the Plaintiffs that were incurred during the same time period
9 of the survey as this, which is not just May. It's actually a period before
10 May, and you've got to compare just the core CPT code 99291 for the
11 Plaintiffs' claims, and just the 99291 core CPT code that's here. And
12 when you do that, you'll see a significantly different number.

13 Q Let's try it again. Are you saying that you believe Mr.
14 Mizenko's analysis in this histogram is analyzing something other than
15 just the 99291 code?

16 A It is -- no, I mean, he has represented it to be just 99291.

17 Q Right. So he's analyzing one of the codes at issue in the
18 case, correct?

19 A Yes.

20 Q Just one code, in at least this histogram?

21 A That's correct.

22 Q And he has 107 more that analyze the other codes, correct?

23 A That's correct.

24 Q And you analyzed 99291 --

25 A I did.

1 Q -- as one of the codes, right?

2 A Yes.

3 Q So you're both looking at one code, 99291. You both do that
4 in your analysis, right?

5 A Correct.

6 Q You both do it for the services rendered in the Las Vegas
7 area with the geozip 890, correct?

8 A Correct.

9 Q You both do it for claims that were reported for encounters in
10 May of 2019?

11 A Not literally May of 2019, but the encounters that incurred
12 during this survey period that resulted in the May 19 survey.

13 Q So you would capture the data for this period just like Mr.
14 Mizenko?

15 A Yes.

16 Q Okay. So with respect --

17 A Except for ensuring that I'm just capturing a 99291 CPT code.

18 Q Right. And you do that.

19 A Yes.

20 Q You have in your analysis an analysis of codes individually
21 by each code, and then you do a separate analysis for what you call the
22 bundle codes, right?

23 A Correct.

24 Q So you have individual code analysis, right?

25 A Yes.

1 Q Just like he does, right? He's analyzing one code here, right?

2 A In terms of the FAIR Health data.

3 Q Right. So for purposes of analyzing the FAIR Health data,
4 which you have talked about with this jury, you looked at a single code,
5 one of which is 99291, right?

6 A Yes.

7 Q You looked at it for services rendered in this area, Las Vegas?

8 A Yes.

9 Q Geozip 890, right?

10 A Yes.

11 Q Including data for the survey period May of 2019?

12 A Yes.

13 Q So in that respect, it's an apples to apples comparison?

14 A Yes.

15 Q Okay. Now, what you were saying is you cannot, and you're
16 not prepared to render a judgement that the charges from 1800 to 1200
17 to 800 to 400 is the reasonable value for the service based on just this
18 data, correct?

19 A I believe that the reasonable value of the service for 99291 is
20 represented by -- in the Defendant's documents -- is the 80th percentile,
21 which is \$1765.

22 Q Okay. You've said that now twice. Tell me which
23 Defendants' claim, in your view, in the record that the 80th percentile
24 represents the appropriate fair value for a service?

25 A All.

1 Q Every single one of them?

2 A Yeah, so the United -- basically, to clarify that, the United
3 documents will have a document that say UnitedHealthcare, and it'll
4 have a discussion about UnitedHealthcare and all of its affiliates, which
5 then essentially include all of these other Defendants that are here.

6 Q Okay. And you watched some of the trial, didn't you, so far,
7 correct?

8 A I watched the opening and then a little bit while I was here
9 yesterday.

10 Q Did you hear any United Defendants testify that that was
11 true?

12 A I don't recall one way or another.

13 Q So whatever -- sitting here today, you can't identify the
14 witness or one of the Defendants who represented under oath that what
15 you just said the record shows is that all Defendants believe the FAIR
16 Health 80th percentile equals the reasonable value of services?

17 A I don't know. Well, like I said, I don't recall that, and I don't
18 know if you would see that they would literally say all Defendants, but I
19 would be -- I don't know how to answer that any more.

20 Q Okay. So I take it your view about this histogram is that you
21 can't say that 400 -- you told me earlier 400 is not something you could
22 say is reasonable value; is that right?

23 A Just literally -- just limited to this particular piece of paper?
24 No.

25 Q So the 400 you can't say is reasonable value. The 800 is

1 something you can't say is reasonable value. The 1200 is something you
2 can't say is reasonable value. Are you with me so far?

3 A I am.

4 Q But the 1800, that's reasonable value, correct?

5 A The 1800 is a benchmark for reasonable value based on the
6 information provided by the Defendants in their documentation.

7 Q Okay. Now, let's go back, and we'll come back to this
8 question about the discovery in a second. Let's go back to the document
9 Mr. Leyendecker was showing you. I'm going to pick up with another --
10 this was the spelling incident. You remember this document, sir?

11 A Yes, sir, I do.

12 Q Okay. Let's make sure that the jury remembers what we
13 were discussing here. So my memory is that you represented that based
14 on your analysis, the average allowed amount across all of the 11,500
15 and something claims was \$246; is that right?

16 A Yes.

17 Q All right. My memory is that for that other number, all other
18 ER providers, you represented to the jury that based on your analysis of
19 what you called the United market data, that the average reimbursement
20 for the out-of-network claims in that data to other ER providers, other
21 than the Plaintiffs was 528?

22 A Yes.

23 Q All right. So does that mean, sir, that in your -- let me get the
24 calculator out because I'm not the guy that can do that without the
25 assistance of a calculator. So for purposes of just understanding how

1 these numbers compare, sir, am I correct that that would mean that for
2 the same population of claims that we had, which was 11,563, that would
3 mean that the allowed amount for these other Defendants was
4 \$6,105,264?

5 A Yes.

6 Q Is that right?

7 A Approximately.

8 Q And in fact, you did that calculation in your work papers for
9 your second report, correct?

10 A I did.

11 Q So just so the jury is clear on what you're doing here, you're
12 saying if you looked at the allowed amounts for ERs providers, other
13 than the Plaintiffs, and you use the average allowed to those other
14 Plaintiffs for the same types of services and measured it against the
15 same less disputed claim, the allowed amount that you would pay
16 would've been \$6,105,264?

17 A Correct. For allowed amount you would've received.

18 Q That the -- if that had been the measure, Plaintiffs would've
19 received that?

20 A Correct.

21 Q Instead of \$2,843,447.78?

22 A That's correct.

23 Q All right.

24 MR. BLALACK: Can you go to the next slide, please? All
25 right, thanks.

1 BY MR. BLALACK:

2 Q Now, so this is where you were summarizing your
3 calculation. And my memory is that what you did was you explained
4 this whole core bundle concept, right?

5 A Yes.

6 Q And you tabulated the total damages for the claims at issue
7 using your methodology, summed it up, and then on the next slide, you
8 showed how that dollars distribute by Defendant and Plaintiff; is that
9 right?

10 A Yes.

11 Q And all of these numbers that add up to this total start from
12 the premise that the allowed amount for each of these claims should've
13 been the bill charge?

14 A Correct.

15 Q Okay. If the jury finds that allowed amount for these claims
16 was not the bill charge and was some other number, this analysis is not
17 -- would not accurately capture the measure of damages, correct?

18 A Correct.

19 Q So that's the starting point. If they don't agree with that
20 premise, they can't use these numbers for memory damage, correct?

21 A Correct.

22 Q Let's talk about that first. I'm going to make sure I'm clear
23 about what your opinion is and what it is not. I thought I heard you say
24 -- you remember describing the steps that you took to reach the
25 calculations that we just showed the jury?

1 A Yes.

2 Q And the first step you described, I wrote it down as step one,
3 Plaintiffs claim they are owed their bill charge. You remember saying
4 that?

5 A Yes.

6 Q Okay. Now I want to understand what your opinion is in this
7 case because when you gave testimony earlier in the deposition, I asked
8 you whether you were doing a calculation where you accepted the
9 Plaintiffs' allegations as true for purposes of doing a damages
10 computation. Then whether you were coming before this jury and
11 purporting to actually render an opinion, an expert opinion, on whether
12 those bill of charges were actually the allowed amount. Do you
13 remember that question?

14 A I do, yeah.

15 Q I thought my memory was that you explained that you -- for
16 purposes of conducting a damages analysis, you treated that allegation
17 as true for purposes of rendering your opinion; is that accurate?

18 A Yes. I recall my deposition testimony as I rendered it as true,
19 but I didn't do it blindly. I did my own analysis to assess the
20 reasonableness of that claim.

21 Q Okay. So here, you're not rendering an opinion to the jury
22 that they should know that based on your expertise, your definitively
23 saying that full bill charges are the amount that was due and owing
24 under these circumstances. You're saying you had treated the Plaintiffs'
25 allegation as true for doing your calculation and then did diligence on

1 the record to make sure there's a reasonable basis for it?

2 A Yes. Recognizing the jury has a lot of information that
3 they've reviewed, including my opinion from my analysis that bill
4 charges is the reasonable amount to be --

5 Q Okay.

6 A -- used.

7 Q And by the way, all that analysis that you did to measure
8 whether the charges are reasonable whether it's looking at the FAIR
9 Health data, whether it's looking at data from other out-of-network
10 providers in United's data, that's only measuring whether the charges
11 are reasonable if that's the proper allowed amount, right? That's not
12 saying that's the proper -- that doesn't give you any indication of
13 whether that's the proper allowed amount, right?

14 A Well, yes and no. I mean, one piece is the analysis that is it
15 reasonable. The second piece is, is that if you look at the data, the
16 allowed amount prior to the alleged actions were based on usual and
17 customary charges and according to United's data and information,
18 reasonable and customary charges are measured against the FAIR
19 Health data.

20 Q Right.

21 A So there's a tie to not only just the reasonableness, but a tie
22 back to what the appropriate charges would have been prior to the
23 actions.

24 Q Right, but I just want to make sure that the methodology is
25 solid. First, you start with the question of what should be the allowed

1 amount, right? That's the first question that has to be answered for
2 purposes of conducting this analysis.

3 A Okay.

4 Q Do you agree with me on that? Is that --

5 A It's a narrative process, but you need to understand -- well, I
6 think you need to understand what the Plaintiffs would have received
7 absent the actions of the Defendants.

8 Q They alleged the [indiscernible] should have been bill
9 charges, right?

10 A That's correct.

11 Q You know, my clients contest that and say the allowed
12 amount was the amount that was reimbursed.

13 A That's my understanding. That's correct.

14 Q So that's a dispute, right?

15 A Yes.

16 Q So if you start for a damages analysis with what's the
17 allowed amount going to be for figuring out where you start, right?

18 A Right.

19 Q In your case, you started with full bill charges, right?

20 A Correct.

21 Q Then you did an analysis to determine whether those
22 charges are reasonable?

23 A The chronology is correct.

24 Q Okay. And then once you concluded it was reasonable, then
25 you did a mathematical equation to get to alleged damage?

1 A That's correct.

2 Q Okay. So where I'm going here, just so the jury is clear, you
3 are accepting the assertion of the Plaintiff that bill charges were and
4 should have been the allowed amount for these claims. You are not
5 rendering an independent expert opinion as an expert in insurance law
6 or insurance rules or the plan documents to say that was the right
7 allowed amount?

8 A Correct, as you've described it, but obviously, based on the
9 information that I have in the analysis I've performed, it supports the
10 Plaintiffs' claim.

11 Q Now, let's talk about that. What is the evidence that you
12 relied on to conclude that Plaintiffs are right and that the allowed amount
13 are these disputed claims of bill charges?

14 A I relied upon a combination of the information produced by
15 the Defendants, produced by all parties. I think I showed a chart -- Mr.
16 Leyendecker presented a chart I had prepared yesterday that kind of
17 summarized all the data and information that I have.

18 Q Right. And I was present for that chart --

19 A Okay.

20 Q -- but I'm asking for --

21 A Okay.

22 Q -- something a little more specific.

23 A So that's a component of it.

24 Q I'm going to make it simple because I don't want you to have
25 to look at everything you looked at. I know it's substantial. To help the

1 jury get along, you're saying you reviewed evidence that caused you to
2 believe there was a reasonable basis for Plaintiffs' allegations. The
3 Defendants knew and understood they had an obligation to pay charges,
4 correct?

5 A Correct.

6 Q Tell me what you're relying on, specifically.

7 A Specifically --

8 Q Not generally. Specifically.

9 A Well, I don't know that I can recite the Bates number of the
10 document, but what I can point you to is that there are United
11 documents --

12 Q Uh-huh.

13 A -- and there is United testimony of which -- some of which is
14 cited in my report, that state, both in 2016 --

15 Q Uh-huh.

16 A -- or state retrospectively a document that's in '17 and '18
17 that says, prior to -- it doesn't say prior to the actions, but it essentially
18 says, prior to some of these savings programs and things like that the
19 appropriate charge was billed charges.

20 Q Okay. He wrote that?

21 A United Healthcare wrote that document.

22 Q And who -- what individual? Like, what witness? What
23 person, based on your internal investigation from this?

24 A It was -- when you look at a United document like that, it
25 doesn't have a specific author. It actually has a copywrite on the bottom

1 of it to say this is United Healthcare, and United Healthcare and all of
2 their affiliates. It discusses through the process of the plant.

3 Q Okay.

4 A So it is those --

5 Q Is there anything else? Because I want to make sure that
6 we're not going to be surprised later to learn there's something else that
7 you didn't disclose. Is the thing you just described, which you can't
8 identify an author for; it just says United Healthcare its affiliates; is there
9 anything else?

10 A There are multiple documents that are similar to what I've
11 described. There are PowerPoint presentations. There is deposition
12 testimony, authenticating those documents.

13 Q Uh-huh. Whose deposition testimony?

14 A There's deposition testimony of Mr. Haben, Ms. Paradise.
15 There is deposition testimony of Ms. -- she's in charge of out-of-network
16 operations. I forget her name.

17 Q Anybody else?

18 A Well, then there's other deposition testimony of the
19 witnesses that relate to Data iSight, as well as Mr. Bristow that was a
20 representative of the Plaintiffs.

21 Q Right now what we're discussing is the assertion that the
22 Defendants in this case knew they were obligated to pay full bill charges.
23 That's what I'm asking you for the evidence you say you reviewed to
24 support that opinion.

25 A Okay. So -- all right. So now we're changing our opinion in

1 terms of they knew this?

2 Q Well, yeah, we can stick to that that was the obligation of
3 United Healthcare.

4 A Okay. So those documents --

5 Q You can do it however you want, sir.

6 A Okay.

7 Q Whatever works best for you.

8 A So there are documents, for example, they'll be a document
9 that is a -- you know, a 30-page document that's an -- it says -- I can't
10 remember what it is, but it says something like United Healthcare, and its
11 information package. And it has a description of in-network and out-of-
12 network services and how those services are to be reimbursed. There
13 are other documents that state, that are more, let's say after the 2016
14 time period that say prior to the beginning of 2017. They may not say
15 that literally. Prior to the beginning of 2017, out-of-network charges for
16 emergency room services were at billed charges. We want to get our
17 providers off of the reasonable and customary language, and we want to
18 lower those charges.

19 So there is a tie in the documents to both billed charges, being the
20 amount that is owed, and that amount being prior to the actions in this
21 matter. And there are documents that show and illustrate that the
22 actions taken to reduce the amount that's being reimbursed from that
23 billed charge amount.

24 Q Are you done, sir?

25 A Yeah, I'm sorry, I thought I was answering your question.

1 Q Okay. Yeah, I just wanted to make sure you were done
2 before I started asking the next question.

3 A Yes.

4 Q Okay. So you mentioned Mr. Haben. I've got deposition
5 transcript up there for you for Mr. Haben. Do you see where I have
6 deposition transcript?

7 A I see deposition transcript. Oh, okay, that's me.

8 Q Mr. Haben.

9 A I've got it right here.

10 Q Okay. Now, I'm going to direct you to a language, a quote --
11 MR. BLALACK: Strike that.

12 BY MR. BLALACK:

13 Q I'm going to direct you to the page and line that you cited in
14 your report for the proposition that the United Defendants knew and
15 understood and had an obligation to pay charges, okay? And if you
16 would, go to page 94 of the transcript, line 5, and I would use your
17 citation from your report. If you would like to close your report, I would
18 say that I'm showing you the first citation.

19 A Yes, I would appreciate that. Are we looking --

20 Q Do you have your report, sir, is the Defendants' Exhibit 5183.
21 I'm not going to move it into evidence. So we turn to your exhibit.

22 A That would be --

23 Q I think that should be it right there.

24 A Okay.

25 Q And we're just going to use it to help refresh your memory,

1 just so the jury is clear and accurate on the first pass.

2 A I'm sorry, will you tell me the exhibit --

3 Q Defendant's Exhibit 5183.

4 A 5183.

5 Q And you have a footnote, a footnote 39. Do you see you
6 citation to Mr. Haben's deposition?

7 A Yes, I do. Okay.

8 Q And in fact, you said that [indiscernible] deposition; don't
9 you?

10 A I do, yes.

11 Q All right. Let's look at that.

12 A And Ms. Bradley. That was the other person that I was
13 thinking about.

14 Q That's what I remember. By the way, sir, before we move on,
15 do you know who these three individuals work for?

16 A Yes. They all work for United Healthcare.

17 Q Do they work for Sierra?

18 A No, not that I recall.

19 Q Do they work for Health Plan of Nevada?

20 A Not that I recall.

21 Q Do they work for UMR?

22 A Not that I recall, other than they -- as we heard yesterday
23 from Mrs. Hare's testimony, I believe, that they all kind of collaborate
24 and work together.

25 Q Okay. So did you -- in connection with this deposition, did

1 you cite the deposition testimony of any employee of Sierra Health Plan
2 of Nevada or UMR?

3 A No.

4 Q Okay. Now, look at Mr. Haben's depo, and look at the
5 sentence, and I'll direct you to page 94 to lines 5 through 6, and you can
6 just skim that to yourself. You can read it through

7 A Okay. Let's see here. We've got --

8 Q Page 96, line 8. That covers the subject. Just let me know
9 when you're done.

10 A Yeah, let me -- just -- I'm sorry, just give me a second to kind
11 of catch up with you here.

12 Q Okay.

13 A Okay. You would like me to look at --

14 Q Page 94.

15 A Page -- okay.

16 Q And I'm directing you to the citation you have.

17 A Well, that's what I'm looking at. The citation is different.

18 Q You can read whatever you want.

19 A Okay. Well, I mean, I've got multiple citations. Would you
20 like me to go through each one of them?

21 Q Well, I'm going to have you cite seven pages; do you agree
22 with me?

23 A I cite Mr. Haben -- we're looking at footnote 39?

24 Q Correct.

25 A Okay. So yes, I cite Mr. Haben in 84 to 87, and 93 to 100, 183

1 to 188.

2 Q Okay. Look at all of those quickly, and then when you're
3 done, let me know so that I can ask you a question.

4 A Okay. Okay. I'm on the 183 ones. I'm almost done.

5 Q Okay.

6 A I'm just marking them here. I assume you're going to want
7 me to just recite them to you.

8 Q I don't want you to. The jury will get to see the language that
9 I'm interested in seeing.

10 A Okay. Okay.

11 Q So my question is this, and I'll keep it -- keep it with your
12 hand there so you can get to the transcript. So if you would, direct me to
13 the line -- page and line where Mr. Haben says that United Healthcare
14 understands that those full bill charges on out-of-network services, or
15 out-of-network emergency services.

16 A Okay. So beginning on page 85, there's a discussion leading
17 up to page -- in page 5, talking about the savings and these programs to
18 try to reduce the billed charges.

19 Q Let's go to the line and be specific.

20 A The line is --

21 Q The page and line.

22 A Line 5, starting at line 5.

23 Q Okay. To where? When does it end?

24 A Well, it's really line 5 through line 13.

25 Q Let's move that to the jury, okay?

1 A Okay. So it says here on line 5, it says, "Okay. How do you
2 calculate the savings?" The answer is, from Mr. Haben, "The billed
3 amount -- the billed charges of the provider, less the allowed amount
4 through out-of-network program."

5 Q Uh-huh.

6 A "Okay. The billed charges of the provider, minus the allowed
7 amount through the program equals the savings."

8 Q Okay. And [indiscernible] correct, and he says correct, right?

9 A That's right. And so --

10 Q Okay.

11 A -- I cited that as knowing that before these savings programs
12 were implemented, which are part of this case, what was paid before
13 that? Billed charges.

14 Q Let's -- now, let's break that down. See, your understanding,
15 that United -- well, let me ask this, when the shared savings programs
16 going to effect?

17 A The shared savings -- my recollection is that they have
18 evolved over a period of time. And I don't recall the exact date that they
19 would have technically begun.

20 Q Do you know that the shared savings programs were in place
21 back in the -- before 2010?

22 A I don't recall one way or another.

23 Q So you don't know when the shared savings program began?

24 A I know that there was a change in the shared savings
25 programs as it related to out-of-network services beginning on or around

1 the late 2016, early 2017 time period.

2 Q And what was that change?

3 A That change was to get the out-of-network emergency room
4 charges that were currently on usual and customary charges, that would
5 then be paid at billed charges off of that program and onto a savings
6 plan to reduce that amount that was allowed.

7 Q Is your [indiscernible] shared savings program when it
8 existed before this change was the reasonable and customary -- the
9 physician reasonable and customary payment; is that what your
10 understanding is?

11 A No.

12 Q So you understand there was a shared savings program with
13 a fee that had been in place for over a decade, correct?

14 A I don't recall that one way or another.

15 Q Okay. So that's -- if that's true, that's news to you, correct?

16 A No. There's a lot of information around the shared savings
17 plans, and exactly when they were implemented or not implemented --
18 I'm focusing on emergency room physicians and their -- and the -- and
19 the reimbursement to those emergency room physicians.

20 Q Okay. So the statement that Mr. Haben made that you said
21 shows that United Healthcare understood that it owed the full bill
22 charges as the allowed amount for services, is the statement,

23 "Q How do you calculate the savings?

24 "A The billed amount -- the bill charges [indiscernible] for the
25 out-of-network program."

1 "Q Okay.

2 "A And the bill charges, the provider [indiscernible] program
3 equals the savings, correct?"

4 A That is one reference, that's correct.

5 Q Okay. Now, that's because you're starting from the premise
6 that because savings are being calculated based on charges, providers
7 charges, that is somehow an acknowledgement that charges are
8 overdue, correct?

9 A Yes.

10 Q Okay. So is it your position to the jury that the provider bill
11 \$100,000 for a --

12 MR. BLALACK: Strike that.

13 BY MR. BLALACK:

14 Q That the amount due and owed would be amount of the
15 charges?

16 A If that was what was agreed upon by the parties and by --

17 Q Hold on, sir. You know this is an out-of-network case? There
18 are no contracts; you understand that, right?

19 A Okay.

20 Q Are you with me?

21 A I am.

22 Q There's no contract. No agreement between the parties; are
23 you with me?

24 A I am, yes.

25 Q Okay. In that scenario, is it your position that because the

1 billed -- the provider with \$100,000 for strep throat on a claim for and
2 submitted it for a member of United Healthcare, that United Healthcare is
3 owed to pay the allowed amount of charges because that's what
4 provider put on the form?

5 A Well, I think that's a difficult question to ask because it's
6 nonsensical that somebody would put \$100,000 on a strep throat sort of
7 thing. But to the extent that that was processed appropriately, and that
8 \$100,000 for, let's say that unique strep throat was reasonable, then that
9 would have been the amount that would have been paid.

10 Q So it sounds like you're putting a qualifier, sir, on the
11 obligation to pay the charges, which is the charge has got to be
12 reasonable?

13 A Yes. There is a part of it -- it's exactly right. That's the whole
14 analysis that we've talked about before.

15 Q So what we read is what the jury should be looking for, and
16 that quoted line that's in the transcripts is what the jury should be
17 looking for, for the support for your position that United Healthcare knew
18 and understood it was obligated to pay full billed charges when the
19 provider put that language?

20 A Well, what I would -- what I would say that the jury should
21 look for is they should look at that site, along with about one, two, three,
22 four, five, eight more sites that reference same or similar information,
23 not necessarily directed to the savings program, that all, when you --
24 when you put those citations together, acknowledge that prior to the
25 actions that are claimed in this case, the amount that was owed is the full

1 bill charge.

2 Q So did you -- it sounds like you were at the view that there
3 was a time when United Healthcare paid the Plaintiffs and others full bill
4 charges for their services and then they stopped doing that; is that your
5 understanding?

6 A Generally, that's correct. That's what the evidence illustrates.

7 Q Okay. Did you, in your preparation, review the testimony of
8 a TeamHealth official, senior officer named Kent Bristow?

9 A I did, yes.

10 Q Did you review his deposition testimony when he testified as
11 a corporate representative for two of the Plaintiffs in this case, Ruby
12 Crest and Team Physicians?

13 A Yes.

14 Q Okay. Do you remember Mr. Bristow testifying that for the
15 period prior to the dispute in this case, which is prior to July 1, 2017, but
16 the Defendants in this case allowed payments at full bill charges to those
17 two Plaintiffs, less than seven percent of the time?

18 A Yes.

19 Q Okay. So just so the jury understands and internalizes what
20 that means, with the period prior to 2017, dispute period, 7/1/17, 1/31/20.
21 You know that the evidence in the case shows that the Defendants
22 allowed full charges to Ruby Crest and Team Physicians seven percent of
23 the time, correct?

24 A Yes, that's what he testified to.

25 Q And you know the number is lower for Fremont, right?

1 A Slightly, yes.

2 Q Okay. So your position is that before the dispute happened,
3 you understand that the pattern of dealing between the parties was that
4 the Defendants did not pay those Plaintiffs full billed charges frequently?

5 A Yes. There were adjustments for other considerations.

6 Q They did not pay full bill charges frequently, correct?

7 A Correct.

8 Q Okay --

9 A Without adjustment for those considerations.

10 Q Now, do you agree with me, sir, that in assessing whether
11 the TeamHealth Plaintiffs are truly entitled to their full billed charges,
12 how frequently they are paid their full charges by other health insurers is
13 important evidence?

14 A Yes.

15 Q Okay. And did you look at that data?

16 A I'm sorry. Can you -- can you repeat the question?

17 Q Sure. Let me say it again. Did you look at the data from the
18 TeamHealth Plaintiffs showing how frequently during the period of
19 dispute -- leave aside what happened before with my clients. During the
20 period of dispute, did you look at the data produced by TeamHealth
21 Plaintiffs showing how frequently they were paid at full charges by other
22 health insurers, not my clients?

23 A Yes. I believe we were talking about that before lunch. Yes, I
24 did. I did look at that file early on in this case.

25 Q Do you recall seeing that other health insurers, not my

1 clients, during the period in question, reimbursed the TeamHealth
2 Plaintiffs at full billed charges only about six percent of the time?

3 A I don't recall that one way or another.

4 Q You don't remember that?

5 A No. I don't -- I don't remember the specifics. Six percent,
6 five percent, three percent --

7 Q Well, let me ask it another way --

8 A -- twenty percent. I don't recall the specifics.

9 Q Let me ask you this, sir. Let me -- did you review the
10 deposition testimony of Mr. Phillips, the TeamHealth Plaintiffs' other
11 damages expert in this case until very recently?

12 A No.

13 Q Did you see that he testified that based on his analysis, the
14 TeamHealth Plaintiffs were reimbursed for full billed charges by other
15 health insurers, not my clients --

16 MR. LEYENDECKER: Foundation. He just said he didn't
17 review the depo, Your Honor.

18 THE COURT: Objection sustained.

19 MR. BLALACK: I'll withdraw it.

20 BY MR. BLALACK:

21 Q Would -- does that surprise you if my representation, sir, is
22 that Mr. Phillips found that to be true? Does that surprise you?

23 A No.

24 Q Okay. And I take it you have the data to make that
25 determination yourself, correct? You have the Plaintiffs' market data?

1 A Yes.

2 Q You have the ability to know the answer to that question,
3 correct?

4 A Yes.

5 Q You do not know the answer to that question, correct?

6 A Not as I sit here, correct. The exact -- the exact percentage, I
7 do not know.

8 Q Because that's not something you decided to find out the
9 answer to, is it?

10 A It's something that I looked at early on, but it was just part of
11 the information.

12 Q Well, when you say you looked at it, you didn't look at it long
13 enough to know the answer and remember it, correct?

14 A Well, as I'm sure the jury knows, there's a lot of information
15 and a lot of numbers, and I, you know, endeavor to memorize as much
16 as I can. But I can't remember every bit of information.

17 Q Did you write that number down in your report anywhere?

18 A No.

19 Q So not only did you not remember it, you didn't, as you were
20 doing this in-depth investigation, get out a pen and scribble down on a
21 piece of paper that only six percent of the time did a health insurer other
22 than my client pay the TeamHealth Plaintiffs their full billed charges?

23 A That's correct. I did not write that down.

24 Q And so did you -- did I hear you just say that you saw the
25 opening statements in this case?

1 A Yes.

2 Q Okay. Sir, I'm going to show you a slide from Mr.
3 Leyendecker's opening statement that he gave to the jury. Do you
4 remember seeing this slide, sir?

5 A No, I don't.

6 Q Well --

7 A I was listening in, so I didn't -- I didn't have the visual.

8 Q Well, you missed it. It was good. And he said in this slide to
9 the jury that 99 percent of the time, the TeamHealth Plaintiffs do not get
10 their charges, and the 1 percent they do, that's this little green bar over
11 here. Do you remember? If you didn't see it, do you remember hearing
12 it?

13 A Yes, I do.

14 Q Okay. Is there anything about Mr. Leyendecker's statement
15 about the frequency with which other health insurers, not just my clients,
16 pay full bill charges to the TeamHealth Plaintiffs that you disagree with?

17 A No.

18 Q Okay. Now, if my memories of it -- and if we need to pull it
19 up, we can -- is that when explaining this slide to the jury, Mr.
20 Leyendecker said -- this is on page 54 of the transcript. He said, "You
21 know why 99 percent of the time, we don't get paid the bill charged?
22 Because 99 percent of the time, insurance companies, everyone besides
23 United, pays us a fair and reasonable discount off what they owed."

24 Do you remember Mr. Leyendecker making that statement?

25 A Generally, I remember the discussion. I don't remember the

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1 specifics one way or another.

2 Q Okay. Now, based on your analysis of the TeamHealth
3 Plaintiffs' market data, you know that that's not true, right? You know
4 that the TeamHealth Plaintiffs accept reimbursement at substantially
5 lower rates than billed charges from other out-of-network providers
6 when they're out-of-network, other than out-of-network health insurers?

7 A Well, your representation to me -- I didn't recall the exact
8 percentage. If your representation is that it is less than one percent or
9 greater than one percent, then it -- then it's different than what Mr.
10 Leyendecker has put forward here.

11 Q I just -- I want to make sure. I may have confused you, and if
12 I did, my apologies. What this is saying is how often is a TeamHealth
13 Plaintiff's billed charge claim paid at full charge.

14 A Okay.

15 Q And Mr. Leyendecker was representing, and I agree with him,
16 according to him, 99 percent of the time it's not paid at charges. It's paid
17 at something less. And I think that's what you understood him to be
18 saying, correct? Based on your own analysis of the data?

19 A Well, I didn't -- I did not recall it to be 99 percent of the time.
20 I thought that it was closer to, like, 94, 95 percent. I mean, we're splitting
21 hairs, but yeah.

22 Q Okay. And I confess, I think my data is 94 and Mr. Phillips
23 said 94. I'm not entirely sure why he went up to 99, but I'll take it. My
24 question, really, is his explanation was somehow within that 99 percent
25 that are paying less than charges, the other health insurers are paying a

1 reasonable out-of-network rate. That was the implication.

2 A Okay.

3 Q Did you do an analysis of the TeamHealth Plaintiffs' out-of-
4 network data to determine the rates of out-of-network reimbursement
5 that the TeamHealth Plaintiffs accept from other health insurers?

6 A Not specific to -- I didn't put a pen to paper specific to the
7 TeamHealth Plaintiffs' data. I certainly looked at other amounts allowed,
8 like we talked about earlier with regards to what I referenced as the
9 market data, to reconcile the difference between the amount that was
10 allowed by others and what the billed charge is to understand the
11 reasonableness of the difference between those numbers.

12 Q Right. But my question is this: did you look at the claims
13 data, the market data, for the TeamHealth Plaintiffs for their claims on
14 out-of-network claims to determine on an average or median basis what
15 they accepted in payment from other out-of-network health insurers?

16 A I'm sorry if I haven't answered your question. But yes, I did
17 look at that.

18 Q And what was the --

19 A Okay? And I -- and I think what I've said to you a couple
20 times is I did not go to put to a pen to paper exactly what that percentage
21 was.

22 Q So you cannot tell this jury what that number is, correct?

23 A No. I cannot tell them specifically what the percentage of
24 time in the TeamHealth data that they actually got 100 percent of their
25 billed charges.

1 Q I think we've got that, but I'm asking a slightly different
2 question. It may be I'm not being clear, and if so, my apologies. We've
3 already established they rarely were paid charges. I think we both agree
4 with that, correct?

5 A Well, yeah.

6 Q Ninety-four percent of time, anyway.

7 A Right.

8 Q So that's rare. You agree with me that's rare?

9 A I'll be real careful about that. But I think there's -- it's
10 infrequent.

11 Q Okay. Let's agree on infrequent.

12 A Okay.

13 Q So for when they don't get charges -- I'm asking a different
14 way --

15 A Okay.

16 Q So pooled claims where they're not paid charged.

17 A Right.

18 Q Did you go into the Plaintiffs' market data that you have, look
19 at the rates they were paid by other health insurers, not my clients, to
20 determine what the out-of-network reimbursement was for those
21 TeamHealth Plaintiffs' out-of-network claim?

22 A Yes. I did look at that.

23 Q And what was the number?

24 A Like I said, I didn't put a pen to paper. I don't recall. I -- my
25 best recollection is that they were reimbursed slightly more than what

1 the other United data was. The other United data is they were
2 reimbursed 50 percent and the TeamHealth Plaintiffs were about that
3 amount or slightly more. That's my best recollection.

4 Q So your -- you don't have the exact number, but your best
5 guess is that the other health insurers during the same period were
6 reimbursing the TeamHealth Plaintiffs at about 50 percent of their
7 charges, 40 percent of their charges?

8 A A little bit higher than that was my recollection.

9 Q Okay. But that's not something you formally calculated and
10 put in your report?

11 A That's correct.

12 Q Is there a reason why you didn't put that in there?

13 A Yes.

14 Q What was that?

15 A Well, the reason was that I understood that -- I understood
16 that what was important to me was not as much the number itself but
17 being able to reconcile between that amount and the billed charges that
18 were being claimed by the Plaintiffs in this case. That's the important
19 piece.

20 Q Thank you for that. Okay. Now, I think we can move ahead
21 because -- I do want to talk about the Data iSight product. That's
22 something that in your list of disputed -- the Plaintiffs' list of disputed
23 claims that you analyzed. You annotated every disputed claim that was
24 adjudicated using the Data iSight tool, correct?

25 A Yes.

1 MR. BLALACK: Okay. Can we bring up Plaintiffs' 473, those
2 first three pages? If you could, Shane, go over to the right-hand column
3 where there's the first Data iSight? Okay, there.

4 BY MR. BLALACK:

5 Q Now, sir, that AE column, that's the place where you
6 annotated the 11,500 claims, which ones were Data iSight and which
7 ones were not?

8 A Yes.

9 Q Okay. So there has been an enormous amount of time,
10 energy, and effort that this jury has gone through to learn about Data
11 iSight and all the ways it works and overrides, reports, and Wizard of Oz
12 and all that sort of thing. When you did this analysis, how many claims
13 on the disputed claims list, the 11,500, were reimbursed using Data
14 iSight?

15 A About 790 claims, as I recall.

16 Q Seven hundred and ninety claims. Sir, we can check your
17 analysis, but do you recall that was the number that you had in your
18 supplemental report, 792?

19 A I don't -- yeah. It was -- that -- that seems right.

20 Q The reason I'm asking --

21 A I mean, I'm -- I mean, I recalled 700 and you say 792.

22 That's -- we're probably consistent.

23 Q The reason I'm asking is that as the Plaintiffs have kept
24 changing their disputed claims list, they kept dropping claims, some of
25 which involved Data iSight. According to my count, you can do the math

1 and come out and you can count it, I had 686 claims that you've
2 identified as being reimbursed using Data iSight on this list.

3 A Okay.

4 Q Does that sound about right to you based on your analysis?

5 A Well, I didn't count them up this time. But if you --

6 Q Is there a way to do that quickly?

7 A Sure. Sure. You can go to the -- well, you can go to the filter
8 up there on column AD. You can click on the filter.

9 MR. BLALACK: Oh. All right, Shane. That will probably
10 be -- will you try that?

11 THE WITNESS: Probably should be blank.

12 MR. GODFREY: Click on E, AE, right?

13 THE WITNESS: Right.

14 MR. GODFREY: AE.

15 THE WITNESS: No -- yes, that's right. AD -- AE.

16 MR. GODFREY: Okay.

17 THE WITNESS: Okay? And then, so -- it's kind of hard for me
18 to see here.

19 MR. GODFREY: So we're backing out of that set?

20 THE WITNESS: You could say -- you could unclick Select.
21 Okay. And then click DIS, Data iSight.

22 MR. GODFREY: Okay. Okay.

23 THE WITNESS: Okay. And then hit Okay. And then, you
24 should sum that column. That would probably tell you at the bottom. It
25 looks like it's a count. I can't even read that. I need a --

1 MR. BLALACK: Could you go down, Shane?

2 THE WITNESS: Well, you don't even have to. You can look
3 in the -- just the bottom -- I'm happy to stand up and show you.

4 MR. BLALACK: Okay.

5 THE WITNESS: But you can sum.

6 THE COURT: You may.

7 THE WITNESS: Okay. I'm sorry. So here you are. Six
8 hundred candidates. So I get 685 as the total count.

9 MR. BLALACK: Okay.

10 THE WITNESS: So essentially what's happening is that this
11 column here where we filtered it --

12 MR. BLALACK: Yeah.

13 THE WITNESS: -- to say just these claims. And then,
14 because he's highlighted the entire column, it counts how many records
15 that he has counted that are -- that are now here that are for Data iSight.

16 BY MR. BLALACK:

17 Q Okay. So using your math -- and thank you, sir, and thank
18 you, Shane -- 658 out of 11,563 disputed claims went through Data iSight
19 according to your analysis.

20 A Yes, sir.

21 Q So do you mean that's a little over six percent?

22 A Yes, it is.

23 Q So the vast, vast, vast majority of disputed claims in this case
24 do not touch Data iSight, correct? Ninety-four percent.

25 A I'm hesitating because there was a claim of the whole

1 savings program and Data iSight falls into the savings programs. But
2 yes, the answer is correct. There's a -- there is a relatively small percent
3 of the 11,000 claims that have been tagged as being processed by Data
4 iSight.

5 Q Now, sir, do you recall that you did an analysis of the amount
6 allowed on average --

7 MR. LEYENDECKER: May we approach, Your Honor?

8 THE COURT: Yes.

9 [Sidebar at 1:52 p.m., ending at 1:52 p.m., not transcribed]

10 THE COURT: Okay. This is time for our afternoon recess, or
11 the first of the afternoon. During the recess, don't talk with each other or
12 anyone else on any subject connected to the trial. Don't read, watch, or
13 listen to any report of or commentary on the trial. Don't discuss this
14 case with anyone connected to it by any medium of information,
15 including without limitation newspapers, television, radio, internet, cell
16 phones, or texting.

17 Do not conduct any research on your own relating to the
18 case. Don't consult dictionaries, use the internet, or use reference
19 materials. Don't talk, text, use social media, tweet, Google issues, or
20 conduct any other type of research with regard to any issue, party,
21 witness, or attorney involved in this case.

22 Most importantly, do not form or express any opinion on any
23 subject connected with the trial until the matter is submitted to the jury.

24 It's 1:53. Let's be back sharp at 2:10.

25 THE MARSHAL: All rise for the jury.

1 [Jury out at 1:53 p.m.]

2 [Outside the presence of the jury]

3 THE COURT: Sir, you may step down during the recess.

4 THE WITNESS: Thank you.

5 THE COURT: Plaintiff, do you have anything for the record
6 before you take your break?

7 MR. ZAVITSANOS: Not from the Plaintiffs, Your Honor.

8 THE COURT: Defendant?

9 MR. BLALACK: Not from us, Your Honor.

10 THE COURT: So it seems to me that the Bristow issue,
11 when -- Mr. Zavitsanos, the Bristow issue, when the Defendant calls him
12 in their case in chief, they have the right to choose the method of
13 examination. But you may -- you're entitled to have your further
14 cross-examination.

15 MR. ZAVITSANOS: Yes. Thank you.

16 THE COURT: All right? Does that resolve that issue?

17 MR. BLALACK: Yes, it does. For us, it does.

18 THE COURT: Good. Thank you. Have a good break,
19 everybody.

20 [Recess taken from 1:54 p.m. to 2:10 p.m.]

21 [Outside the presence of the jury]

22 THE COURT: Please remain seated. So I'm not sure who
23 gave me deposition designations, but there's the rulings.

24 MR. BLALACK: Thank you, Your Honor.

25 THE COURT: Are we ready to bring in the jury?

1 MR. BLALACK: We are, Your Honor.

2 MR. LEYENDECKER: Yes, Your Honor.

3 THE COURT: Okay.

4 [Pause]

5 THE COURT: So I need to bring something to your attention.

6 Mr. R has had a -- just learned of a death in his family. He's pretty
7 shaken up, according to the marshal. I would propose that we bring him
8 in and assess that, and probably excuse him.

9 MR. BLALACK: Which one is Mr. Reese?

10 THE COURT: He would be Juror Number 10.

11 MR. BLALACK: Okay.

12 THE COURT: In the front row.

13 MR. BLALACK: Yeah.

14 THE COURT: The casino worker who takes notes.

15 MR. BLALACK: Understood.

16 THE COURT: Yeah. So do you guys want to excuse the
17 witness for that discussion?

18 MR. ZAVITSANOS: I'm sorry, Your Honor?

19 THE COURT: Would you like to excuse the witness for that
20 discussion?

21 MR. BLALACK: Oh, yeah.

22 MR. ZAVITSANOS: We don't -- we can excuse him.

23 THE COURT: Thank you. Bring in -- can you bring in Mr.
24 Reese?

25 THE MARSHAL: Yes. Watch your step.

1 THE COURT: Mr. Reese, we understand you just got some
2 bad news. We all extend our sincere sympathies to you and your family.

3 JUROR NO. 10: Thank you.

4 THE COURT: Do you think you can go on? Do you need to
5 travel?

6 JUROR NO. 10: No. It's in town, but I have to make
7 arrangements. And he -- I'm the only person he had left in the world.

8 THE COURT: We're all so very sorry.

9 JUROR NO. 10: And I don't think I can [indiscernible].

10 THE COURT: Thank you. And we didn't mean to put you --

11 JUROR NO. 10: I'm sorry.

12 THE COURT: -- on the spot. We didn't want to embarrass
13 you in front of everybody. But thank you. Why don't you step out with
14 him, Marshal, please?

15 THE COURT: Do you guys want a moment to confer with
16 your teams?

17 MR. BLALACK: I think I know what -- we're ready to proceed,
18 Your Honor.

19 MR. ZAVITSANOS: The same.

20 THE COURT: Bring them all in, please.

21 THE MARSHAL: Bring them all in?

22 THE COURT: Will you bring in -- yeah. Bring in Mr. Reese
23 alone, please.

24 THE MARSHAL: Yes, Your Honor.

25 [Pause]

1 THE MARSHAL: All rise for the jury.

2 [Jury in at 2:14 p.m.]

3 THE COURT: Mr. Reese, why don't you hold up right there?

4 Just hold up there. Thank you. Come on in, Ms. Wynn, Ms. Herzog.

5 Mr. Reese, we thank you for being willing to serve your
6 community. You've been such a great juror. You've taken notes, you've
7 been so attentive. We understand you've received some sad news in
8 your family. We thank you and excuse you from further jury service.

9 JUROR NO. 10: Okay, thank you. I'd like to apologize to
10 everybody. It's been educational and [indiscernible] experience. Sorry I
11 couldn't finish it out.

12 UNIDENTIFIED SPEAKER: Thank you for your time.

13 MR. BLALACK: Thank you.

14 UNIDENTIFIED SPEAKER: Thank you, sir.

15 MR. ZAVITSANOS: Our condolences.

16 THE COURT: All right. Let's ask the witness to come back
17 please. Mr. Leathers. Mr. Blalack, please proceed.

18 MR. BLALACK: Thank you, Your Honor.

19 BY MR. BLALACK:

20 Q Mr. Leathers, when we broke, we were discussing your
21 analysis of the two claims as it relates to the Data iSight service; do you
22 remember us talking about that?

23 A Yes, sir. I do.

24 MR. BLALACK: And if I could have Shane bring it back up to
25 show the column with the Data iSight claim?

1 BY MR. BLALACK:

2 Q So again, just reminding the jury you have 11,500 and some-
3 odd claims. You determined that, well, about six percent -- well, under
4 six percent had been reimbursed using the Data iSight tool, correct?

5 A Correct.

6 Q Okay. And I want to talk about that tool some more and what
7 you found in your investigation. Before I do that though, let's set those
8 640 or 90 whatever it was aside for the remainder, the other 94 percent.
9 Did you investigate or determine which of those claims were reimbursed
10 using the shared savings program?

11 A Yes.

12 Q Which ones were reimbursed using the shared savings
13 program?

14 A I attempted to investigate that and to identify that, and I was
15 unable to conclude which shared savings program, if any, were utilized
16 for each of those different claims.

17 Q Did you investigate to determine which of the claims had
18 been reimbursed using the ENRP Program?

19 A Yes, I investigated that. But was unable, based on the
20 information that I had, to determine which ones were or were not.

21 Q Did you investigate to determine which claims were
22 reimbursed using the physician reasonable and customary program?

23 A Yes.

24 Q And which -- how many funds were reimbursed using the
25 physician reasonable and customary program?

1 A My understanding is that -- two answers to that. One is that
2 is part of the dispute in terms of that they should have been reimbursed
3 at that reasonable and customary rate. But specifically how the actual
4 dispute was resolved, I investigated that and could not determine the
5 specific plan that was utilized.

6 Q Okay. And did you investigate to determine which of these
7 claims were reimbursed using the outlier cost management program?

8 A Yes.

9 Q And which claims were reimbursed using the outlier cost
10 management?

11 A So I believe that at a minimum, the ones that are identified as
12 iSight because the iSight and the outlier cost management program are
13 used interchangeably as part of the savings programs in here.

14 Q Okay. So that's the six percent or a little less?

15 A At least the six percent, yes.

16 Q Okay. But beyond that, you can't say anything about which
17 programs you --

18 A That's correct.

19 Q Okay. With respect to the out-of-network programs used by
20 UMR, do you remember the names of those programs?

21 A Do I remember each of them?

22 THE COURT RECORDER: Mr. Blalack?

23 BY MR. BLALACK:

24 Q Each of the names of the of the UMR program.

25 THE COURT: Can you turn your mic on?

1 THE COURT RECORDER: Can you turn your mic on?

2 MR. BLALACK: Oh, I'm sorry. I must not be loud enough to
3 be heard there.

4 THE COURT: No, this beautiful ceiling is coppered. And it's
5 beautiful, but it bounces the sound around. And with the masks, it's
6 even harder.

7 MR. BLALACK: My apologies.

8 BY MR. BLALACK:

9 Q So coming back to my question, sir. UMR, Defendant, there
10 are a number of different out-of-network programs; you're aware of that,
11 right?

12 A Yes.

13 Q What are the names of those programs?

14 A That were specifically used for UMR?

15 Q Yes.

16 A I don't recall.

17 Q Okay. Did you determine which of these UMR claims were
18 priced using the specific UMR programs that's been your testimony in
19 this case?

20 A I investigated that and was unable to determine that based
21 on the information available.

22 Q Okay. All right. So I take it then that with respect to out-of-
23 network programs -- just talking about that concept -- the only out-of-
24 network program that you identified with respect to each of the 11,500
25 claims are claims reimbursed using the Data iSight tool?

1 A Correct.

2 Q And that's just less than six percent?

3 A Yes.

4 Q And so you were not offering any opinion or evidence
5 connecting any of these other just short of 11,000 disputing claims to any
6 other out-of-network program, right?

7 A I'm not linking them to a specific out-of-network program
8 such as Data iSight or OCM.

9 Q Okay. Now, let's come back to Data iSight. And my
10 recollection -- so it's -- that you did an analysis of the Data iSight claims.
11 You determined what you probably -- essentially, a discount percentage
12 off of bill charges for claims reimbursed using Data iSight; is that right?

13 A Yes.

14 Q And then you did the same kind of analysis for the level of
15 discount for claims that were reimbursed using some other program, not
16 Data iSight?

17 A Correct.

18 Q Okay. Do you recall what the Data iSight reimbursement
19 allowed amount percentage was?

20 A I don't specifically. If I could look at my report, I can tell you
21 exactly what it was.

22 Q All right. And I'm going to ask you to do this. Let me try to
23 fast forward. I'll just give you some numbers and see if they seem about
24 right. So for the claims in dispute that were submitted by Fremont, did
25 you find that the Data iSight claims were allowed at about 30.3 percent

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