Case Nos. 85525 & 85656

In the Supreme Court of Nevada

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

Appellants,

vs.

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

Respondents.

Case No. 85525

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

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

APPELLANTS' APPENDIX
VOLUME 44
PAGES 10,751–11,000

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CHRONOLOGICAL TABLE OF CONTENTS TO APPENDIX

Tab	Document	Date	Vol.	Pages
1.	Complaint (Business Court)	04/15/19	1	1–17
2.	Peremptory Challenge of Judge	04/17/19	1	18–19
3.	Summons - UMR, Inc. dba United Medical Resources	04/25/19	1	20–22
4.	Summons – United Health Care Services Inc. dba UnitedHealthcare	04/25/19	1	23–25
5.	Summons – United Healthcare Insurance Company	04/25/19	1	26–28
6.	Summons – Health Plan of Nevada, Inc.	04/30/19	1	29–31
7.	Summons – Sierra Health-Care Options, Inc.	04/30/19	1	32–34
8.	Summons – Sierra Health and Life Insurance Company, Inc.	04/30/19	1	35–37
9.	Summons – Oxford Health Plans, Inc.	05/06/19	1	38–41
10.	Notice of Removal to Federal Court	05/14/19	1	42–100
11.	Motion to Remand	05/24/19	1	101–122
12.	Defendants' Statement of Removal	05/30/19	1	123–126
13.	Freemont Emergency Services (MANDAVIA), Ltd's Response to Statement of Removal	05/31/19	1	127–138
14.	Defendants' Opposition to Fremont Emergency Services (MANDAVIA), Ltd.'s Motion to Remand	06/21/19	1 2	139–250 251–275
15.	Rely in Support of Motion to Remand	06/28/19	2	276–308
16.	Civil Order to Statistically Close Case	12/10/19	2	309
17.	Amended Motion to Remand	01/15/20	2	310–348

Tab	Document	Date	Vol.	Pages
18.	Defendants' Opposition to Plaintiffs' Amended Motion to Remand	01/29/20	2	349–485
19.	Reply in Support of Amended Motion to Remand	02/05/20	2 3	486–500 501–518
20.	Order	02/20/20	3	519–524
21.	Order	02/24/20	3	525–542
22.	Notice of Entry of Order Re: Remand	02/27/20	3	543–552
23.	Defendants' Motion to Dismiss	03/12/20	3	553–698
24.	Notice of Intent to Take Default as to: (1) Defendant UnitedHealth Group, Inc. on All Claims; and (2) All Defendants on the First Amended Complaint's Eighth Claim for Relief	03/13/20	3 4	699–750 751
25.	Plaintiffs' Opposition to Defendants' Motion to Dismiss	03/26/20	4	752–783
26.	Appendix of Exhibits in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss	03/26/20	4	784–908
27.	Recorder's Transcript of Proceedings Re: Motions	04/03/20	4	909–918
28.	Defendants' Reply in Support of Motion to Dismiss	05/07/20	4	919–948
29.	Recorder's Transcript of Proceedings Re: Pending Motions	05/14/20	4	949-972
30.	First Amended Complaint	05/15/20	4 5	973–1000 1001–1021
31.	Recorder's Transcript of Hearing All Pending Motions	05/15/20	5	1022–1026
32.	Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint	05/26/20	5	1027–1172

Tab	Document	Date	Vol.	Pages
33.	Defendants' Supplemental Brief in Support of Their Motion to Dismiss Plaintiffs' First Amended Complaint Addressing Plaintiffs' Eighth Claim for Relief	05/26/20	5	1173–1187
34.	Plaintiffs' Opposition to Defendants' Motion to Dismiss First Amended Complaint	05/29/20	5 6	1188–1250 1251–1293
35.	Plaintiffs' Opposition to Defendants' Supplemental Brief in Support of Their Motion to Dismiss Plaintiffs' First Amended Complaint Addressing Plaintiffs' Eighth Claim for Relief	05/29/20	6	1294–1309
36.	Defendants' Reply in Support of Motion to Dismiss Plaintiffs' First Amended Complaint	06/03/20	6	1310–1339
37.	Defendants' Reply in Support of Their Supplemental Brief in Support of Their Motions to Dismiss Plaintiff's First Amended Complaint	06/03/20	6	1340–1349
38.	Transcript of Proceedings, All Pending Motions	06/05/20	6	1350–1384
39.	Transcript of Proceedings, All Pending Motions	06/09/20	6	1385–1471
40.	Notice of Entry of Order Denying Defendants' (1) Motion to Dismiss First Amended Complaint; and (2) Supplemental Brief in Support of Their Motion to Dismiss Plaintiffs' First Amended Complaint Addressing Plaintiffs' Eighth Claim for Relief	06/24/20	6 7	1472–1500 1501–1516
41.	Notice of Entry of Stipulated Confidentiality and Protective Order	06/24/20	7	1517–1540
42.	Defendants' Answer to Plaintiffs' First Amended Complaint	07/08/20	7	1541–1590

Tab	Document	Date	Vol.	Pages
43.	Recorder's Transcript of Proceedings Re: Motions (via Blue Jeans)	07/09/20	7	1591–1605
44.	Joint Case Conference Report	07/17/20	7	1606–1627
45.	Recorder's Transcript of Proceedings Re: Motions (via Blue Jeans)	07/23/20	7	1628–1643
46.	Transcript of Proceedings, Plaintiff's Motion to Compel Defendants' Production of Unredacted MultiPlan, Inc. Agreement	07/29/20	7	1644–1663
47.	Amended Transcript of Proceedings, Plaintiff's Motion to Compel Defendants' Production of Unredacted MultiPlan, Inc. Agreement	07/29/20	7	1664–1683
48.	Errata	08/04/20	7	1684
49.	Plaintiffs' Motion to Compel Defendants' Production of Claims File for At-Issue Claims, or, in the Alternative, Motion in Limine on Order Shortening Time	08/28/20	7 8	1685–1700 1701–1845
50.	Defendants' Opposition to Plaintiffs' Motion to Compel Defendants' Production of Claims File for At-Issue Claims, Or, in The Alternative, Motion in Limine on Order Shortening Time	09/04/20	8	1846–1932
51.	Recorder's Transcript of Proceedings Re: Pending Motions	09/09/20	8	1933–1997
52.	Defendants' Motion to Compel Production of Clinical Documents for the At-Issue Claims and Defenses and to Compel Plaintiffs to Supplement Their NRCP 16.1 Initial Disclosures on an Order Shortening Time	09/21/20	8 9	1998–2000 2001–2183
53.	Notice of Entry of Order Granting, in Part Plaintiffs' Motion to Compel Defendants' Production of Claims for At-Issue Claims,	09/28/20	9	2184–2195

Tab	Document	Date	Vol.	Pages
	Or, in The Alternative, Motion in Limine			
54.	Errata to Plaintiffs' Motion to Compel Defendants' List of Witnesses Production of Documents and Answers to Interrogatories	09/28/20	9	2196–2223
55.	Plaintiffs' Opposition to Motion to Compel Production of Clinical Documents for the At-Issue Claims and Defenses and to Compel Plaintiff to Supplement Their NRCP 16.1 Initial Disclosures on an Order Shortening Time	09/29/20	9-10	2224–2292
56.	Defendants' Opposition to Plaintiffs' Motion to Compel Defendants' List of Witnesses, Production of Documents, and Answers to Interrogatories on Order Shortening Time	10/06/20	10	2293–2336
57.	Reply in Support of Defendants' Motion to Compel Production of Clinical Documents for the At-Issue Claims and Defenses and to Compel Plaintiff to Supplement Their NRCP 16.1 Initial Disclosures	10/07/20	10	2337–2362
58.	Recorder's Transcript of Proceedings Re: Motions (via Blue Jeans)	10/08/20	10	2363–2446
59.	Recorder's Transcript of Proceedings Re: Motions (via Blue Jeans)	10/22/20	10	2447–2481
60.	Defendants' Objections to Plaintiffs' Order Granting Plaintiffs' Motion to Compel Defendants' List of Witnesses, Production of Documents and Answers to Interrogatories on Order Shortening Time	10/23/20	10 11	2482–2500 2501–2572
61.	Defendants' Objections to Plaintiffs to Plaintiffs' Order Granting Plaintiffs' Motion to Compel Defendants' List of Witnesses, Production of Documents and Answers to Interrogatories on Order Shortening Time	10/26/20	11	2573–2670

Tab	Document	Date	Vol.	Pages
62.	Notice of Entry of Order Denying Defendants' Motion to Compel Production of Clinical Documents for the At-Issue Claims and Defenses and to Compel Plaintiff to Supplement Their NRCP 16.1 Initial Disclosures on Order Shortening Time	10/27/20	11	2671–2683
63.	Notice of Entry of Order Granting Plaintiffs' Motion to Compel Defendants' List of Witnesses, Production of Documents and Answers to Interrogatories on Order Shortening Time	10/27/20	11	2684–2695
64.	Defendants' Objections to Plaintiffs' Order Denying Defendants' Motion to Compel Production of Clinical Documents for the At-Issue Claims and Defenses and to Compel Plaintiffs' to Supplement Their NRCP 16.1 Initial Disclosures on an Order Shortening Time	11/02/20	11	2696–2744
65.	Recorder's Transcript of Proceedings Re: Motions (via Blue Jeans)	11/04/20	11 12	2745–2750 2751–2774
66.	Notice of Entry of Order Setting Defendants' Production & Response Schedule Re: Order Granting Plaintiffs' Motion to Compel Defendants' List of Witnesses, Production of Documents and Answers to Interrogatories on Order Shortening Time	11/09/20	12	2775–2785
67.	Recorder's Transcript of Proceedings Re: Motions (via Blue Jeans)	12/23/20	12	2786–2838
68.	Recorder's Transcript of Proceedings Re: Motions (via Blue Jeans)	12/30/20	12	2839–2859
69.	Notice of Entry of Stipulated Electronically Stored Information Protocol Order	01/08/21	12	2860–2874

Tab	Document	Date	Vol.	Pages
70.	Appendix to Defendants' Motion to Compel Plaintiffs' Responses to Defendants' First and Second Requests for Production on Order Shortening Time	01/08/21	12 13 14	2875–3000 3001–3250 3251–3397
71.	Defendants' Motion to Compel Plaintiffs' Responses to Defendants' First and Second Requests for Production on Order Shortening Time	01/11/21	14	3398–3419
72.	Plaintiffs' Opposition to Motion to Compel Responses to Defendants' First and Second Requests for Production on Order Shortening Time	01/12/21	14	3420–3438
73.	Recorder's Partial Transcript of Proceedings Re: Motions (Unsealed Portion Only)	01/13/21	14	3439–3448
74.	Defendants' Reply in Support of Motion to Compel Plaintiffs' Responses to Defendants' First and Second Requests for Production on Order Shortening Time	01/19/21	14	3449–3465
75.	Appendix to Defendants' Reply in Support of Motion to Compel Plaintiffs' Responses to Defendants' First and Second Requests for Production on Order Shortening Time	01/19/21	14 15	3466–3500 3501–3658
76.	Recorder's Transcript of Proceedings Re: Motions	01/21/21	15	3659–3692
77.	Notice of Entry of Order Granting Defendants' Motion for Appointment of Special Master	02/02/21	15	3693–3702
78.	Notice of Entry of Order Denying Defendants' Motion to Compel Responses to Defendants' First and Second Requests for Production on Order Shortening Time	02/04/21	15	3703–3713
79.	Motion for Reconsideration of Order Denying Defendants' Motion to Compel	02/18/21	15 16	3714–3750 3751–3756

Tab	Document	Date	Vol.	Pages
	Plaintiffs Responses to Defendants' First and Second Requests for Production			
80.	Recorder's Transcript of Proceedings Re: Motions	02/22/21	16	3757–3769
81.	Recorder's Transcript of Proceedings Re: Motions	02/25/21	16	3770–3823
82.	Recorder's Transcript of Hearing Defendants' Motion to Extend All Case Management Deadlines and Continue Trial Setting on Order Shortening Time (Second Request)	03/03/21	16	3824–3832
83.	Plaintiffs' Opposition to Motion for Reconsideration of Order Denying Defendants' Motion to Compel Plaintiffs Responses to Defendants' First and Second Requests for Production	03/04/21	16	3833–3862
84.	Plaintiffs' Renewed Motion for Order to Show Cause Why Defendants Should Not Be Held in Contempt and for Sanctions	03/08/21	16	3863–3883
85.	Errata to Plaintiffs' Renewed Motion for Order to Show Cause Why Defendants Should Not Be Held in Contempt and for Sanctions	03/12/21	16	3884–3886
86.	Notice of Entry of Report and Recommendation #1	03/16/21	16	3887–3894
87.	Reply in Support of Motion for Reconsideration of Order Denying Defendants' Motion to Compel Plaintiffs Responses to Defendants' First and Second Requests for Production	03/16/21	16	3895–3909
88.	Recorder's Transcript of Hearing All Pending Motions	03/18/21	16	3910–3915

Tab	Document	Date	Vol.	Pages
89.	Defendants' Opposition to Plaintiffs' Renewed Motion for Order to Show Cause Why Defendants Should Not be Held in Contempt and for Sanctions	03/22/21	16	3916–3966
90.	Recorder's Transcript of Hearing All Pending Motions	03/25/21	16	3967–3970
91.	Notice of Entry of Report and Recommendation #2 Regarding Plaintiffs' Objection to Notice of Intent to Issue Subpoena Duces Tecum to TeamHealth Holdings, Inc. and Collect Rx, Inc. Without Deposition and Motion for Protective Order	03/29/21	16	3971–3980
92.	Recorder's Transcript of Hearing Motion to Associate Counsel on OST	04/01/21	16	3981–3986
93.	Recorder's Transcript of Proceedings Re: Motions	04/09/21	16 17	3987–4000 4001–4058
94.	Defendants' Objection to the Special Master's Report and Recommendation No. 2 Regarding Plaintiffs' Objection to Notice of Intent to Issue Subpoena Duces Tecum to TeamHealth Holdings, Inc. and Collect Rx, Inc. Without Deposition and Motion for Protective Order	04/12/21	17	4059–4079
95.	Notice of Entry of Report and Recommendation #3 Regarding Defendants' Motion to Compel Responses to Defendants' Second Set of Requests for Production on Order Shortening Time	04/15/21	17	4080–4091
96.	Recorder's Transcript of Hearing All Pending Motions	04/21/21	17	4092–4095
97.	Notice of Entry of Order Denying Motion for Reconsideration of Court's Order Denying Defendants' Motion to Compel Responses to	04/26/21	17	4096–4108

Tab	Document	Date	Vol.	Pages
	Defendants' First and Second Requests for Production			
98.	Defendants' Objection to the Special Master's Report and Recommendation No. 3 Regarding Defendants' Motion to Compel Responses to Defendants' Second Set of Request for Production on Order Shortening Time	04/28/21	17	4109–4123
99.	Defendants' Errata to Their Objection to the Special Master's Report and Recommendation No. 3 Regarding Defendants' Motion to Compel Responses to Defendants' Second Set of Requests for Production	05/03/21	17	4124–4127
100.	Defendants' Objections to Plaintiffs' Proposed Order Granting Plaintiffs' Renewed Motion for Order to Show Cause Why Defendants Should Not Be Held in Contempt and for Sanctions	05/05/21	17	4128–4154
101.	Recorder's Transcript of Hearing Motion for Leave to File Opposition to Defendants' Motion to Compel Responses to Second Set of Requests for Production on Order Shortening Time in Redacted and Partially Sealed Form	05/12/21	17	4155–4156
102.	Notice of Entry of Order of Report and Recommendation #6 Regarding Defendants' Motion to Compel Further Testimony from Deponents Instructed Not to Answer Question	05/26/21	17	4157–4165
103.	Recorder's Transcript of Proceedings Re: Motions	05/28/21	17	4166–4172
104.	Notice of Entry of Report and Recommendation #7 Regarding Defendants'	06/03/21	17	4173–4184

Tab	Document	Date	Vol.	Pages
	Motion to Compel Plaintiffs' Responses to Defendants' Amended Third Set of Requests for Production of Documents			
105.	Recorder's Transcript of Proceedings Re: Motions Hearing	06/03/21	17	4185–4209
106.	Recorder's Transcript of Proceedings Re: Motions Hearing	06/04/21	17	4210–4223
107.	Recorder's Transcript of Hearing Motion for Leave to File Plaintiffs' Response to Defendants' Objection to the Special Master's Report and Recommendation No. 3 Regarding Defendants' Second Set of Request for Production on Order Shortening Time in Redacted and Partially Sealed Form	06/09/21	17	4224–4226
108.	Defendants' Objections to Special Master Report and Recommendation No. 7 Regarding Defendants' Motion to Compel Responses to Defendants' Amended Third Set of Requests for Production of Documents	06/17/21	17	4227–4239
109.	Recorder's Transcript of Proceedings Re: Motions Hearing	06/23/21	17 18	4240–4250 4251–4280
110.	Plaintiffs' Response to Defendants' Objection to Special Master's Report and Recommendation #7 Regarding Defendants' Motion to Compel Responses to Amended Third Set of Request for Production of Documents	06/24/21	18	4281–4312
111.	Notice of Entry Report and Recommendations #9 Regarding Pending Motions	07/01/21	18	4313–4325
112.	United's Reply in Support of Motion to Compel Plaintiffs' Production of Documents	07/12/21	18	4326–4340

Tab	Document	Date	Vol.	Pages
	About Which Plaintiffs' Witnesses Testified on Order Shortening Time			
113.	Recorder's Transcript of Proceedings Re: Motions Hearing	07/29/21	18	4341–4382
114.	Notice of Entry of Order Granting Plaintiffs' Renewed Motion for Order to Show Cause Why Defendants Should Not Be Held in Contempt and for Sanctions	08/03/21	18	4383–4402
115.	Notice of Entry of Order Affirming and Adopting Report and Recommendation No. 2 Regarding Plaintiffs' Objection to Notice of Intent to Issue Subpoena Duces Tecum to TeamHealth Holdings, Inc. and Collect Rx, Inc. Without Deposition and Motion for Protective Order and Overruling Objection	08/09/21	18	4403–4413
116.	Notice of Entry of Order Affirming and Adopting Report and Recommendation No. 3 Regarding Defendants' Motion to Compel Responses to Defendants' Second Set of Requests for Production on Order Shortening Time and Overruling Objection	08/09/21	18	4414–4424
117.	Amended Notice of Entry of Order Affirming and Adopting Report and Recommendation No. 2 Regarding Plaintiffs' Objection to Notice of Intent to Issue Subpoena Duces Tecum to TeamHealth Holdings, Inc. and Collect Rx, Inc. Without Deposition and Motion for Protective Order and Overruling Objection	08/09/21	18	4425–4443
118.	Amended Notice of Entry of Order Affirming and Adopting Report and Recommendation No. 3 Regarding Defendants' Second Set of Requests for Production on Order Shortening Time and	08/09/21	18	4444–4464

Tab	Document	Date	Vol.	Pages
	Overruling Objection			
119.	Motion for Order to Show Cause Why Plaintiffs Should Not Be Held in Contempt and Sanctioned for Violating Protective Order	08/10/21	18	4465–4486
120.	Notice of Entry of Report and Recommendation #11 Regarding Defendants' Motion to Compel Plaintiffs' Production of Documents About Which Plaintiffs' Witnesses Testified	08/11/21	18	4487–4497
121.	Recorder's Transcript of Proceedings Re: Motions Hearing (Unsealed Portion Only)	08/17/21	18 19	4498–4500 4501–4527
122.	Plaintiffs' Opposition to United's Motion for Order to Show Cause Why Plaintiffs Should Not Be Held in Contempt and Sanctioned for Allegedly Violating Protective Order	08/24/21	19	4528–4609
123.	Recorder's Transcript of Proceedings Re: Motions Hearing	09/02/21	19	4610–4633
124.	Reply Brief on "Motion for Order to Show Cause Why Plaintiffs Should Not Be Hold in Contempt and Sanctioned for Violating Protective Order"	09/08/21	19	4634–4666
125.	Recorder's Partial Transcript of Proceedings Re: Motions Hearing	09/09/21	19	4667–4680
126.	Recorder's Partial Transcript of Proceedings Re: Motions Hearing (Via Blue Jeans)	09/15/21	19	4681–4708
127.	Notice of Entry of Order Affirming and Adopting Report and Recommendation No. 6 Regarding Defendants' Motion to Compel Further Testimony from Deponents Instructed Not to Answer Questions and Overruling Objection	09/16/21	19	4709–4726

Tab	Document	Date	Vol.	Pages
128.	Notice of Entry of Order Affirming and Adopting Report and Recommendation No. 7 Regarding Defendants' Motion to Compel Responses to Defendants' Amended Third Set of Request for Production of Documents and Overruling Objection	09/16/21	19	4727–4747
129.	Notice of Entry of Order Affirming and Adopting Report and Recommendation No. 9 Regarding Defendants' Renewed Motion to Compel Further Testimony from Deponents Instructed No to Answer and Overruling Objection	09/16/21	19 20	4748–4750 4751–4769
130.	Defendants' Motion for Partial Summary Judgment	09/21/21	20	4770–4804
131.	Defendants' Motion in Limine No. 1: Motion to Authorize Defendants to Offer Evidence Relating to Plaintiffs' Agreements with other Market Players and Related Negotiations	09/21/21	20	4805–4829
132.	Defendants' Motion in Limine No. 2: Motion Offered in the Alternative to MIL No. 1, to Preclude Plaintiffs from Offering Evidence Relating to Defendants' Agreements with Other Market Players and Related Negotiations	09/21/21	20	4830–4852
133.	Motion in Limine No. 4 to Preclude References to Defendants' Decision Making Process and Reasonableness of billed Charges if Motion in Limine No. 3 is Denied	09/21/21	20	4853–4868
134.	Defendants' Motion in Limine No. 10 to Exclude Reference of Defendants' Corporate Structure (Alternative Moton to be Considered Only if court Denies Defendants' Counterpart Motion in Limine No. 9)	09/21/21	20	4869–4885

Tab	Document	Date	Vol.	Pages
135.	Defendants' Motion in Limine No. 13: Motion to Authorize Defendants to Offer Evidence Relating to Plaintiffs' Collection Practices for Healthcare Claims	09/21/21	20	4886–4918
136.	Defendants' Motion in Limine No. 14: Motion Offered in the Alternative to MIL No. 13 to Preclude Plaintiffs from Contesting Defendants' Defenses Relating to Claims that were Subject to Settlement Agreement Between CollectRX and Data iSight; and Defendants' Adoption of Specific Negotiation Thresholds for Reimbursement Claims Appealed or Contested by Plaintiffs	09/21/21	20	4919–4940
137.	Defendants' Motion in Limine No. 24 to Preclude Plaintiffs from Referring to Themselves as Healthcare Professionals	09/21/21	20	4941–4972
138.	Defendants' Motion in Limine No. 7 to Authorize Defendants to Offer Evidence of the Costs of the Services that Plaintiffs Provided	09/22/21	20 21	4973–5000 5001–5030
139.	Defendants' Motion in Limine No. 8, Offered in the Alternative to MIL No. 7, to Preclude Plaintiffs from Offering Evidence as to the Qualitative Value, Relative Value, Societal Value, or Difficulty of the Services they Provided	09/22/21	21	5031–5054
140.	Defendants' Motion in Limine No. 9 to Authorize Defendants to Offer Evidence of Plaintiffs Organizational, Management, and Ownership Structure, Including Flow of Funds Between Related Entities, Operating Companies, Parent Companies, and Subsidiaries	09/22/21	21	5055–5080
141.	Defendants' Opposition to Plaintiffs' Motion	09/29/21	21	5081–5103

Tab	Document	Date	Vol.	Pages
	in Limine No. 1: to Exclude Evidence, Testimony and/or Argument Relating to (1) Increase in Insurance Premiums (2) Increase in Costs and (3) Decrease in Employee Wages/Benefits Arising from Payment of Billed Charges			
142.	Notice of Entry of Order Regarding Defendants' Objection to Special Master's Report and Recommendation No. 11 Regarding Defendants' Motion to Compel Plaintiffs' Production of Documents about which Plaintiffs' Witnesses Testified on Order Shortening Time	09/29/21	21	5104–5114
143.	Plaintiffs' Opposition to Defendants' Motion in Limine Nos. 3, 4, 5, 6 Regarding Billed Charges	09/29/21	21	5115–5154
144.	Plaintiffs' Opposition to Defendants' Motion in Limine No. 24 to Preclude Plaintiffs from Referring to Themselves as Healthcare Professionals	09/29/21	21	5155–5169
145.	Plaintiffs' Motion for Leave to File Second Amended Complaint on Order Shortening Time	10/04/21	21	5170–5201
146.	Transcript of Proceedings Re: Motions (Via Blue Jeans)	10/06/21	21	5202–5234
147.	Notice of Entry of Order Granting Plaintiffs' Motion for Leave to File Second Amended Complaint on Order Shortening Time	10/07/21	21	5235–5245
148.	Second Amended Complaint	10/07/21	21 22	5246–5250 5251–5264
149.	Plaintiffs' Motion in Limine to Exclude Evidence, Testimony and-or Argument Regarding the Fact that Plaintiffs Have	10/08/21	22	5265–5279

Tab	Document	Date	Vol.	Pages
	Dismissed Certain Claims and Parties on Order Shortening Time			
150.	Defendants' Answer to Plaintiffs' Second Amended Complaint	10/08/21	22	5280–5287
151.	Defendants' Objections to Plaintiffs' NRCP 16.1(a)(3) Pretrial Disclosures	10/08/21	22	5288–5294
152.	Plaintiffs' Objections to Defendants' Pretrial Disclosures	10/08/21	22	5295–5300
153.	Opposition to Plaintiffs' Motion in Limine to Exclude Evidence, Testimony and/or Argument Regarding the Fact that Plaintiffs have Dismissed Certain Claims and Parties on Order Shortening Time	10/12/21	22	5301–5308
154.	Notice of Entry of Order Denying Defendants' Motion for Order to Show Cause Why Plaintiffs Should not be Held in Contempt for Violating Protective Order	10/14/21	22	5309–5322
155.	Defendants' Opposition to Plaintiffs' Motion for Leave to File Supplemental Record in Opposition to Arguments Raised for the First Time in Defendants' Reply in Support of Motion for Partial Summary Judgment	10/18/21	22	5323–5333
156.	Media Request and Order Allowing Camera Access to Court Proceedings (Legal Newsline)	10/18/21	22	5334–5338
157.	Transcript of Proceedings Re: Motions	10/19/21	22 23	5339–5500 5501–5561
158.	Amended Transcript of Proceedings Re: Motions	10/19/21	23 24	5562–5750 5751–5784
159.	Amended Transcript of Proceedings Re: Motions	10/20/21	24	5785–5907
160.	Transcript of Proceedings Re: Motions	10/22/21	24	5908–6000

Tab	Document	Date	Vol.	Pages
			25	6001–6115
161.	Notice of Entry of Order Denying Defendants' Motion for Partial Summary Judgment	10/25/21	25	6116–6126
162.	Recorder's Transcript of Jury Trial – Day 1	10/25/21	25 26	6127–6250 6251–6279
163.	Recorder's Transcript of Jury Trial – Day 2	10/26/21	26	6280–6485
164.	Joint Pretrial Memorandum Pursuant to EDRC 2.67	10/27/21	26 27	6486–6500 6501–6567
165.	Recorder's Transcript of Jury Trial – Day 3	10/27/21	27 28	6568–6750 6751–6774
166.	Recorder's Transcript of Jury Trial – Day 4	10/28/21	28	6775–6991
167.	Media Request and Order Allowing Camera Access to Court Proceedings (Dolcefino Communications, LLC)	10/28/21	28 28	6992–6997
168.	Media Request and Order Allowing Camera Access to Court Proceedings (Dolcefino Communications, LLC)	10/28/21	28 29	6998–7000 7001–7003
169.	Defendants' Objection to Media Requests	10/28/21	29	7004–7018
170.	Supplement to Defendants' Objection to Media Requests	10/31/21	29	7019–7039
171.	Notice of Entry of Order Denying Defendants' Motion in Limine No. 1 Motion to Authorize Defendants to Offer Evidence Relating to Plaintiffs' Agreements with Other Market Players and Related Negotiations	11/01/21	29	7040–7051
172.	Notice of Entry of Order Denying Defendants' Motion in Limine No. 2: Motion Offered in the Alternative to MIL No. 1, to Preclude Plaintiffs from Offering Evidence	11/01/21	29	7052–7063

Tab	Document	Date	Vol.	Pages
	Relating to Defendants' Agreements with Other Market Players and Related Negotiations			
173.	Notice of Entry of Order Denying Defendants' Motion in Limine No. 3 to Allow Reference to Plaintiffs' Decision Making Processes Regarding Setting Billed Charges	11/01/21	29	7064–7075
174.	Notice of Entry of Order Denying Defendants' Motion in Limine No. 4 to Preclude References to Defendants' Decision Making Processes and Reasonableness of Billed Charges if Motion in Limine No. 3 is Denied	11/01/21	29	7076–7087
175.	Notice of Entry of Order Denying Defendants' Motion in Limine No. 12, Paired with Motion in Limine No. 11, to Preclude Plaintiffs from Discussing Defendants' Approach to Reimbursement	11/01/21	29	7088–7099
176.	Notice of Entry of Order Denying Defendants' Motion in Limine No. 5 Regarding Argument or Evidence that Amounts TeamHealth Plaintiffs Billed for Services are Reasonable [An Alternative Motion to Motion in Limine No. 6]	11/01/21	29	7100–7111
177.	Notice of Entry of Order Denying Defendants' Motion in Limine No. 7 to Authorize Defendants to Offer Evidence of the Costs of the Services that Plaintiffs Provided	11/01/21	29	7112–7123
178.	Notice of Entry of Order Denying Defendants' Motion in Limine No. 8, Offered in the Alternative to MIL No. 7, to Preclude Plaintiffs from Offering Evidence as to the	11/01/21	29	7124–7135

Tab	Document	Date	Vol.	Pages
	Qualitative Value, Relative Value, Societal Value, or Difficulty of the Services they Provided			
179.	Notice of Entry of Order Denying Defendants' Motion in Limine No. 10 to Exclude Evidence of Defendants' Corporate Structure (Alternative Motion to be Considered Only if Court Denies Defendants' Counterpart Motion in Limine No. 9)	11/01/21	29	7136–7147
180.	Notice of Entry of Order Denying Defendants' Motion in Limine No. 11, Paired with Motion in Limine No. 12, to Authorize Defendants to Discuss Plaintiffs' Conduct and Deliberations in Negotiating Reimbursement	11/01/21	29	7148–7159
181.	Notice of Entry of Order Denying Defendants' Motion in Limine No. 13 Motion to Authorize Defendants to Offer Evidence Relating to Plaintiffs' Collection Practices for Healthcare Claims	11/01/21	29	7160–7171
182.	Notice of Entry of Order Denying Defendants' Motion in Limine No. 14: Motion Offered in the Alternative MIL No. 13 to Preclude Plaintiffs from Contesting Defendants' Defenses Relating to Claims that were Subject to a Settlement Agreement Between CollectRx and Data iSight; and Defendants' Adoption of Specific Negotiation Thresholds for Reimbursement Claims Appealed or Contested by Plaintiffs	11/01/21	29	7172–7183
183.	Notice of Entry of Order Denying Defendants' Motion in Limine No. 15 to Preclude Reference and Testimony	11/01/21	29	7184–7195

Tab	Document	Date	Vol.	Pages
	Regarding the TeamHealth Plaintiffs Policy not to Balance Bill			
184.	Notice of Entry of Order Denying Defendants' Motion in Limine No. 18 to Preclude Testimony of Plaintiffs' Non-Retained Expert Joseph Crane, M.D.	11/01/21	29	7196–7207
185.	Notice of Entry of Order Denying Defendants' Motion in Limine No. 20 to Exclude Defendants' Lobbying Efforts	11/01/21	29	7208–7219
186.	Notice of Entry of Order Denying Defendants' Motion in Limine No. 24 to Preclude Plaintiffs from Referring to Themselves as Healthcare Professionals	11/01/21	29	7220–7231
187.	Notice of Entry of Order Denying Defendants' Motion in Limine No. 27 to Preclude Evidence of Complaints Regarding Defendants' Out-Of-Network Rates or Payments	11/01/21	29	7232–7243
188.	Notice of Entry of Order Denying Defendants' Motion in Limine No. 29 to Preclude Evidence Only Relating to Defendants' Evaluation and Development of a Company that Would Offer a Service Similar to Multiplan and Data iSight	11/01/21	29 30	7244–7250 7251–7255
189.	Notice of Entry of Order Denying Defendants' Motion in Limine No. 32 to Exclude Evidence or Argument Relating to Materials, Events, or Conduct that Occurred on or After January 1, 2020	11/01/21	30	7256–7267
190.	Notice of Entry of Order Denying Defendants' Motion in Limine to Preclude Certain Expert Testimony and Fact Witness Testimony by Plaintiffs' Non-Retained	11/01/21	30	7268–7279

Tab	Document	Date	Vol.	Pages
	Expert Robert Frantz, M.D.			
191.	Notice of Entry of Order Denying Defendants' Motion in Limine No. 38 to Exclude Evidence or Argument Relating to Defendants' use of MultiPlan and the Data iSight Service, Including Any Alleged Conspiracy or Fraud Relating to the use of Those Services	11/01/21	30	7280–7291
192.	Notice of Entry of Order Granting Plaintiffs' Motion in Limine to Exclude Evidence, Testimony And-Or Argument Regarding the Fact that Plaintiff have Dismissed Certain Claims	11/01/21	30	7292–7354
193.	Notice of Entry of Order Denying Defendants' Motion to Strike Supplement Report of David Leathers	11/01/21	30	7355–7366
194.	Plaintiffs' Notice of Amended Exhibit List	11/01/21	30	7367–7392
195.	Plaintiffs' Response to Defendants' Objection to Media Requests	11/01/21	30	7393–7403
196.	Recorder's Transcript of Jury Trial – Day 5	11/01/21	30 31	7404–7500 7501–7605
197.	Recorder's Transcript of Jury Trial – Day 6	11/02/21	31 32	7606–7750 7751–7777
198.	Defendants' Deposition Designations and Objections to Plaintiffs' Deposition Counter-Designations	11/03/21	32	7778–7829
199.	Defendants' Objections to Plaintiffs' Proposed Order Granting in Part and Denying in Part Plaintiffs' Motion in Limine to Exclude Evidence Subject to the Court's Discovery Orders	11/03/21	32	7830–7852
200.	Notice of Entry of Order Affirming and	11/03/21	32	7853–7874

Tab	Document	Date	Vol.	Pages
	Adopting Report and Recommendation No. 11 Regarding Defendants' Motion to Compel Plaintiffs' Production of Documents About Which Plaintiffs' Witnesses Testified			
201.	Recorder's Transcript of Jury Trial – Day 7	11/03/21	32 33	7875–8000 8001–8091
202.	Notice of Entry of Order Granting Defendants' Motion in Limine No. 17	11/04/21	33	8092–8103
203.	Notice of Entry of Order Granting Defendants' Motion in Limine No. 25	11/04/21	33	8104–8115
204.	Notice of Entry of Order Granting Defendants' Motion in Limine No. 37	11/04/21	33	8116–8127
205.	Notice of Entry of Order Granting in Part and Denying in Part Defendants' Motion in Limine No. 9	11/04/21	33	8128–8140
206.	Notice of Entry of Order Granting in Part and Denying in Part Defendants' Motion in Limine No. 21	11/04/21	33	8141–8153
207.	Notice of Entry of Order Granting in Part and Denying in Part Defendants' Motion in Limine No. 22	11/04/21	33	8154–8165
208.	Plaintiffs' Notice of Deposition Designations	11/04/21	33 34	8166–8250 8251–8342
209.	1st Amended Jury List	11/08/21	34	8343
210.	Recorder's Transcript of Jury Trial – Day 8	11/08/21	34 35	8344–8500 8501–8514
211.	Recorder's Amended Transcript of Jury Trial – Day 9	11/09/21	35	8515–8723
212.	Recorder's Transcript of Jury Trial – Day 9	11/09/21	35 36	8724–8750 8751–8932
213.	Recorder's Transcript of Jury Trial – Day 10	11/10/21	36	8933–9000

Tab	Document	Date	Vol.	Pages
			37	9001–9152
214.	Defendants' Motion for Leave to File Defendants' Preliminary Motion to Seal Attorneys' Eyes Only Documents Used at Trial Under Seal	11/12/21	37	9153–9161
215.	Notice of Entry of Order Granting in Part and Denying in Part Plaintiffs' Motion in Limine to Exclude Evidence Subject to the Court's Discovery Orders	11/12/21	37	9162–9173
216.	Plaintiffs' Trial Brief Regarding Defendants' Prompt Payment Act Jury Instruction Re: Failure to Exhaust Administrative Remedies	11/12/21	37	9174–9184
217.	Recorder's Transcript of Jury Trial – Day 11	11/12/21	37 38	9185–9250 9251–9416
218.	Plaintiffs' Trial Brief Regarding Specific Price Term	11/14/21	38	9417–9425
219.	2nd Amended Jury List	11/15/21	38	9426
220.	Defendants' Proposed Jury Instructions (Contested)	11/15/21	38	9427–9470
221.	Jointly Submitted Jury Instructions	11/15/21	38	9471–9495
222.	Plaintiffs' Proposed Jury Instructions (Contested)	11/15/21	38 39	9496–9500 9501–9513
223.	Plaintiffs' Trial Brief Regarding Punitive Damages for Unjust Enrichment Claim	11/15/21	39	9514–9521
224.	Recorder's Transcript of Jury Trial – Day 12	11/15/21	39 40	9522–9750 9751–9798
225.	Defendants' Response to TeamHealth Plaintiffs' Trial Brief Regarding Defendants' Prompt Pay Act Jury Instruction Re: Failure to Exhaust Administrative	11/16/21	40	9799–9806

Tab	Document	Date	Vol.	Pages
	Remedies			
226.	General Defense Verdict	11/16/21	40	9807–9809
227.	Plaintiffs' Proposed Verdict Form	11/16/21	40	9810–9819
228.	Recorder's Transcript of Jury Trial – Day 13	11/16/21	40 41	9820–10,000 10,001–10,115
229.	Reply in Support of Trial Brief Regarding Evidence and Argument Relating to Out-Of-State Harms to Non-Parties	11/16/21	41	10,116–10,152
230.	Response to Plaintiffs' Trial Brief Regarding Specific Price Term	11/16/21	41	10,153–10,169
231.	Special Verdict Form	11/16/21	41	10,169–10,197
232.	Trial Brief Regarding Jury Instructions on Formation of an Implied-In-Fact Contract	11/16/21	41	10,198–10,231
233.	Trial Brief Regarding Jury Instructions on Unjust Enrichment	11/16/21	41	10,232–10,248
234.	3rd Amended Jury List	11/17/21	41	10,249
235.	Defendants' Motion for Judgment as a Matter of Law	11/17/21	41 42	10,250 10,251–10,307
236.	Plaintiffs' Supplemental Jury Instruction (Contested)	11/17/21	42	10,308–10,313
237.	Recorder's Transcript of Jury Trial – Day 14	11/17/21	42 43	10,314–10,500 10,501–10,617
238.	Errata to Source on Defense Contested Jury Instructions	11/18/21	43	10,618–10,623
239.	Recorder's Transcript of Jury Trial – Day 15	11/18/21	43 44	10,624–10,750 10,751–10,946
240.	Defendants' Supplemental Proposed Jury Instructions (Contested)	11/19/21	44	10,947–10,952

Tab	Document	Date	Vol.	Pages
241.	Errata	11/19/21	44	10,953
242.	Notice of Entry of Order Granting Plaintiffs' Motion for Leave to File Supplemental Record in Opposition to Arguments Raised for the First Time in Defendants' Reply in Support of Motion for Partial Summary Judgment	11/19/21	44	10,954–10,963
243.	Plaintiffs' Proposed Special Verdict Form	11/19/21	44	10,964–10,973
244.	Recorder's Transcript of Jury Trial – Day 16	11/19/21	44 45	10,974–11,000 11,001–11,241
245.	Response to Plaintiffs' Trial Brief Regarding Punitive Damages for Unjust Enrichment Claim	11/19/21	45 46	11,242–11,250 11,251–11,254
246.	Plaintiffs' Second Supplemental Jury Instructions (Contested)	11/20/21	46	11,255–11,261
247.	Defendants' Supplemental Proposed Jury Instruction	11/21/21	46	11,262–11,266
248.	Plaintiffs' Third Supplemental Jury Instructions (Contested)	11/21/21	46	11,267–11,272
249.	Recorder's Transcript of Jury Trial – Day 17	11/22/21	46 47	11,273–11,500 11.501–11,593
250.	Plaintiffs' Motion to Modify Joint Pretrial Memorandum Re: Punitive Damages on Order Shortening Time	11/22/21	47	11,594–11,608
251.	Defendants' Opposition to Plaintiffs' Motion to Modify Joint Pretrial Memorandum Re: Punitive Damages on Order Shortening Time	11/22/21	47	11,609–11,631
252.	4th Amended Jury List	11/23/21	47	11,632
253.	Recorder's Transcript of Jury Trial – Day 18	11/23/21	47 48	11,633–11,750 11,751–11,907

Tab	Document	Date	Vol.	Pages
254.	Recorder's Transcript of Jury Trial – Day 19	11/24/21	48	11,908–11,956
255.	Jury Instructions	11/29/21	48	11,957–11,999
256.	Recorder's Transcript of Jury Trial – Day 20	11/29/21	48 49	12,000 12,001–12,034
257.	Special Verdict Form	11/29/21	49	12,035–12,046
258.	Verdict(s) Submitted to Jury but Returned Unsigned	11/29/21	49	12,047–12,048
259.	Defendants' Proposed Second Phase Jury Instructions	12/05/21	49	12,049–12,063
260.	Plaintiffs' Proposed Second Phase Jury Instructions and Verdict Form	12/06/21	49	12,064–12,072
261.	Plaintiffs' Supplement to Proposed Second Phase Jury Instructions	12/06/21	49	12,072–12,077
262.	Recorder's Transcript of Jury Trial – Day 21	12/06/21	49	12,078–,12,135
263.	Defendants' Proposed Second Phase Jury Instructions-Supplement	12/07/21	49	12,136–12,142
264.	Jury Instructions Phase Two	12/07/21	49	12,143–12,149
265.	Special Verdict Form	12/07/21	49	12,150–12,152
266.	Recorder's Transcript of Jury Trial – Day 22	12/07/21	49 50	12,153–12,250 12,251–12,293
267.	Motion to Seal Defendants' Motion to Seal Certain Confidential Trial Exhibits	12/15/21	50	12,294–12,302
268.	Motion to Seal Defendants' Supplement to Motion to Seal Certain Confidential Trial Exhibits	12/15/21	50	12,303–12,311
269.	Notice of Entry of Order Granting Defendants' Motion for Leave to File Defendants' Preliminary Motion to Seal Attorneys' Eyes Only Documents Used at	12/27/21	50	12,312–12,322

Tab	Document	Date	Vol.	Pages
	Trial Under Seal			
270.	Plaintiffs' Opposition to United's Motion to Seal	12/29/21	50	12,323–12,341
271.	Defendants' Motion to Apply the Statutory Cap on Punitive Damages	12/30/21	50	12,342–12,363
272.	Appendix of Exhibits to Defendants' Motion to Apply the Statutory Cap on Punitive Damage	12/30/21	50 51	12,364–12,500 12,501–12,706
273.	Defendants' Objection to Plaintiffs' Proposed Order Denying Defendants' Motion for Judgment as a Matter of Law	01/04/22	51	12,707–12,717
274.	Notice of Entry of Order Denying Defendants' Motion for Judgement as a Matter of Law	01/06/22	51	12,718–12,738
275.	Motion to Seal Defendants' Reply in Support of Motion to Seal Certain Confidential Trial Exhibits	01/10/22	51	12,739–12,747
276.	Motion to Seal Defendants' Second Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits	01/10/22	51 52	12,748–12,750 12,751–12,756
277.	Defendants' Motion to Seal Courtroom During January 12, 2022 Hearing on Defendants' Motion to Seal Certain Confidential Trial Exhibits on Order Shortening Time	01/11/22	52	12,757–12,768
278.	Plaintiffs' Opposition to Defendants' Motion to Seal Courtroom During January 12, 2022 Hearing	01/12/22	52	12,769–12,772
279.	Plaintiffs' Opposition to Defendants' Motion to Apply Statutory Cap on Punitive Damages and Plaintiffs' Cross Motion for	01/20/22	52	12,773–12,790

Tab	Document	Date	Vol.	Pages
	Entry of Judgment			
280.	Appendix in Support of Plaintiffs' Opposition to Defendants' Motion to Apply Statutory Cap on Punitive Damages and Plaintiffs' Cross Motion for Entry of Judgment	01/20/22	52	12,791–12,968
281.	Notice of Entry of Order Granting Plaintiffs' Proposed Schedule for Submission of Final Redactions	01/31/22	52	12,969–12,979
282.	Notice of Entry of Stipulation and Order Regarding Schedule for Submission of Redactions	02/08/22	52	12,980–12,996
283.	Defendants' Opposition to Plaintiffs' Cross-Motion for Entry of Judgment	02/10/22	52 53	12,997–13,000 13,001–13,004
284.	Defendant' Reply in Support of Their Motion to Apply the Statutory Cap on Punitive Damages	02/10/22	53	13,005–13,028
285.	Notice of Entry of Order Shortening Time for Hearing Re: Plaintiffs' Motion to Unlock Certain Admitted Trial Exhibits	02/14/22	53	13,029–13,046
286.	Defendants' Response to Plaintiffs' Motion to Unlock Certain Admitted Trial Exhibits on Order Shortening Time	02/15/22	53	13,047–13,053
287.	Plaintiffs' Reply in Support of Cross Motion for Entry of Judgment	02/15/22	53	13,054–13,062
288.	Defendants' Index of Trial Exhibit Redactions in Dispute	02/16/22	53	13,063–13,073
289.	Notice of Entry of Stipulation and Order Regarding Certain Admitted Trial Exhibits	02/17/22	53	13,074–13,097
290.	Transcript of Proceedings Re: Motions Hearing	02/17/22	53	13,098–13,160

Tab	Document	Date	Vol.	Pages
291.	Objection to Plaintiffs' Proposed Judgment and Order Denying Motion to Apply Statutory Cap on Punitive Damages	03/04/22	53	13,161–13,167
292.	Notice of Entry of Judgment	03/09/22	53	13,168–13,178
293.	Notice of Entry of Order Denying Defendants' Motion to Apply Statutory Cap on Punitive Damages	03/09/22	53	13,179–13,197
294.	Health Care Providers' Verified Memorandum of Cost	03/14/22	53	13,198–13,208
295.	Appendix of Exhibits in Support of Health Care Providers' Verified Memorandum of Cost Volume 1	03/14/22	53 54	13,209–13,250 13.251–13,464
296.	Appendix of Exhibits in Support of Health Care Providers' Verified Memorandum of Cost Volume 2	03/14/22	54 55	13,465–13,500 13,501–13,719
297.	Appendix of Exhibits in Support of Health Care Providers' Verified Memorandum of Cost Volume 3	03/14/22	55 56	13,720–13,750 13,751–13,976
298.	Appendix of Exhibits in Support of Health Care Providers' Verified Memorandum of Cost Volume 4	03/14/22	56 57	13,977–14,000 14,001–14,186
299.	Appendix of Exhibits in Support of Health Care Providers' Verified Memorandum of Cost Volume 5	03/14/22	57 58	14,187–14,250 14,251–14,421
300.	Appendix of Exhibits in Support of Health Care Providers' Verified Memorandum of Cost Volume 6	03/14/22	58 59	14,422–14,500 14,501–14,673
301.	Appendix of Exhibits in Support of Health Care Providers' Verified Memorandum of Cost Volume 7	03/14/22	59 60	14,674–14,750 14,751–14,920
302.	Appendix of Exhibits in Support of Health Care Providers' Verified Memorandum of	03/14/22	60 61	14,921–15,000 15,001–15,174

Tab	Document	Date	Vol.	Pages
	Cost Volume 8			
303.	Appendix of Exhibits in Support of Health Care Providers' Verified Memorandum of Cost Volume 9	03/14/22	61 62	15,175–15,250 15,251–15,373
304.	Defendants' Motion to Retax Costs	03/21/22	62	15,374–15,388
305.	Health Care Providers' Motion for Attorneys' Fees	03/30/22	62	15,389–15,397
306.	Appendix of Exhibits in Support of Health Care Providers' Motion for Attorneys' Fees Volume 1	03/30/22	62 63	15,398–15,500 15,501–15,619
307.	Appendix of Exhibits in Support of Health Care Providers' Motion for Attorneys' Fees Volume 2	03/30/22	63 64	15,620–15,750 15,751–15,821
308.	Appendix of Exhibits in Support of Health Care Providers' Motion for Attorneys' Fees Volume 3	03/30/22	64 65	15,822–16,000 16,001–16,053
309.	Appendix of Exhibits in Support of Health Care Providers' Motion for Attorneys' Fees Volume 4	03/30/22	65	16,054–16,232
310.	Appendix of Exhibits in Support of Health Care Providers' Motion for Attorneys' Fees Volume 5	03/30/22	65 66	16,233–16,250 16,251–16,361
311.	Defendants Rule 62(b) Motion for Stay Pending Resolution of Post-Trial Motions on Order Shortening Time	04/05/22	66	16,362–16,381
312.	Defendants' Motion for Remittitur and to Alter or Amend the Judgment	04/06/22	66	16,382–16,399
313.	Defendants' Renewed Motion for Judgment as a Matter of Law	04/06/22	66	16,400–16,448
314.	Motion for New Trial	04/06/22	66 67	16,449–16,500 16,501–16,677

Tab	Document	Date	Vol.	Pages
315.	Notice of Appeal	04/06/22	67	16,678–16,694
316.	Case Appeal Statement	04/06/22	67 68	16,695–16,750 16,751–16,825
317.	Plaintiffs' Opposition to Defendants' Rule 62(b) Motion for Stay	04/07/22	68	16,826–16,831
318.	Reply on "Defendants' Rule 62(b) Motion for Stay Pending Resolution of Post-Trial Motions" (*on Order Shortening Time*)	04/07/22	68	16,832–16,836
319.	Transcript of Proceedings Re: Motions Hearing	04/07/22	68	16,837–16,855
320.	Opposition to Defendants' Motion to Retax Costs	04/13/22	68	16,856–16,864
321.	Appendix in Support of Opposition to Defendants' Motion to Retax Costs	04/13/22	68 69	16,865–17,000 17,001–17,035
322.	Defendants' Opposition to Plaintiffs' Motion for Attorneys' Fees	04/20/22	69	17,036–17,101
323.	Transcript of Proceedings Re: Motions Hearing	04/21/22	69	17,102–17,113
324.	Notice of Posting *Supersedeas* Bond	04/29/22	69	17,114–17,121
325.	Defendants' Reply in Support of Motion to Retax Costs	05/04/22	69	17,122–17,150
326.	Health Care Providers' Reply in Support of Motion for Attorneys' Fees	05/04/22	69	17,151–17,164
327.	Plaintiffs' Opposition to Defendants' Motion for Remittitur and to Alter or Amend the Judgment	05/04/22	69	17,165–17,178
328.	Plaintiffs' Opposition to Defendants' Motion for New Trial	05/04/22	69 70	17,179–17,250 17,251–17,335
329.	Plaintiffs' Opposition to Defendants' Renewed Motion for Judgment as a Matter	05/05/22	70	17,336–17,373

Tab	Document	Date	Vol.	Pages
	of Law			
330.	Reply in Support of Defendants' Motion for Remittitur and to Alter or Amend the Judgment	06/22/22	70	17,374–17,385
331.	Reply in Support of Defendants' Renewed Motion for Judgment as a Matter of Law	06/22/22	70	17,386–17,411
332.	Reply in Support of Motion for New Trial	06/22/22	70	17,412–17,469
333.	Notice of Supplemental Attorneys Fees Incurred After Submission of Health Care Providers' Motion for Attorneys Fees	06/24/22	70 71	17,470–17,500 17,501–17,578
334.	Defendants' Response to Improper Supplement Entitled "Notice of Supplemental Attorney Fees Incurred After Submission of Health Care Providers' Motion for Attorneys Fees"	06/28/22	71	17,579–17,593
335.	Notice of Entry of Order Granting Plaintiffs' Motion to Modify Joint Pretrial Memorandum Re: Punitive Damages on Order Shortening Time	06/29/22	71	17,594–17,609
336.	Transcript of Proceedings Re: Motions Hearing	06/29/22	71	17,610–17,681
337.	Order Amending Oral Ruling Granting Defendants' Motion to Retax	07/01/22	71	17,682–17,688
338.	Notice of Entry of Order Denying Defendants' Motion for Remittitur and to Alter or Amend the Judgment	07/19/22	71	17,689–17,699
339.	Defendants' Objection to Plaintiffs' Proposed Order Approving Plaintiffs' Motion for Attorneys' Fees	07/26/22	71	17,700–17,706
340.	Notice of Entry of Order Approving Plaintiffs' Motion for Attorney's Fees	08/02/22	71	17,707–17,725

Tab	Document	Date	Vol.	Pages
341.	Notice of Entry of Order Granting in Part and Denying in Part Defendants' Motion to Retax Costs	08/02/22	71	17,726–17,739
342.	Amended Case Appeal Statement	08/15/22	71 72	17,740–17,750 17,751–17,803
343.	Amended Notice of Appeal	08/15/22	72	17,804–17,934
344.	Reply in Support of Supplemental Attorney's Fees Request	08/22/22	72	17,935–17,940
345.	Objection to Plaintiffs' Proposed Orders Denying Renewed Motion for Judgment as a Matter of Law and Motion for New Trial	09/13/22	72	17,941–17,950
346.	Recorder's Transcript of Hearing Re: Hearing	09/22/22	72	17,951–17,972
347.	Limited Objection to "Order Unsealing Trial Transcripts and Restoring Public Access to Docket"	10/06/22	72	17,973–17,978
348.	Defendants' Motion to Redact Portions of Trial Transcript	10/06/22	72	17,979–17,989
349.	Plaintiffs' Opposition to Defendants' Motion to Redact Portions of Trial Transcript	10/07/22	72	17,990–17,993
350.	Transcript of Proceedings re Status Check	10/10/22	72 73	17,994–18,000 18,001–18,004
351.	Notice of Entry of Order Approving Supplemental Attorney's Fee Award	10/12/22	73	18,005–18,015
352.	Notice of Entry of Order Denying Defendants' Motion for New Trial	10/12/22	73	18,016–18,086
353.	Notice of Entry of Order Denying Defendants' Renewed Motion for Judgment as a Matter of Law	10/12/22	73	18,087–18,114
354.	Notice of Entry of Order Unsealing Trial Transcripts and Restoring Public Access to	10/12/22	73	18,115–18,125

Tab	Document	Date	Vol.	Pages
	Docket			
355.	Notice of Appeal	10/12/22	73 74	18,126–18,250 18,251–18,467
356.	Case Appeal Statement	10/12/22	74 75	18,468–18,500 18,501–18,598
357.	Notice of Entry of Order Denying "Motion to Redact Portions of Trial Transcript"	10/13/22	75	18,599–18,608
358.	Notice of Entry of Order Granting in Part and Denying in Part Defendants' Motion to Seal Certain Confidential Trial Exhibits	10/18/22	75 76	18,609–18,750 18,751–18,755
359.	Recorder's Transcript of Hearing Status Check	10/20/22	76	18,756–18,758
360.	Notice of Entry of Stipulation and Order Regarding Expiration of Temporary Stay for Sealed Redacted Transcripts	10/25/22	76	18,759–18,769
361.	Notice of Filing of Writ Petition	11/17/22	76	18,770–18855
362.	Trial Exhibit D5502		76 77	18,856–19,000 19,001–19,143
491.	Appendix of Exhibits in Support of Plaintiffs' Renewed Motion for Order to Show Cause Why Defendants Should Not Be Held in Contempt and for Sanctions	03/08/21	145 146	35,813–36,062 36,063–36,085
492.	Transcript Re: Proposed Jury Instructions	11/21/21	146	36,086–36,250

Filed Under Seal

Tab	Document	Date	Vol.	Pages
363.	Plaintiffs' Motion to Compel Defendants' List of Witnesses, Production of Documents and Answers to Interrogatories on Order Shortening Time	09/28/20	78	19,144–19,156

364.	Plaintiffs' Reply in Support of Renewed Motion for Order to Show Cause Why Defendants Should Not Be Held in Contempt and for Sanctions	04/01/21	78	19,157–19,176
365.	Appendix of Exhibits in Support of Plaintiffs' Renewed Motion for Order to Show Cause Why Defendants Should Not Be Held in Contempt and for Sanctions	04/01/21	78	19,177–19,388
366.	Plaintiffs' Response to Defendants Objection to the Special Master's Report and Recommendation No. 2 Regarding Plaintiffs' Objection to Notice of Intent to Issue Subpoena Duces Tecum to TeamHealth Holdings, Inc. and Collect Rx, Inc. Without Deposition and Motion for Protective Order	04/19/21	78 79	19,389–19,393 19,394–19,532
367.	Plaintiffs' Response to Defendants' Objection to the Special Master's Report and Recommendation No. 3 Regarding Defendants' Motion to Compel Responses to Defendants' Second Set of Request for Production on Order Shortening Time	05/05/21	79	19,533–19,581
368.	Appendix to Defendants' Motion to Supplement the Record Supporting Objections to Reports and Recommendations #2 & #3 on Order Shortening Time	05/21/21	79 80 81	19,582–19,643 19,644–19,893 19,894–20,065
369.	Plaintiffs' Opposition to Defendants' Motion to Supplement the Record Supporting Objections to Reports and Recommendations #2 and #3 on Order Shortening Time	06/01/21	81 82	20,066–20,143 20,144–20,151
370.	Defendants' Objection to the Special Master's Report and Recommendation No. 5 Regarding Defendants' Motion for Protective Order Regarding Confidentiality	06/01/21	82	20,152–20,211

	Designations (Filed April 15, 2021)			
371.	Plaintiffs' Response to Defendants' Objection to Report and Recommendation #6 Regarding Defendants' Motion to Compel Further Testimony from Deponents Instructed Not to Answer Questions	06/16/21	82	20,212–20,265
372.	United's Motion to Compel Plaintiffs' Production of Documents About Which Plaintiffs' Witnesses Testified on Order Shortening Time	06/24/21	82	20,266–20,290
373.	Appendix to Defendants' Motion to Compel Plaintiffs' Production of Documents About Which Plaintiffs' Witnesses Testified on Order Shortening Time	06/24/21	82 83 84	20,291–20,393 20,394–20,643 20,644–20,698
374.	Plaintiffs' Opposition to Defendants' Motion to Compel Plaintiffs' Production of Documents About Which Plaintiffs' Witnesses Testified on Order Shortening Time	07/06/21	84	20,699–20,742
375.	Defendants' Motion for Leave to File Defendants' Objection to the Special Master's Report and Recommendation No. 9 Regarding Defendants' Renewed Motion to Compel Further Testimony from Deponents Instructed not to Answer Under Seal	07/15/21	84	20,743–20,750
376.	Plaintiffs' Response to Defendants' Objection to Special Master Report and Recommendation No. 9 Regarding Defendants' Renewed Motion to Compel Further Testimony from Deponents Instructed not to Answer Questions	07/22/21	84	20,751–20,863
377.	Objection to R&R #11 Regarding United's Motion to Compel Documents About Which Plaintiffs' Witnesses Testified	08/25/21	84 85	20,864–20,893 20,894–20,898

378.	Plaintiffs' Motion in Limine to Exclude Evidence Subject to the Court's Discovery Orders	09/21/21	85	20,899–20,916
379.	Appendix of Exhibits in Support of Plaintiffs' Motion in Limine to Exclude Evidence Subject to the Court's Discovery Orders	09/21/21	85	20,917–21,076
380.	Plaintiffs' Motion in Limine to Exclude Evidence, Testimony and/or Argument Relating to (1) Increase in Insurance Premiums (2) Increase in Costs and (3) Decrease in Employee Wages/Benefits Arising from Payment of Billed Charges	09/21/21	85	21,077–21,089
381.	Appendix of Exhibits in Support of Plaintiffs' Motion in Limine to Exclude Evidence, Testimony and/or Argument Relating to (1) Increase in Insurance Premiums (2) Increase in Costs and (3) Decrease in Employee Wages/Benefits Arising from Payment of Billed Charges	09/21/21	85 86	21,090–21,143 21,144–21,259
382.	Motion in Limine No. 3 to Allow References to Plaintiffs' Decision Making Process Regarding Settling Billing Charges	09/21/21	86	21,260–21,313
383.	Defendants' Motion in Limine No. 5 Regarding Arguments or Evidence that Amounts TeamHealth Plaintiffs billed for Serves are Reasonable [an Alternative to Motion in Limine No. 6]	09/21/21	86	21,314–21,343
384.	Defendants' Motion in Limine No. 6 Regarding Argument or Evidence That Amounts Teamhealth Plaintiffs Billed for Services are Reasonable	09/21/21	86	21,344–21,368
385.	Appendix to Defendants' Motion in Limine No. 13 (Volume 1 of 6)	09/21/21	86 87	21,369–21,393 21,394–21,484

386.	Appendix to Defendants' Motion in Limine No. 13 (Volume 2 of 6)	09/21/21	87	21,485–21,614
387.	Appendix to Defendants' Motion in Limine No. 13 (Volume 3 of 6)	09/21/21	87 88	21,615–21,643 21,644–21,744
388.	Appendix to Defendants' Motion in Limine No. 13 (Volume 4 of 6)	09/21/21	88	21,745–21,874
389.	Appendix to Defendants' Motion in Limine No. 13 (Volume 5 of 6)	09/21/21	88 89	21,875–21,893 21,894–22,004
390.	Appendix to Defendants' Motion in Limine No. 13 (Volume 6 of 6)	09/21/21	89	22,005–22,035
391.	Appendix to Defendants' Motion for Partial Summary Judgment Volume 1 of 8	09/21/21	89 90	22,036–22,143 22,144–22,176
392.	Appendix to Defendants' Motion for Partial Summary Judgment Volume 2 of 8	09/21/21	90	22,177–22,309
393.	Appendix to Defendants' Motion for Partial Summary Judgment Volume 3 of 8	09/22/21	90 91	22,310–22,393 22,394–22,442
394.	Appendix to Defendants' Motion for Partial Summary Judgment Volume 4 of 8	09/22/21	91	22,443–22,575
395.	Appendix to Defendants' Motion for Partial Summary Judgment Volume 5 of 8	09/22/21	91	22,576–22,609
396.	Appendix to Defendants' Motion for Partial Summary Judgment Volume 6 of 8	09/22/21	91 92 93	22,610–22,643 22,644–22,893 22,894–23,037
397.	Appendix to Defendants' Motion for Partial Summary Judgment Volume 7a of 8	09/22/21	93 94	23,038–23,143 23,144–23,174
398.	Appendix to Defendants' Motion for Partial Summary Judgment Volume 7b of 8	09/22/21	94	23,175–23,260
399.	Appendix to Defendants' Motion for Partial Summary Judgment Volume 8a of 8	09/22/21	94 95	23,261–23,393 23,394–23,535
400.	Appendix to Defendants' Motion for Partial Summary Judgment Volume 8b of 8	09/22/21	95 96	23,536–23,643 23,634–23,801
401.	Defendants' Motion in Limine No. 11 Paired	09/22/21	96	23,802–23,823

	with Motion in Limine No. 12 to Authorize Defendants to Discuss Plaintiffs' Conduct and deliberations in Negotiating Reimbursement			
402.	Errata to Defendants' Motion in Limine No. 11	09/22/21	96	23,824–23,859
403.	Defendants' Motion in Limine No. 12 Paired with Motion in Limine No. 11 to Preclude Plaintiffs from Discussing Defendants' Approach to Reimbursement	09/22/21	96	23,860–23,879
404.	Errata to Defendants' Motion in Limine No. 12	09/22/21	96 97	23,880–23,893 23,894–23,897
405.	Appendix to Defendants' Exhibits to Motions in Limine: 1, 9, 15, 18, 19, 22, 24, 26, 29, 30, 33, 37 (Volume 1)	09/22/21	97	23,898–24,080
406.	Appendix to Defendants' Exhibits to Motions in Limine: 1, 9, 15, 18, 19, 22, 24, 26, 29, 30, 33, 37 (Volume 2)	09/22/21	97 98	24,081–24,143 24,144–24,310
407.	Appendix to Defendants' Exhibits to Motions in Limine: 1, 9, 15, 18, 19, 22, 24, 26, 29, 30, 33, 37 (Volume 3)	09/22/21	98 99 100	24,311–24,393 24,394–24,643 24,644–24,673
408.	Appendix to Defendants' Exhibits to Motions in Limine: 1, 9, 15, 18, 19, 22, 24, 26, 29, 30, 33, 37 (Volume 4)	09/22/21	100 101 102	24,674–24,893 24,894–25,143 25,144–25,204
409.	Appendix to Defendants' Motion in Limine No. 14 – Volume 1 of 6	09/22/21	102	25,205–25,226
410.	Appendix to Defendants' Motion in Limine No. 14 – Volume 2 of 6	09/22/21	102	25,227–25,364
411.	Appendix to Defendants' Motion in Limine No. 14 – Volume 3 of 6	09/22/21	102 103	25,365–25,393 25,394–25,494
412.	Appendix to Defendants' Motion in Limine No. 14 – Volume 4 of 6	09/22/21	103	25,495–25,624
413.	Appendix to Defendants' Motion in Limine	09/22/21	103	25,625–25,643

	No. 14 – Volume 5 of 6		104	25,644–25,754
414.	Appendix to Defendants' Motion in Limine No. 14 – Volume 6 of 6	09/22/21	104	25,755–25,785
415.	Plaintiffs' Combined Opposition to Defendants Motions in Limine 1, 7, 9, 11 & 13	09/29/21	104	25,786–25,850
416.	Plaintiffs' Combined Opposition to Defendants' Motions in Limine No. 2, 8, 10, 12 & 14	09/29/21	104	25,851–25,868
417.	Defendants' Opposition to Plaintiffs' Motion in Limine No. 3: To Exclude Evidence Subject to the Court's Discovery Orders	09/29/21	104 105	25,869–25,893 25,894–25,901
418.	Appendix to Defendants' Opposition to Plaintiffs' Motion in Limine No. 3: To Exclude Evidence Subject to the Court's Discovery Orders - Volume 1	09/29/21	105 106	25,902–26,143 26,144–26,216
419.	Appendix to Defendants' Opposition to Plaintiffs' Motion in Limine No. 3: To Exclude Evidence Subject to the Court's Discovery Orders - Volume 2	09/29/21	106 107	26,217–26,393 26,394–26,497
420.	Plaintiffs' Opposition to Defendants' Motion for Partial Summary Judgment	10/05/21	107	26,498–26,605
421.	Defendants' Reply in Support of Motion for Partial Summary Judgment	10/11/21	107 108	26,606–26,643 26,644–26,663
422.	Plaintiffs' Motion for Leave to File Supplemental Record in Opposition to Arguments Raised for the First Time in Defendants' Reply in Support of Motion for Partial Summary Judgment	10/17/21	108	26,664–26,673
423.	Appendix of Exhibits in Support of Plaintiffs' Motion for Leave to File Supplemental Record in Opposition to Arguments Raised for the First Time in Defendants' Reply in Support of Motion for	10/17/21	108 109	26,674–26,893 26,894–26,930

	Partial Summary Judgment			
424.	Response to Sur-Reply Arguments in Plaintiffs' Motion for Leave to File Supplemental Record in Opposition to Arguments Raised for the First Time in Defendants' Reply in Support of Motion for Partial Summary Judgment	10/21/21	109	26,931–26,952
425.	Trial Brief Regarding Evidence and Argument Relating to Out-of-State Harms to Non-Parties	10/31/21	109	26,953–26,964
426.	Plaintiffs' Response to Defendants' Trial Brief Regarding Evidence and Argument Relating to Out-of-State Harms to Non-Parties	11/08/21	109	26,965–26,997
427.	Excerpts of Recorder's Transcript of Jury Trial – Day 9	11/09/21	109	26,998–27003
428.	Preliminary Motion to Seal Attorneys' Eyes Documents Used at Trial	11/11/21	109	27,004–27,055
429.	Appendix of Selected Exhibits to Trial Briefs	11/16/21	109	27,056–27,092
430.	Excerpts of Recorder's Transcript of Jury Trial – Day 13	11/16/21	109	27,093–27,099
431.	Defendants' Omnibus Offer of Proof	11/22/21	109 110	27,100–27,143 27,144–27,287
432.	Motion to Seal Certain Confidential Trial Exhibits	12/05/21	110	27,288–27,382
433.	Supplement to Defendants' Motion to Seal Certain Confidential Trial Exhibits	12/08/21	110 111	27,383–27,393 27,394–27,400
434.	Motion to Seal Certain Confidential Trial Exhibits	12/13/21	111	27,401–27,495
435.	Defendant's Omnibus Offer of Proof for Second Phase of Trial	12/14/21	111	27,496–27,505

436.	Appendix of Exhibits to Defendants' Omnibus Offer of Proof for Second Phase of Trial – Volume 1	12/14/21	111 112	27,506–27,643 27,644–27,767
437.	Appendix of Exhibits to Defendants' Omnibus Offer of Proof for Second Phase of Trial – Volume 2	12/14/21	112 113	27,768–27,893 27,894–27,981
438.	Appendix of Exhibits to Defendants' Omnibus Offer of Proof for Second Phase of Trial – Volume 3	12/14/21	113 114	27,982–28,143 28,144–28,188
439.	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 1 of 18	12/24/21	114	28,189–28,290
440.	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 2 of 18	12/24/21	114 115	28,291–28,393 28,394–28,484
441.	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 3 of 18	12/24/21	115 116	28,485–28,643 28,644–28,742
442.	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 4 of 18	12/24/21	116 117	28,743–28,893 28,894–28,938
443.	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 5 of 18	12/24/21	117	28,939–29,084
444.	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 6 of 18	12/24/21	117 118	29,085–29,143 29,144–29,219
445.	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 7 of 18	12/24/21	118	29,220–29,384
446.	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 8 of 18	12/24/21	118 119	29,385–29,393 29,394–29,527

447.	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 9 of 18	12/24/21	119 120	29,528–29,643 29,644–29,727
448.	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 10 of 18	12/24/21	120 121	29,728–29,893 29,894–29,907
449.	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 11 of 18	12/24/21	121	29,908–30,051
450.	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 12 of 18	12/24/21	121 122	30,052–30,143 30,144–30,297
451.	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 13 of 18	12/24/21	122 123	30,298–30,393 30,394–30,516
452.	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 14 of 18	12/24/21	123 124	30,517–30,643 30,644–30,677
453.	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 15 of 18	12/24/21	124	30,678–30,835
454.	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 16 of 18	12/24/21	124 125	30,836–30,893 30,894–30,952
455.	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 17 of 18	12/24/21	125	30,953–31,122
456.	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 18 of 18	12/24/21	125 126	30,123–31,143 31,144–31,258
457.	Defendants' Reply in Support of Motion to Seal Certain Confidential Trial Exhibits	01/05/22	126	31,259–31,308
458.	Second Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial	01/05/22	126	31,309–31,393

	Exhibits		127	31,394–31,500
459.	Transcript of Proceedings Re: Motions	01/12/22	127	31,501–31,596
460.	Transcript of Proceedings Re: Motions	01/20/22	127 128	31,597–31,643 31,644–31,650
461.	Transcript of Proceedings Re: Motions	01/27/22	128	31,651–31,661
462.	Defendants' Index of Trial Exhibit Redactions in Dispute	02/10/22	128	31,662–31,672
463.	Transcript of Proceedings Re: Motions Hearing	02/10/22	128	31,673–31,793
464.	Transcript of Proceedings Re: Motions Hearing	02/16/22	128	31,794–31,887
465.	Joint Status Report and Table Identifying the Redactions to Trial Exhibits That Remain in Dispute	03/04/22	128 129	31,888–31,893 31,894–31,922
466.	Transcript of Proceedings re Hearing Regarding Unsealing Record	10/05/22	129	31,923–31,943
467.	Transcript of Proceedings re Status Check	10/06/22	129	31,944–31,953
468.	Appendix B to Order Granting in Part and Denying in Part Defendants' Motion to Seal Certain Confidential Trial Exhibits (Volume 1)	10/07/22	129 130	31,954–32,143 32,144–32,207
469.	Appendix B to Order Granting in Part and Denying in Part Defendants' Motion to Seal Certain Confidential Trial Exhibits (Volume 2)	10/07/22	130 131	32,208–32,393 32,394–32,476
470.	Appendix B to Order Granting in Part and Denying in Part Defendants' Motion to Seal Certain Confidential Trial Exhibits (Volume 3)	10/07/22	131 132	32,477–32,643 32,644–32,751
471.	Appendix B to Order Granting in Part and Denying in Part Defendants' Motion to Seal Certain Confidential Trial Exhibits (Volume	10/07/22	132 133	32,752–32,893 32,894–33,016

	4)			
472.	Appendix B to Order Granting in Part and Denying in Part Defendants' Motion to Seal Certain Confidential Trial Exhibits (Volume 5)	10/07/22	133 134	33,017–33,143 33,144–33,301
473.	Appendix B to Order Granting in Part and Denying in Part Defendants' Motion to Seal Certain Confidential Trial Exhibits (Volume 6)	10/07/22	134 135	33,302–33,393 33,394–33,529
474.	Appendix B to Order Granting in Part and Denying in Part Defendants' Motion to Seal Certain Confidential Trial Exhibits (Volume 7)	10/07/22	135 136	33,530–33,643 33,644–33,840
475.	Appendix B to Order Granting in Part and Denying in Part Defendants' Motion to Seal Certain Confidential Trial Exhibits (Volume 8)	10/07/22	136 137	33,841–33,893 33,894–34,109
476.	Appendix B to Order Granting in Part and Denying in Part Defendants' Motion to Seal Certain Confidential Trial Exhibits (Volume 9)	10/07/22	137 138	34,110–34,143 34,144–34,377
477.	Appendix B to Order Granting in Part and Denying in Part Defendants' Motion to Seal Certain Confidential Trial Exhibits (Volume 10)	10/07/22	138 139 140	34,378–34,393 34,394–34,643 34,644–34,668
478.	Appendix B to Order Granting in Part and Denying in Part Defendants' Motion to Seal Certain Confidential Trial Exhibits (Volume 11)	10/07/22	140 141	34,669–34,893 34,894–34,907
479.	Appendix B to Order Granting in Part and Denying in Part Defendants' Motion to Seal Certain Confidential Trial Exhibits (Volume 12)	10/07/22	141 142	34,908–35,143 35,144–35,162
480.	Appendix B to Order Granting in Part and	10/07/22	142	35,163–35,242

	Denying in Part Defendants' Motion to Seal Certain Confidential Trial Exhibits (Volume 13)			
481.	Exhibits P473_NEW, 4002, 4003, 4005, 4006, 4166, 4168, 4455, 4457, 4774, and 5322 to "Appendix B to Order Granting in Part and Denying in Part Defendants' Motion to Seal Certain Confidential Trial Exhibits" (Tabs 98, 106, 107, 108, 109, 111, 112, 113, 114, 118, and 119)	10/07/22	142	35,243–35,247
482.	Transcript of Status Check	10/10/22	142	35,248–35,258
483.	Recorder's Transcript of Hearing re Hearing	10/13/22	142	35,259–35,263
484.	Trial Exhibit D5499		142 143	35,264–35,393 35,394–35,445
485.	Trial Exhibit D5506		143	35,446
486.	Appendix of Exhibits in Support of Motion to Compel Defendants' List of Witnesses, Production of Documents and Answers to Interrogatories on Order Shortening Time	09/28/20	143	35,447–35,634
487.	Defendants' Motion to Supplement Record Supporting Objections to Reports and Recommendations #2 & #3 on Order Shortening Time	05/24/21	143 144	35,635–35,643 35,644–35,648
488.	Motion in Limine No. 3 to Allow References to Plaintiffs; Decision Making Processes Regarding Setting Billed Charges	09/21/21	144	35,649–35,702
489.	Appendix to Defendants' Opposition to Plaintiffs' Motion in Limine No. 3: to Exclude Evidence Subject to the Court's Discovery Orders (Exhibit 43)	09/29/21	144	35,703–35,713
490.	Notice of Filing of Expert Report of Bruce Deal, Revised on November 14, 2021	04/18/23	144	35,714–35,812

ALPHABETICAL TABLE OF CONTENTS TO APPENDIX

Tab	Document	Date	Vol.	Pages
209	1st Amended Jury List	11/08/21	34	8343
219	2nd Amended Jury List	11/15/21	38	9426
234	3rd Amended Jury List	11/17/21	41	10,249
252	4th Amended Jury List	11/23/21	47	11,632
342	Amended Case Appeal Statement	08/15/22	71 72	17,740–17,750 17,751–17,803
17	Amended Motion to Remand	01/15/20	2	310–348
343	Amended Notice of Appeal	08/15/22	72	17,804–17,934
117	Amended Notice of Entry of Order Affirming and Adopting Report and Recommendation No. 2 Regarding Plaintiffs' Objection to Notice of Intent to Issue Subpoena Duces Tecum to TeamHealth Holdings, Inc. and Collect Rx, Inc. Without Deposition and Motion for Protective Order and Overruling Objection	08/09/21	18	4425–4443
118	Amended Notice of Entry of Order Affirming and Adopting Report and Recommendation No. 3 Regarding Defendants' Second Set of Requests for Production on Order Shortening Time and Overruling Objection	08/09/21	18	4444–4464
158	Amended Transcript of Proceedings Re: Motions	10/19/21	23 24	5562–5750 5751–5784
159	Amended Transcript of Proceedings Re: Motions	10/20/21	24	5785–5907
47	Amended Transcript of Proceedings, Plaintiff's Motion to Compel Defendants' Production of Unredacted MultiPlan, Inc. Agreement	07/29/20	7	1664–1683

Tab	Document	Date	Vol.	Pages
468	Appendix B to Order Granting in Part and Denying in Part Defendants' Motion to Seal Certain Confidential Trial Exhibits (Volume 1) (Filed Under Seal)	10/07/22	129 130	31,954–32,143 32,144–32,207
469	Appendix B to Order Granting in Part and Denying in Part Defendants' Motion to Seal Certain Confidential Trial Exhibits (Volume 2) (Filed Under Seal)	10/07/22	130 131	32,208–32,393 32,394–32,476
470	Appendix B to Order Granting in Part and Denying in Part Defendants' Motion to Seal Certain Confidential Trial Exhibits (Volume 3) (Filed Under Seal)	10/07/22	131 132	32,477–32,643 32,644–32,751
471	Appendix B to Order Granting in Part and Denying in Part Defendants' Motion to Seal Certain Confidential Trial Exhibits (Volume 4) (Filed Under Seal)	10/07/22	132 133	32,752–32,893 32,894–33,016
472	Appendix B to Order Granting in Part and Denying in Part Defendants' Motion to Seal Certain Confidential Trial Exhibits (Volume 5) (Filed Under Seal)	10/07/22	133 134	33,017–33,143 33,144–33,301
473	Appendix B to Order Granting in Part and Denying in Part Defendants' Motion to Seal Certain Confidential Trial Exhibits (Volume 6) (Filed Under Seal)	10/07/22	134 135	33,302–33,393 33,394–33,529
474	Appendix B to Order Granting in Part and Denying in Part Defendants' Motion to Seal Certain Confidential Trial Exhibits (Volume 7) (Filed Under Seal)	10/07/22	135 136	33,530–33,643 33,644–33,840
475	Appendix B to Order Granting in Part and Denying in Part Defendants' Motion to Seal Certain Confidential Trial Exhibits (Volume 8) (Filed Under Seal)	10/07/22	136 137	33,841–33,893 33,894–34,109
476	Appendix B to Order Granting in Part and	10/07/22	137	34,110–34,143

Tab	Document	Date	Vol.	Pages
	Denying in Part Defendants' Motion to Seal Certain Confidential Trial Exhibits (Volume 9) (Filed Under Seal)		138	34,144–34,377
477	Appendix B to Order Granting in Part and Denying in Part Defendants' Motion to Seal Certain Confidential Trial Exhibits (Volume 10) (Filed Under Seal)	10/07/22	138 139 140	34,378–34,393 34,394–34,643 34,644–34,668
478	Appendix B to Order Granting in Part and Denying in Part Defendants' Motion to Seal Certain Confidential Trial Exhibits (Volume 11) (Filed Under Seal)	10/07/22	140 141	34,669–34,893 34,894–34,907
479	Appendix B to Order Granting in Part and Denying in Part Defendants' Motion to Seal Certain Confidential Trial Exhibits (Volume 12) (Filed Under Seal)	10/07/22	141 142	34,908–35,143 35,144–35,162
480	Appendix B to Order Granting in Part and Denying in Part Defendants' Motion to Seal Certain Confidential Trial Exhibits (Volume 13) (Filed Under Seal)	10/07/22	142	35,163–35,242
321	Appendix in Support of Opposition to Defendants' Motion to Retax Costs	04/13/22	68 69	16,865–17,000 17,001–17,035
280	Appendix in Support of Plaintiffs' Opposition to Defendants' Motion to Apply Statutory Cap on Punitive Damages and Plaintiffs' Cross Motion for Entry of Judgment	01/20/22	52	12,791–12,968
306	Appendix of Exhibits in Support of Health Care Providers' Motion for Attorneys' Fees Volume 1	03/30/22	62 63	15,398–15,500 15,501–15,619
307	Appendix of Exhibits in Support of Health Care Providers' Motion for Attorneys' Fees Volume 2	03/30/22	63 64	15,620–15,750 15,751–15,821
308	Appendix of Exhibits in Support of Health Care Providers' Motion for Attorneys' Fees	03/30/22	64 65	15,822–16,000 16,001–16,053

Tab	Document	Date	Vol.	Pages
	Volume 3			
309	Appendix of Exhibits in Support of Health Care Providers' Motion for Attorneys' Fees Volume 4	03/30/22	65	16,054–16,232
310	Appendix of Exhibits in Support of Health Care Providers' Motion for Attorneys' Fees Volume 5	03/30/22	65 66	16,233–16,250 16,251–16,361
295	Appendix of Exhibits in Support of Health Care Providers' Verified Memorandum of Cost Volume 1	03/14/22	53 54	13,209–13,250 13.251–13,464
296	Appendix of Exhibits in Support of Health Care Providers' Verified Memorandum of Cost Volume 2	03/14/22	54 55	13,465–13,500 13,501–13,719
297	Appendix of Exhibits in Support of Health Care Providers' Verified Memorandum of Cost Volume 3	03/14/22	55 56	13,720–13,750 13,751–13,976
298	Appendix of Exhibits in Support of Health Care Providers' Verified Memorandum of Cost Volume 4	03/14/22	56 57	13,977–14,000 14,001–14,186
299	Appendix of Exhibits in Support of Health Care Providers' Verified Memorandum of Cost Volume 5	03/14/22	57 58	14,187–14,250 14,251–14,421
300	Appendix of Exhibits in Support of Health Care Providers' Verified Memorandum of Cost Volume 6	03/14/22	58 59	14,422–14,500 14,501–14,673
301	Appendix of Exhibits in Support of Health Care Providers' Verified Memorandum of Cost Volume 7	03/14/22	59 60	14,674–14,750 14,751–14,920
302	Appendix of Exhibits in Support of Health Care Providers' Verified Memorandum of Cost Volume 8	03/14/22	60 61	14,921–15,000 15,001–15,174
303	Appendix of Exhibits in Support of Health	03/14/22	61	15,175–15,250

Tab	Document	Date	Vol.	Pages
	Care Providers' Verified Memorandum of Cost Volume 9		62	15,251–15,373
486	Appendix of Exhibits in Support of Motion to Compel Defendants' List of Witnesses, Production of Documents and Answers to Interrogatories on Order Shortening Time (Filed Under Seal)	09/28/20	143	35,447–35,634
423	Appendix of Exhibits in Support of Plaintiffs' Motion for Leave to File Supplemental Record in Opposition to Arguments Raised for the First Time in Defendants' Reply in Support of Motion for Partial Summary Judgment (Filed Under Seal)	10/17/21	108 109	26,674–26,893 26,894–26,930
379	Appendix of Exhibits in Support of Plaintiffs' Motion in Limine to Exclude Evidence Subject to the Court's Discovery Orders (Filed Under Seal)	09/21/21	85	20,917–21,076
381	Appendix of Exhibits in Support of Plaintiffs' Motion in Limine to Exclude Evidence, Testimony and/or Argument Relating to (1) Increase in Insurance Premiums (2) Increase in Costs and (3) Decrease in Employee Wages/Benefits Arising from Payment of Billed Charges (Filed Under Seal)	09/21/21	85 86	21,090–21,143 21,144–21,259
26	Appendix of Exhibits in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss	03/26/20	4	784–908
491	Appendix of Exhibits in Support of Plaintiffs' Renewed Motion for Order to Show Cause Why Defendants Should Not Be Held in Contempt and for Sanctions	03/08/21	145 146	35,813–36,062 36,063–36,085
365	Appendix of Exhibits in Support of Plaintiffs' Renewed Motion for Order to	04/01/21	78	19,177–19,388

Tab	Document	Date	Vol.	Pages
	Show Cause Why Defendants Should Not Be Held in Contempt and for Sanctions (Filed Under Seal)			
272	Appendix of Exhibits to Defendants' Motion to Apply the Statutory Cap on Punitive Damage	12/30/21	50 51	12,364–12,500 12,501–12,706
436	Appendix of Exhibits to Defendants' Omnibus Offer of Proof for Second Phase of Trial – Volume 1 (Filed Under Seal)	12/14/21	111 112	27,506–27,643 27,644–27,767
437	Appendix of Exhibits to Defendants' Omnibus Offer of Proof for Second Phase of Trial – Volume 2 (Filed Under Seal)	12/14/21	112 113	27,768–27,893 27,894–27,981
438	Appendix of Exhibits to Defendants' Omnibus Offer of Proof for Second Phase of Trial – Volume 3 (Filed Under Seal)	12/14/21	113 114	27,982–28,143 28,144–28,188
429	Appendix of Selected Exhibits to Trial Briefs (Filed Under Seal)	11/16/21	109	27,056–27,092
405	Appendix to Defendants' Exhibits to Motions in Limine: 1, 9, 15, 18, 19, 22, 24, 26, 29, 30, 33, 37 (Volume 1) (Filed Under Seal)	09/22/21	97	23,898–24,080
406	Appendix to Defendants' Exhibits to Motions in Limine: 1, 9, 15, 18, 19, 22, 24, 26, 29, 30, 33, 37 (Volume 2) (Filed Under Seal)	09/22/21	97 98	24,081–24,143 24,144–24,310
407	Appendix to Defendants' Exhibits to Motions in Limine: 1, 9, 15, 18, 19, 22, 24, 26, 29, 30, 33, 37 (Volume 3) (Filed Under Seal)	09/22/21	98 99 100	24,311–24,393 24,394–24,643 24,644–24,673
408	Appendix to Defendants' Exhibits to Motions in Limine: 1, 9, 15, 18, 19, 22, 24, 26, 29, 30, 33, 37 (Volume 4) (Filed Under Seal)	09/22/21	100 101 102	24,674–24,893 24,894–25,143 25,144–25,204
391	Appendix to Defendants' Motion for Partial Summary Judgment Volume 1 of 8 (Filed Under Seal)	09/21/21	89 90	22,036–22,143 22,144–22,176

Tab	Document	Date	Vol.	Pages
392	Appendix to Defendants' Motion for Partial Summary Judgment Volume 2 of 8 (Filed Under Seal)	09/21/21	90	22,177–22,309
393	Appendix to Defendants' Motion for Partial Summary Judgment Volume 3 of 8 (Filed Under Seal)	09/22/21	90 91	22,310–22,393 22,394–22,442
394	Appendix to Defendants' Motion for Partial Summary Judgment Volume 4 of 8 (Filed Under Seal)	09/22/21	91	22,443–22,575
395	Appendix to Defendants' Motion for Partial Summary Judgment Volume 5 of 8 (Filed Under Seal)	09/22/21	91	22,576–22,609
396	Appendix to Defendants' Motion for Partial Summary Judgment Volume 6 of 8 (Filed Under Seal)	09/22/21	91 92 93	22,610–22,643 22,644–22,893 22,894–23,037
397	Appendix to Defendants' Motion for Partial Summary Judgment Volume 7a of 8 (Filed Under Seal)	09/22/21	93 94	23,038–23,143 23,144–23,174
398	Appendix to Defendants' Motion for Partial Summary Judgment Volume 7b of 8 (Filed Under Seal)	09/22/21	94	23,175–23,260
399	Appendix to Defendants' Motion for Partial Summary Judgment Volume 8a of 8 (Filed Under Seal)	09/22/21	94 95	23,261–23,393 23,394–23,535
400	Appendix to Defendants' Motion for Partial Summary Judgment Volume 8b of 8 (Filed Under Seal)	09/22/21	95 96	23,536–23,643 23,634–23,801
385	Appendix to Defendants' Motion in Limine No. 13 (Volume 1 of 6) (Filed Under Seal)	09/21/21	86 87	21,369–21,393 21,394–21,484
386	Appendix to Defendants' Motion in Limine No. 13 (Volume 2 of 6) (Filed Under Seal)	09/21/21	87	21,485–21,614
387	Appendix to Defendants' Motion in Limine	09/21/21	87	21,615–21,643

Tab	Document	Date	Vol.	Pages
	No. 13 (Volume 3 of 6) (Filed Under Seal)		88	21,644–21,744
388	Appendix to Defendants' Motion in Limine No. 13 (Volume 4 of 6) (Filed Under Seal)	09/21/21	88	21,745–21,874
389	Appendix to Defendants' Motion in Limine No. 13 (Volume 5 of 6) (Filed Under Seal)	09/21/21	88 89	21,875–21,893 21,894–22,004
390	Appendix to Defendants' Motion in Limine No. 13 (Volume 6 of 6) (Filed Under Seal)	09/21/21	89	22,005–22,035
409	Appendix to Defendants' Motion in Limine No. 14 – Volume 1 of 6 (Filed Under Seal)	09/22/21	102	25,205–25,226
410	Appendix to Defendants' Motion in Limine No. 14 – Volume 2 of 6 (Filed Under Seal)	09/22/21	102	25,227–25,364
411	Appendix to Defendants' Motion in Limine No. 14 – Volume 3 of 6 (Filed Under Seal)	09/22/21	102 103	25,365–25,393 25,394–25,494
412	Appendix to Defendants' Motion in Limine No. 14 – Volume 4 of 6 (Filed Under Seal)	09/22/21	103	25,495–25,624
413	Appendix to Defendants' Motion in Limine No. 14 – Volume 5 of 6 (Filed Under Seal)	09/22/21	103 104	25,625–25,643 25,644–25,754
414	Appendix to Defendants' Motion in Limine No. 14 – Volume 6 of 6 (Filed Under Seal)	09/22/21	104	25,755–25,785
373	Appendix to Defendants' Motion to Compel Plaintiffs' Production of Documents About Which Plaintiffs' Witnesses Testified on Order Shortening Time (Filed Under Seal)	06/24/21	82 83 84	20,291–20,393 20,394–20,643 20,644–20,698
70	Appendix to Defendants' Motion to Compel Plaintiffs' Responses to Defendants' First and Second Requests for Production on Order Shortening Time	01/08/21	12 13 14	2875–3000 3001–3250 3251–3397
368	Appendix to Defendants' Motion to Supplement the Record Supporting Objections to Reports and Recommendations #2 & #3 on Order Shortening Time (Filed	05/21/21	79 80 81	19,582–19,643 19,644–19,893 19,894–20,065

Tab	Document	Date	Vol.	Pages
	Under Seal)			
418	Appendix to Defendants' Opposition to Plaintiffs' Motion in Limine No. 3: To Exclude Evidence Subject to the Court's Discovery Orders - Volume 1 (Filed Under Seal)	09/29/21	105 106	25,902–26,143 26,144–26,216
419	Appendix to Defendants' Opposition to Plaintiffs' Motion in Limine No. 3: To Exclude Evidence Subject to the Court's Discovery Orders - Volume 2 (Filed Under Seal)	09/29/21	106 107	26,217–26,393 26,394–26,497
489	Appendix to Defendants' Opposition to Plaintiffs' Motion in Limine No. 3: to Exclude Evidence Subject to the Court's Discovery Orders (Exhibit 43) (Filed Under Seal)	09/29/21	144	35,703–35,713
75	Appendix to Defendants' Reply in Support of Motion to Compel Plaintiffs' Responses to Defendants' First and Second Requests for Production on Order Shortening Time	01/19/21	14 15	3466–3500 3501–3658
316	Case Appeal Statement	04/06/22	67 68	16,695–16,750 16,751–16,825
356	Case Appeal Statement	10/12/22	74 75	18,468–18,500 18,501–18,598
16	Civil Order to Statistically Close Case	12/10/19	2	309
1	Complaint (Business Court)	04/15/19	1	1–17
284	Defendant' Reply in Support of Their Motion to Apply the Statutory Cap on Punitive Damages	02/10/22	53	13,005–13,028
435	Defendant's Omnibus Offer of Proof for Second Phase of Trial (Filed Under Seal)	12/14/21	111	27,496–27,505

Tab	Document	Date	Vol.	Pages
311	Defendants Rule 62(b) Motion for Stay Pending Resolution of Post-Trial Motions on Order Shortening Time	04/05/22	66	16,362–16,381
42	Defendants' Answer to Plaintiffs' First Amended Complaint	07/08/20	7	1541–1590
150	Defendants' Answer to Plaintiffs' Second Amended Complaint	10/08/21	22	5280–5287
198	Defendants' Deposition Designations and Objections to Plaintiffs' Deposition Counter-Designations	11/03/21	32	7778–7829
99	Defendants' Errata to Their Objection to the Special Master's Report and Recommendation No. 3 Regarding Defendants' Motion to Compel Responses to Defendants' Second Set of Requests for Production	05/03/21	17	4124–4127
288	Defendants' Index of Trial Exhibit Redactions in Dispute	02/16/22	53	13,063–13,073
462	Defendants' Index of Trial Exhibit Redactions in Dispute (Filed Under Seal)	02/10/22	128	31,662–31,672
235	Defendants' Motion for Judgment as a Matter of Law	11/17/21	41 42	10,250 10,251–10,307
375	Defendants' Motion for Leave to File Defendants' Objection to the Special Master's Report and Recommendation No. 9 Regarding Defendants' Renewed Motion to Compel Further Testimony from Deponents Instructed not to Answer Under Seal (Filed Under Seal)	07/15/21	84	20,743–20,750
214	Defendants' Motion for Leave to File Defendants' Preliminary Motion to Seal Attorneys' Eyes Only Documents Used at	11/12/21	37	9153–9161

Tab	Document	Date	Vol.	Pages
	Trial Under Seal			
130	Defendants' Motion for Partial Summary Judgment	09/21/21	20	4770–4804
312	Defendants' Motion for Remittitur and to Alter or Amend the Judgment	04/06/22	66	16,382–16,399
131	Defendants' Motion in Limine No. 1: Motion to Authorize Defendants to Offer Evidence Relating to Plaintiffs' Agreements with other Market Players and Related Negotiations	09/21/21	20	4805–4829
134	Defendants' Motion in Limine No. 10 to Exclude Reference of Defendants' Corporate Structure (Alternative Moton to be Considered Only if court Denies Defendants' Counterpart Motion in Limine No. 9)	09/21/21	20	4869–4885
401	Defendants' Motion in Limine No. 11 Paired with Motion in Limine No. 12 to Authorize Defendants to Discuss Plaintiffs' Conduct and deliberations in Negotiating Reimbursement (Filed Under Seal)	09/22/21	96	23,802–23,823
403	Defendants' Motion in Limine No. 12 Paired with Motion in Limine No. 11 to Preclude Plaintiffs from Discussing Defendants' Approach to Reimbursement (Filed Under Seal)	09/22/21	96	23,860–23,879
135	Defendants' Motion in Limine No. 13: Motion to Authorize Defendants to Offer Evidence Relating to Plaintiffs' Collection Practices for Healthcare Claims	09/21/21	20	4886–4918
136	Defendants' Motion in Limine No. 14: Motion Offered in the Alternative to MIL No. 13 to Preclude Plaintiffs from Contesting Defendants' Defenses Relating to Claims that were Subject to Settlement Agreement	09/21/21	20	4919–4940

Tab	Document	Date	Vol.	Pages
	Between CollectRX and Data iSight; and Defendants' Adoption of Specific Negotiation Thresholds for Reimbursement Claims Appealed or Contested by Plaintiffs			
132	Defendants' Motion in Limine No. 2: Motion Offered in the Alternative to MIL No. 1, to Preclude Plaintiffs from Offering Evidence Relating to Defendants' Agreements with Other Market Players and Related Negotiations	09/21/21	20	4830–4852
137	Defendants' Motion in Limine No. 24 to Preclude Plaintiffs from Referring to Themselves as Healthcare Professionals	09/21/21	20	4941–4972
383	Defendants' Motion in Limine No. 5 Regarding Arguments or Evidence that Amounts TeamHealth Plaintiffs billed for Serves are Reasonable [an Alternative to Motion in Limine No. 6] (Filed Under Seal)	09/21/21	86	21,314–21,343
384	Defendants' Motion in Limine No. 6 Regarding Argument or Evidence That Amounts Teamhealth Plaintiffs Billed for Services are Reasonable (Filed Under Seal)	09/21/21	86	21,344–21,368
138	Defendants' Motion in Limine No. 7 to Authorize Defendants to Offer Evidence of the Costs of the Services that Plaintiffs Provided	09/22/21	20 21	4973–5000 5001–5030
139	Defendants' Motion in Limine No. 8, Offered in the Alternative to MIL No. 7, to Preclude Plaintiffs from Offering Evidence as to the Qualitative Value, Relative Value, Societal Value, or Difficulty of the Services they Provided	09/22/21	21	5031–5054
140	Defendants' Motion in Limine No. 9 to Authorize Defendants to Offer Evidence of	09/22/21	21	5055–5080

Tab	Document	Date	Vol.	Pages
	Plaintiffs Organizational, Management, and Ownership Structure, Including Flow of Funds Between Related Entities, Operating Companies, Parent Companies, and Subsidiaries			
271	Defendants' Motion to Apply the Statutory Cap on Punitive Damages	12/30/21	50	12,342–12,363
71	Defendants' Motion to Compel Plaintiffs' Responses to Defendants' First and Second Requests for Production on Order Shortening Time	01/11/21	14	3398–3419
52	Defendants' Motion to Compel Production of Clinical Documents for the At-Issue Claims and Defenses and to Compel Plaintiffs to Supplement Their NRCP 16.1 Initial Disclosures on an Order Shortening Time	09/21/20	8 9	1998–2000 2001–2183
23	Defendants' Motion to Dismiss	03/12/20	3	553–698
32	Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint	05/26/20	5	1027–1172
348	Defendants' Motion to Redact Portions of Trial Transcript	10/06/22	72	17,979–17,989
304	Defendants' Motion to Retax Costs	03/21/22	62	15,374–15,388
277	Defendants' Motion to Seal Courtroom During January 12, 2022 Hearing on Defendants' Motion to Seal Certain Confidential Trial Exhibits on Order Shortening Time	01/11/22	52	12,757–12,768
487	Defendants' Motion to Supplement Record Supporting Objections to Reports and Recommendations #2 & #3 on Order Shortening Time (Filed Under Seal)	05/24/21	143 144	35,635–35,643 35,644–35,648
169	Defendants' Objection to Media Requests	10/28/21	29	7004–7018

Tab	Document	Date	Vol.	Pages
339	Defendants' Objection to Plaintiffs' Proposed Order Approving Plaintiffs' Motion for Attorneys' Fees	07/26/22	71	17,700–17,706
273	Defendants' Objection to Plaintiffs' Proposed Order Denying Defendants' Motion for Judgment as a Matter of Law	01/04/22	51	12,707–12,717
94	Defendants' Objection to the Special Master's Report and Recommendation No. 2 Regarding Plaintiffs' Objection to Notice of Intent to Issue Subpoena Duces Tecum to TeamHealth Holdings, Inc. and Collect Rx, Inc. Without Deposition and Motion for Protective Order	04/12/21	17	4059–4079
98	Defendants' Objection to the Special Master's Report and Recommendation No. 3 Regarding Defendants' Motion to Compel Responses to Defendants' Second Set of Request for Production on Order Shortening Time	04/28/21	17	4109–4123
370	Defendants' Objection to the Special Master's Report and Recommendation No. 5 Regarding Defendants' Motion for Protective Order Regarding Confidentiality Designations (Filed April 15, 2021) (Filed Under Seal)	06/01/21	82	20,152–20,211
61	Defendants' Objections to Plaintiffs to Plaintiffs' Order Granting Plaintiffs' Motion to Compel Defendants' List of Witnesses, Production of Documents and Answers to Interrogatories on Order Shortening Time	10/26/20	11	2573–2670
151	Defendants' Objections to Plaintiffs' NRCP 16.1(a)(3) Pretrial Disclosures	10/08/21	22	5288–5294
64	Defendants' Objections to Plaintiffs' Order Denying Defendants' Motion to Compel	11/02/20	11	2696–2744

Tab	Document	Date	Vol.	Pages
	Production of Clinical Documents for the At-Issue Claims and Defenses and to Compel Plaintiffs' to Supplement Their NRCP 16.1 Initial Disclosures on an Order Shortening Time			
60	Defendants' Objections to Plaintiffs' Order Granting Plaintiffs' Motion to Compel Defendants' List of Witnesses, Production of Documents and Answers to Interrogatories on Order Shortening Time	10/23/20	10 11	2482–2500 2501–2572
199	Defendants' Objections to Plaintiffs' Proposed Order Granting in Part and Denying in Part Plaintiffs' Motion in Limine to Exclude Evidence Subject to the Court's Discovery Orders	11/03/21	32	7830–7852
100	Defendants' Objections to Plaintiffs' Proposed Order Granting Plaintiffs' Renewed Motion for Order to Show Cause Why Defendants Should Not Be Held in Contempt and for Sanctions	05/05/21	17	4128–4154
108	Defendants' Objections to Special Master Report and Recommendation No. 7 Regarding Defendants' Motion to Compel Responses to Defendants' Amended Third Set of Requests for Production of Documents	06/17/21	17	4227–4239
431	Defendants' Omnibus Offer of Proof (Filed Under Seal)	11/22/21	109 110	27,100–27,143 27,144–27,287
14	Defendants' Opposition to Fremont Emergency Services (MANDAVIA), Ltd.'s Motion to Remand	06/21/19	1 2	139–250 251–275
18	Defendants' Opposition to Plaintiffs' Amended Motion to Remand	01/29/20	2	349–485
283	Defendants' Opposition to Plaintiffs' Cross-	02/10/22	52	12,997–13,000

Tab	Document	Date	Vol.	Pages
	Motion for Entry of Judgment		53	13,001–13,004
322	Defendants' Opposition to Plaintiffs' Motion for Attorneys' Fees	04/20/22	69	17,036–17,101
155	Defendants' Opposition to Plaintiffs' Motion for Leave to File Supplemental Record in Opposition to Arguments Raised for the First Time in Defendants' Reply in Support of Motion for Partial Summary Judgment	10/18/21	22	5323–5333
141	Defendants' Opposition to Plaintiffs' Motion in Limine No. 1: to Exclude Evidence, Testimony and/or Argument Relating to (1) Increase in Insurance Premiums (2) Increase in Costs and (3) Decrease in Employee Wages/Benefits Arising from Payment of Billed Charges	09/29/21	21	5081–5103
417	Defendants' Opposition to Plaintiffs' Motion in Limine No. 3: To Exclude Evidence Subject to the Court's Discovery Orders (Filed Under Seal)	09/29/21	104 105	25,869–25,893 25,894–25,901
50	Defendants' Opposition to Plaintiffs' Motion to Compel Defendants' Production of Claims File for At-Issue Claims, Or, in The Alternative, Motion in Limine on Order Shortening Time	09/04/20	8	1846–1932
56	Defendants' Opposition to Plaintiffs' Motion to Compel Defendants' List of Witnesses, Production of Documents, and Answers to Interrogatories on Order Shortening Time	10/06/20	10	2293–2336
251	Defendants' Opposition to Plaintiffs' Motion to Modify Joint Pretrial Memorandum Re: Punitive Damages on Order Shortening Time	11/22/21	47	11,609–11,631
89	Defendants' Opposition to Plaintiffs' Renewed Motion for Order to Show Cause	03/22/21	16	3916–3966

Tab	Document	Date	Vol.	Pages
	Why Defendants Should Not be Held in Contempt and for Sanctions			
220	Defendants' Proposed Jury Instructions (Contested)	11/15/21	38	9427–9470
259	Defendants' Proposed Second Phase Jury Instructions	12/05/21	49	12,049–12,063
263	Defendants' Proposed Second Phase Jury Instructions-Supplement	12/07/21	49	12,136–12,142
313	Defendants' Renewed Motion for Judgment as a Matter of Law	04/06/22	66	16,400–16,448
421	Defendants' Reply in Support of Motion for Partial Summary Judgment (Filed Under Seal)	10/11/21	107 108	26,606–26,643 26,644–26,663
74	Defendants' Reply in Support of Motion to Compel Plaintiffs' Responses to Defendants' First and Second Requests for Production on Order Shortening Time	01/19/21	14	3449–3465
28	Defendants' Reply in Support of Motion to Dismiss	05/07/20	4	919–948
36	Defendants' Reply in Support of Motion to Dismiss Plaintiffs' First Amended Complaint	06/03/20	6	1310–1339
325	Defendants' Reply in Support of Motion to Retax Costs	05/04/22	69	17,122–17,150
457	Defendants' Reply in Support of Motion to Seal Certain Confidential Trial Exhibits (Filed Under Seal)	01/05/22	126	31,259–31,308
37	Defendants' Reply in Support of Their Supplemental Brief in Support of Their Motions to Dismiss Plaintiff's First Amended Complaint	06/03/20	6	1340–1349
334	Defendants' Response to Improper Supplement Entitled "Notice of	06/28/22	71	17,579–17,593

Tab	Document	Date	Vol.	Pages
	Supplemental Attorney Fees Incurred After Submission of Health Care Providers' Motion for Attorneys Fees"			
286	Defendants' Response to Plaintiffs' Motion to Unlock Certain Admitted Trial Exhibits on Order Shortening Time	02/15/22	53	13,047–13,053
225	Defendants' Response to TeamHealth Plaintiffs' Trial Brief Regarding Defendants' Prompt Pay Act Jury Instruction Re: Failure to Exhaust Administrative Remedies	11/16/21	40	9799–9806
12	Defendants' Statement of Removal	05/30/19	1	123–126
33	Defendants' Supplemental Brief in Support of Their Motion to Dismiss Plaintiffs' First Amended Complaint Addressing Plaintiffs' Eighth Claim for Relief	05/26/20	5	1173–1187
247	Defendants' Supplemental Proposed Jury Instruction	11/21/21	46	11,262–11,266
240	Defendants' Supplemental Proposed Jury Instructions (Contested)	11/19/21	44	10,947–10,952
48	Errata	08/04/20	7	1684
241	Errata	11/19/21	44	10,953
402	Errata to Defendants' Motion in Limine No. 11 (Filed Under Seal)	09/22/21	96	23,824–23,859
404	Errata to Defendants' Motion in Limine No. 12 (Filed Under Seal)	09/22/21	96 97	23,880–23,893 23,894–23,897
54	Errata to Plaintiffs' Motion to Compel Defendants' List of Witnesses Production of Documents and Answers to Interrogatories	09/28/20	9	2196–2223
85	Errata to Plaintiffs' Renewed Motion for Order to Show Cause Why Defendants Should Not Be Held in Contempt and for	03/12/21	16	3884–3886

Tab	Document	Date	Vol.	Pages
	Sanctions			
238	Errata to Source on Defense Contested Jury Instructions	11/18/21	43	10,618–10,623
430	Excerpts of Recorder's Transcript of Jury Trial – Day 13 (Filed Under Seal)	11/16/21	109	27,093–27,099
427	Excerpts of Recorder's Transcript of Jury Trial – Day 9 (Filed Under Seal)	11/09/21	109	26,998–27003
481	Exhibits P473_NEW, 4002, 4003, 4005, 4006, 4166, 4168, 4455, 4457, 4774, and 5322 to "Appendix B to Order Granting in Part and Denying in Part Defendants' Motion to Seal Certain Confidential Trial Exhibits" (Tabs 98, 106, 107, 108, 109, 111, 112, 113, 114, 118, and 119) (Filed Under Seal)	10/07/22	142	35,243–35,247
30	First Amended Complaint	05/15/20	4 5	973–1000 1001–1021
13	Freemont Emergency Services (MANDAVIA), Ltd's Response to Statement of Removal	05/31/19	1	127–138
226	General Defense Verdict	11/16/21	40	9807–9809
305	Health Care Providers' Motion for Attorneys' Fees	03/30/22	62	15,389–15,397
326	Health Care Providers' Reply in Support of Motion for Attorneys' Fees	05/04/22	69	17,151–17,164
294	Health Care Providers' Verified Memorandum of Cost	03/14/22	53	13,198–13,208
44	Joint Case Conference Report	07/17/20	7	1606–1627
164	Joint Pretrial Memorandum Pursuant to EDRC 2.67	10/27/21	26 27	6486–6500 6501–6567
465	Joint Status Report and Table Identifying	03/04/22	128	31,888–31,893

Tab	Document	Date	Vol.	Pages
	the Redactions to Trial Exhibits That Remain in Dispute (Filed Under Seal)		129	31,894–31,922
221	Jointly Submitted Jury Instructions	11/15/21	38	9471–9495
255	Jury Instructions	11/29/21	48	11,957–11,999
264	Jury Instructions Phase Two	12/07/21	49	12,143–12,149
347	Limited Objection to "Order Unsealing Trial Transcripts and Restoring Public Access to Docket"	10/06/22	72	17,973–17,978
156	Media Request and Order Allowing Camera Access to Court Proceedings (Legal Newsline)	10/18/21	22	5334–5338
167	Media Request and Order Allowing Camera Access to Court Proceedings (Dolcefino Communications, LLC)	10/28/21	28 28	6992–6997
168	Media Request and Order Allowing Camera Access to Court Proceedings (Dolcefino Communications, LLC)	10/28/21	28 29	6998–7000 7001–7003
314	Motion for New Trial	04/06/22	66 67	16,449–16,500 16,501–16,677
119	Motion for Order to Show Cause Why Plaintiffs Should Not Be Held in Contempt and Sanctioned for Violating Protective Order	08/10/21	18	4465–4486
79	Motion for Reconsideration of Order Denying Defendants' Motion to Compel Plaintiffs Responses to Defendants' First and Second Requests for Production	02/18/21	15 16	3714–3750 3751–3756
488	Motion in Limine No. 3 to Allow References to Plaintiffs; Decision Making Processes Regarding Setting Billed Charges (Filed Under Seal)	09/21/21	144	35,649–35,702

Tab	Document	Date	Vol.	Pages
382	Motion in Limine No. 3 to Allow References to Plaintiffs' Decision Making Process Regarding Settling Billing Charges (Filed Under Seal)	09/21/21	86	21,260–21,313
133	Motion in Limine No. 4 to Preclude References to Defendants' Decision Making Process and Reasonableness of billed Charges if Motion in Limine No. 3 is Denied	09/21/21	20	4853–4868
11	Motion to Remand	05/24/19	1	101–122
432	Motion to Seal Certain Confidential Trial Exhibits (Filed Under Seal)	12/05/21	110	27,288–27,382
434	Motion to Seal Certain Confidential Trial Exhibits (Filed Under Seal)	12/13/21	111	27,401–27,495
267	Motion to Seal Defendants' Motion to Seal Certain Confidential Trial Exhibits	12/15/21	50	12,294–12,302
275	Motion to Seal Defendants' Reply in Support of Motion to Seal Certain Confidential Trial Exhibits	01/10/22	51	12,739–12,747
276	Motion to Seal Defendants' Second Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits	01/10/22	51 52	12,748–12,750 12,751–12,756
268	Motion to Seal Defendants' Supplement to Motion to Seal Certain Confidential Trial Exhibits	12/15/21	50	12,303–12,311
315	Notice of Appeal	04/06/22	67	16,678–16,694
355	Notice of Appeal	10/12/22	73 74	18,126–18,250 18,251–18,467
292	Notice of Entry of Judgment	03/09/22	53	13,168–13,178
115	Notice of Entry of Order Affirming and Adopting Report and Recommendation No. 2	08/09/21	18	4403–4413

Tab	Document	Date	Vol.	Pages
	Regarding Plaintiffs' Objection to Notice of Intent to Issue Subpoena Duces Tecum to TeamHealth Holdings, Inc. and Collect Rx, Inc. Without Deposition and Motion for Protective Order and Overruling Objection			
116	Notice of Entry of Order Affirming and Adopting Report and Recommendation No. 3 Regarding Defendants' Motion to Compel Responses to Defendants' Second Set of Requests for Production on Order Shortening Time and Overruling Objection	08/09/21	18	4414–4424
127	Notice of Entry of Order Affirming and Adopting Report and Recommendation No. 6 Regarding Defendants' Motion to Compel Further Testimony from Deponents Instructed Not to Answer Questions and Overruling Objection	09/16/21	19	4709–4726
128	Notice of Entry of Order Affirming and Adopting Report and Recommendation No. 7 Regarding Defendants' Motion to Compel Responses to Defendants' Amended Third Set of Request for Production of Documents and Overruling Objection	09/16/21	19	4727–4747
129	Notice of Entry of Order Affirming and Adopting Report and Recommendation No. 9 Regarding Defendants' Renewed Motion to Compel Further Testimony from Deponents Instructed No to Answer and Overruling Objection	09/16/21	19 20	4748–4750 4751–4769
200	Notice of Entry of Order Affirming and Adopting Report and Recommendation No. 11 Regarding Defendants' Motion to Compel Plaintiffs' Production of Documents About Which Plaintiffs' Witnesses Testified	11/03/21	32	7853–7874

Tab	Document	Date	Vol.	Pages
340	Notice of Entry of Order Approving Plaintiffs' Motion for Attorney's Fees	08/02/22	71	17,707–17,725
351	Notice of Entry of Order Approving Supplemental Attorney's Fee Award	10/12/22	73	18,005–18,015
357	Notice of Entry of Order Denying "Motion to Redact Portions of Trial Transcript"	10/13/22	75	18,599–18,608
40	Notice of Entry of Order Denying Defendants' (1) Motion to Dismiss First Amended Complaint; and (2) Supplemental Brief in Support of Their Motion to Dismiss Plaintiffs' First Amended Complaint Addressing Plaintiffs' Eighth Claim for Relief	06/24/20	6 7	1472–1500 1501–1516
274	Notice of Entry of Order Denying Defendants' Motion for Judgement as a Matter of Law	01/06/22	51	12,718–12,738
352	Notice of Entry of Order Denying Defendants' Motion for New Trial	10/12/22	73	18,016–18,086
154	Notice of Entry of Order Denying Defendants' Motion for Order to Show Cause Why Plaintiffs Should not be Held in Contempt for Violating Protective Order	10/14/21	22	5309–5322
161	Notice of Entry of Order Denying Defendants' Motion for Partial Summary Judgment	10/25/21	25	6116–6126
338	Notice of Entry of Order Denying Defendants' Motion for Remittitur and to Alter or Amend the Judgment	07/19/22	71	17,689–17,699
171	Notice of Entry of Order Denying Defendants' Motion in Limine No. 1 Motion to Authorize Defendants to Offer Evidence Relating to Plaintiffs' Agreements with Other Market Players and Related Negotiations	11/01/21	29	7040–7051

Tab	Document	Date	Vol.	Pages
172	Notice of Entry of Order Denying Defendants' Motion in Limine No. 2: Motion Offered in the Alternative to MIL No. 1, to Preclude Plaintiffs from Offering Evidence Relating to Defendants' Agreements with Other Market Players and Related Negotiations	11/01/21	29	7052–7063
173	Notice of Entry of Order Denying Defendants' Motion in Limine No. 3 to Allow Reference to Plaintiffs' Decision Making Processes Regarding Setting Billed Charges	11/01/21	29	7064–7075
174	Notice of Entry of Order Denying Defendants' Motion in Limine No. 4 to Preclude References to Defendants' Decision Making Processes and Reasonableness of Billed Charges if Motion in Limine No. 3 is Denied	11/01/21	29	7076–7087
175	Notice of Entry of Order Denying Defendants' Motion in Limine No. 12, Paired with Motion in Limine No. 11, to Preclude Plaintiffs from Discussing Defendants' Approach to Reimbursement	11/01/21	29	7088–7099
176	Notice of Entry of Order Denying Defendants' Motion in Limine No. 5 Regarding Argument or Evidence that Amounts TeamHealth Plaintiffs Billed for Services are Reasonable [An Alternative Motion to Motion in Limine No. 6]	11/01/21	29	7100–7111
177	Notice of Entry of Order Denying Defendants' Motion in Limine No. 7 to Authorize Defendants to Offer Evidence of the Costs of the Services that Plaintiffs Provided	11/01/21	29	7112–7123
178	Notice of Entry of Order Denying	11/01/21	29	7124–7135

Tab	Document	Date	Vol.	Pages
	Defendants' Motion in Limine No. 8, Offered in the Alternative to MIL No. 7, to Preclude Plaintiffs from Offering Evidence as to the Qualitative Value, Relative Value, Societal Value, or Difficulty of the Services they Provided			
179	Notice of Entry of Order Denying Defendants' Motion in Limine No. 10 to Exclude Evidence of Defendants' Corporate Structure (Alternative Motion to be Considered Only if Court Denies Defendants' Counterpart Motion in Limine No. 9)	11/01/21	29	7136–7147
180	Notice of Entry of Order Denying Defendants' Motion in Limine No. 11, Paired with Motion in Limine No. 12, to Authorize Defendants to Discuss Plaintiffs' Conduct and Deliberations in Negotiating Reimbursement	11/01/21	29	7148–7159
181	Notice of Entry of Order Denying Defendants' Motion in Limine No. 13 Motion to Authorize Defendants to Offer Evidence Relating to Plaintiffs' Collection Practices for Healthcare Claims	11/01/21	29	7160–7171
182	Notice of Entry of Order Denying Defendants' Motion in Limine No. 14: Motion Offered in the Alternative MIL No. 13 to Preclude Plaintiffs from Contesting Defendants' Defenses Relating to Claims that were Subject to a Settlement Agreement Between CollectRx and Data iSight; and Defendants' Adoption of Specific Negotiation Thresholds for Reimbursement Claims Appealed or Contested by Plaintiffs	11/01/21	29	7172–7183
183	Notice of Entry of Order Denying	11/01/21	29	7184–7195

Tab	Document	Date	Vol.	Pages
	Defendants' Motion in Limine No. 15 to Preclude Reference and Testimony Regarding the TeamHealth Plaintiffs Policy not to Balance Bill			
184	Notice of Entry of Order Denying Defendants' Motion in Limine No. 18 to Preclude Testimony of Plaintiffs' Non-Retained Expert Joseph Crane, M.D.	11/01/21	29	7196–7207
185	Notice of Entry of Order Denying Defendants' Motion in Limine No. 20 to Exclude Defendants' Lobbying Efforts	11/01/21	29	7208–7219
186	Notice of Entry of Order Denying Defendants' Motion in Limine No. 24 to Preclude Plaintiffs from Referring to Themselves as Healthcare Professionals	11/01/21	29	7220–7231
187	Notice of Entry of Order Denying Defendants' Motion in Limine No. 27 to Preclude Evidence of Complaints Regarding Defendants' Out-Of-Network Rates or Payments	11/01/21	29	7232–7243
188	Notice of Entry of Order Denying Defendants' Motion in Limine No. 29 to Preclude Evidence Only Relating to Defendants' Evaluation and Development of a Company that Would Offer a Service Similar to Multiplan and Data iSight	11/01/21	29 30	7244–7250 7251–7255
189	Notice of Entry of Order Denying Defendants' Motion in Limine No. 32 to Exclude Evidence or Argument Relating to Materials, Events, or Conduct that Occurred on or After January 1, 2020	11/01/21	30	7256–7267
191	Notice of Entry of Order Denying Defendants' Motion in Limine No. 38 to Exclude Evidence or Argument Relating to	11/01/21	30	7280–7291

Tab	Document	Date	Vol.	Pages
	Defendants' use of MultiPlan and the Data iSight Service, Including Any Alleged Conspiracy or Fraud Relating to the use of Those Services			
190	Notice of Entry of Order Denying Defendants' Motion in Limine to Preclude Certain Expert Testimony and Fact Witness Testimony by Plaintiffs' Non-Retained Expert Robert Frantz, M.D.	11/01/21	30	7268–7279
293	Notice of Entry of Order Denying Defendants' Motion to Apply Statutory Cap on Punitive Damages	03/09/22	53	13,179–13,197
62	Notice of Entry of Order Denying Defendants' Motion to Compel Production of Clinical Documents for the At-Issue Claims and Defenses and to Compel Plaintiff to Supplement Their NRCP 16.1 Initial Disclosures on Order Shortening Time	10/27/20	11	2671–2683
78	Notice of Entry of Order Denying Defendants' Motion to Compel Responses to Defendants' First and Second Requests for Production on Order Shortening Time	02/04/21	15	3703–3713
193	Notice of Entry of Order Denying Defendants' Motion to Strike Supplement Report of David Leathers	11/01/21	30	7355–7366
353	Notice of Entry of Order Denying Defendants' Renewed Motion for Judgment as a Matter of Law	10/12/22	73	18,087–18,114
97	Notice of Entry of Order Denying Motion for Reconsideration of Court's Order Denying Defendants' Motion to Compel Responses to Defendants' First and Second Requests for Production	04/26/21	17	4096–4108

Tab	Document	Date	Vol.	Pages
77	Notice of Entry of Order Granting Defendants' Motion for Appointment of Special Master	02/02/21	15	3693–3702
269	Notice of Entry of Order Granting Defendants' Motion for Leave to File Defendants' Preliminary Motion to Seal Attorneys' Eyes Only Documents Used at Trial Under Seal	12/27/21	50	12,312–12,322
202	Notice of Entry of Order Granting Defendants' Motion in Limine No. 17	11/04/21	33	8092–8103
203	Notice of Entry of Order Granting Defendants' Motion in Limine No. 25	11/04/21	33	8104–8115
204	Notice of Entry of Order Granting Defendants' Motion in Limine No. 37	11/04/21	33	8116–8127
205	Notice of Entry of Order Granting in Part and Denying in Part Defendants' Motion in Limine No. 9	11/04/21	33	8128–8140
206	Notice of Entry of Order Granting in Part and Denying in Part Defendants' Motion in Limine No. 21	11/04/21	33	8141–8153
207	Notice of Entry of Order Granting in Part and Denying in Part Defendants' Motion in Limine No. 22	11/04/21	33	8154–8165
341	Notice of Entry of Order Granting in Part and Denying in Part Defendants' Motion to Retax Costs	08/02/22	71	17,726–17,739
358	Notice of Entry of Order Granting in Part and Denying in Part Defendants' Motion to Seal Certain Confidential Trial Exhibits	10/18/22	75 76	18,609–18,750 18,751–18,755
215	Notice of Entry of Order Granting in Part and Denying in Part Plaintiffs' Motion in Limine to Exclude Evidence Subject to the	11/12/21	37	9162–9173

Tab	Document	Date	Vol.	Pages
	Court's Discovery Orders			
147	Notice of Entry of Order Granting Plaintiffs' Motion for Leave to File Second Amended Complaint on Order Shortening Time	10/07/21	21	5235–5245
242	Notice of Entry of Order Granting Plaintiffs' Motion for Leave to File Supplemental Record in Opposition to Arguments Raised for the First Time in Defendants' Reply in Support of Motion for Partial Summary Judgment	11/19/21	44	10,954–10,963
192	Notice of Entry of Order Granting Plaintiffs' Motion in Limine to Exclude Evidence, Testimony And-Or Argument Regarding the Fact that Plaintiff have Dismissed Certain Claims	11/01/21	30	7292–7354
63	Notice of Entry of Order Granting Plaintiffs' Motion to Compel Defendants' List of Witnesses, Production of Documents and Answers to Interrogatories on Order Shortening Time	10/27/20	11	2684–2695
335	Notice of Entry of Order Granting Plaintiffs' Motion to Modify Joint Pretrial Memorandum Re: Punitive Damages on Order Shortening Time	06/29/22	71	17,594–17,609
281	Notice of Entry of Order Granting Plaintiffs' Proposed Schedule for Submission of Final Redactions	01/31/22	52	12,969–12,979
114	Notice of Entry of Order Granting Plaintiffs' Renewed Motion for Order to Show Cause Why Defendants Should Not Be Held in Contempt and for Sanctions	08/03/21	18	4383–4402
53	Notice of Entry of Order Granting, in Part Plaintiffs' Motion to Compel Defendants'	09/28/20	9	2184–2195

Tab	Document	Date	Vol.	Pages
	Production of Claims for At-Issue Claims, Or, in The Alternative, Motion in Limine			
102	Notice of Entry of Order of Report and Recommendation #6 Regarding Defendants' Motion to Compel Further Testimony from Deponents Instructed Not to Answer Question	05/26/21	17	4157–4165
22	Notice of Entry of Order Re: Remand	02/27/20	3	543–552
142	Notice of Entry of Order Regarding Defendants' Objection to Special Master's Report and Recommendation No. 11 Regarding Defendants' Motion to Compel Plaintiffs' Production of Documents about which Plaintiffs' Witnesses Testified on Order Shortening Time	09/29/21	21	5104–5114
66	Notice of Entry of Order Setting Defendants' Production & Response Schedule Re: Order Granting Plaintiffs' Motion to Compel Defendants' List of Witnesses, Production of Documents and Answers to Interrogatories on Order Shortening Time	11/09/20	12	2775–2785
285	Notice of Entry of Order Shortening Time for Hearing Re: Plaintiffs' Motion to Unlock Certain Admitted Trial Exhibits	02/14/22	53	13,029–13,046
354	Notice of Entry of Order Unsealing Trial Transcripts and Restoring Public Access to Docket	10/12/22	73	18,115–18,125
86	Notice of Entry of Report and Recommendation #1	03/16/21	16	3887–3894
120	Notice of Entry of Report and Recommendation #11 Regarding Defendants' Motion to Compel Plaintiffs' Production of Documents About Which Plaintiffs'	08/11/21	18	4487–4497

Tab	Document	Date	Vol.	Pages
	Witnesses Testified			
91	Notice of Entry of Report and Recommendation #2 Regarding Plaintiffs' Objection to Notice of Intent to Issue Subpoena Duces Tecum to TeamHealth Holdings, Inc. and Collect Rx, Inc. Without Deposition and Motion for Protective Order	03/29/21	16	3971–3980
95	Notice of Entry of Report and Recommendation #3 Regarding Defendants' Motion to Compel Responses to Defendants' Second Set of Requests for Production on Order Shortening Time	04/15/21	17	4080–4091
104	Notice of Entry of Report and Recommendation #7 Regarding Defendants' Motion to Compel Plaintiffs' Responses to Defendants' Amended Third Set of Requests for Production of Documents	06/03/21	17	4173–4184
41	Notice of Entry of Stipulated Confidentiality and Protective Order	06/24/20	7	1517–1540
69	Notice of Entry of Stipulated Electronically Stored Information Protocol Order	01/08/21	12	2860–2874
289	Notice of Entry of Stipulation and Order Regarding Certain Admitted Trial Exhibits	02/17/22	53	13,074–13,097
360	Notice of Entry of Stipulation and Order Regarding Expiration of Temporary Stay for Sealed Redacted Transcripts	10/25/22	76	18,759–18,769
282	Notice of Entry of Stipulation and Order Regarding Schedule for Submission of Redactions	02/08/22	52	12,980–12,996
111	Notice of Entry Report and Recommendations #9 Regarding Pending Motions	07/01/21	18	4313–4325

Tab	Document	Date	Vol.	Pages
490	Notice of Filing of Expert Report of Bruce Deal, Revised on November 14, 2021 (Filed Under Seal)	04/18/23	144	35,714–35,812
361	Notice of Filing of Writ Petition	11/17/22	76	18,770–18855
24	Notice of Intent to Take Default as to: (1) Defendant UnitedHealth Group, Inc. on All Claims; and (2) All Defendants on the First Amended Complaint's Eighth Claim for Relief	03/13/20	3 4	699–750 751
324	Notice of Posting *Supersedeas* Bond	04/29/22	69	17,114–17,121
10	Notice of Removal to Federal Court	05/14/19	1	42–100
333	Notice of Supplemental Attorneys Fees Incurred After Submission of Health Care Providers' Motion for Attorneys Fees	06/24/22	70 71	17,470–17,500 17,501–17,578
291	Objection to Plaintiffs' Proposed Judgment and Order Denying Motion to Apply Statutory Cap on Punitive Damages	03/04/22	53	13,161–13,167
345	Objection to Plaintiffs' Proposed Orders Denying Renewed Motion for Judgment as a Matter of Law and Motion for New Trial	09/13/22	72	17,941–17,950
377	Objection to R&R #11 Regarding United's (Filed Under Seal)Motion to Compel Documents About Which Plaintiffs' Witnesses Testified (Filed Under Seal)	08/25/21	84 85	20,864–20,893 20,894–20,898
320	Opposition to Defendants' Motion to Retax Costs	04/13/22	68	16,856–16,864
153	Opposition to Plaintiffs' Motion in Limine to Exclude Evidence, Testimony and/or Argument Regarding the Fact that Plaintiffs have Dismissed Certain Claims and Parties on Order Shortening Time	10/12/21	22	5301–5308

Tab	Document	Date	Vol.	Pages
20	Order	02/20/20	3	519–524
21	Order	02/24/20	3	525–542
337	Order Amending Oral Ruling Granting Defendants' Motion to Retax	07/01/22	71	17,682–17,688
2	Peremptory Challenge of Judge	04/17/19	1	18–19
415	Plaintiffs' Combined Opposition to Defendants Motions in Limine 1, 7, 9, 11 & 13 (Filed Under Seal)	09/29/21	104	25,786–25,850
416	Plaintiffs' Combined Opposition to Defendants' Motions in Limine No. 2, 8, 10, 12 & 14 (Filed Under Seal)	09/29/21	104	25,851–25,868
145	Plaintiffs' Motion for Leave to File Second Amended Complaint on Order Shortening Time	10/04/21	21	5170–5201
422	Plaintiffs' Motion for Leave to File Supplemental Record in Opposition to Arguments Raised for the First Time in Defendants' Reply in Support of Motion for Partial Summary Judgment (Filed Under Seal)	10/17/21	108	26,664–26,673
378	Plaintiffs' Motion in Limine to Exclude Evidence Subject to the Court's Discovery Orders (Filed Under Seal)	09/21/21	85	20,899–20,916
380	Plaintiffs' Motion in Limine to Exclude Evidence, Testimony and/or Argument Relating to (1) Increase in Insurance Premiums (2) Increase in Costs and (3) Decrease in Employee Wages/Benefits Arising from Payment of Billed Charges (Filed Under Seal)	09/21/21	85	21,077–21,089
149	Plaintiffs' Motion in Limine to Exclude Evidence, Testimony and-or Argument	10/08/21	22	5265–5279

Tab	Document	Date	Vol.	Pages
	Regarding the Fact that Plaintiffs Have Dismissed Certain Claims and Parties on Order Shortening Time			
363	Plaintiffs' Motion to Compel Defendants' List of Witnesses, Production of Documents and Answers to Interrogatories on Order Shortening Time (Filed Under Seal)	09/28/20	78	19,144–19,156
49	Plaintiffs' Motion to Compel Defendants' Production of Claims File for At-Issue Claims, or, in the Alternative, Motion in Limine on Order Shortening Time	08/28/20	7 8	1685–1700 1701–1845
250	Plaintiffs' Motion to Modify Joint Pretrial Memorandum Re: Punitive Damages on Order Shortening Time	11/22/21	47	11,594–11,608
194	Plaintiffs' Notice of Amended Exhibit List	11/01/21	30	7367–7392
208	Plaintiffs' Notice of Deposition Designations	11/04/21	33 34	8166–8250 8251–8342
152	Plaintiffs' Objections to Defendants' Pretrial Disclosures	10/08/21	22	5295–5300
328	Plaintiffs' Opposition to Defendants' Motion for New Trial	05/04/22	69 70	17,179–17,250 17,251–17,335
420	Plaintiffs' Opposition to Defendants' Motion for Partial Summary Judgment (Filed Under Seal)	10/05/21	107	26,498–26,605
327	Plaintiffs' Opposition to Defendants' Motion for Remittitur and to Alter or Amend the Judgment	05/04/22	69	17,165–17,178
144	Plaintiffs' Opposition to Defendants' Motion in Limine No. 24 to Preclude Plaintiffs from Referring to Themselves as Healthcare Professionals	09/29/21	21	5155–5169
143	Plaintiffs' Opposition to Defendants' Motion	09/29/21	21	5115–5154

Tab	Document	Date	Vol.	Pages
	in Limine Nos. 3, 4, 5, 6 Regarding Billed Charges			
279	Plaintiffs' Opposition to Defendants' Motion to Apply Statutory Cap on Punitive Damages and Plaintiffs' Cross Motion for Entry of Judgment	01/20/22	52	12,773–12,790
374	Plaintiffs' Opposition to Defendants' Motion to Compel Plaintiffs' Production of Documents About Which Plaintiffs' Witnesses Testified on Order Shortening Time (Filed Under Seal)	07/06/21	84	20,699–20,742
25	Plaintiffs' Opposition to Defendants' Motion to Dismiss	03/26/20	4	752–783
34	Plaintiffs' Opposition to Defendants' Motion to Dismiss First Amended Complaint	05/29/20	5 6	1188–1250 1251–1293
349	Plaintiffs' Opposition to Defendants' Motion to Redact Portions of Trial Transcript	10/07/22	72	17,990–17,993
278	Plaintiffs' Opposition to Defendants' Motion to Seal Courtroom During January 12, 2022 Hearing	01/12/22	52	12,769–12,772
369	Plaintiffs' Opposition to Defendants' Motion to Supplement the Record Supporting Objections to Reports and Recommendations #2 and #3 on Order Shortening Time (Filed Under Seal)	06/01/21	81 82	20,066–20,143 20,144–20,151
329	Plaintiffs' Opposition to Defendants' Renewed Motion for Judgment as a Matter of Law	05/05/22	70	17,336–17,373
317	Plaintiffs' Opposition to Defendants' Rule 62(b) Motion for Stay	04/07/22	68	16,826–16,831
35	Plaintiffs' Opposition to Defendants' Supplemental Brief in Support of Their Motion to Dismiss Plaintiffs' First Amended	05/29/20	6	1294–1309

Tab	Document	Date	Vol.	Pages
	Complaint Addressing Plaintiffs' Eighth Claim for Relief			
83	Plaintiffs' Opposition to Motion for Reconsideration of Order Denying Defendants' Motion to Compel Plaintiffs Responses to Defendants' First and Second Requests for Production	03/04/21	16	3833–3862
55	Plaintiffs' Opposition to Motion to Compel Production of Clinical Documents for the At-Issue Claims and Defenses and to Compel Plaintiff to Supplement Their NRCP 16.1 Initial Disclosures on an Order Shortening Time	09/29/20	9-10	2224–2292
72	Plaintiffs' Opposition to Motion to Compel Responses to Defendants' First and Second Requests for Production on Order Shortening Time	01/12/21	14	3420–3438
122	Plaintiffs' Opposition to United's Motion for Order to Show Cause Why Plaintiffs Should Not Be Held in Contempt and Sanctioned for Allegedly Violating Protective Order	08/24/21	19	4528–4609
270	Plaintiffs' Opposition to United's Motion to Seal	12/29/21	50	12,323–12,341
222	Plaintiffs' Proposed Jury Instructions (Contested)	11/15/21	38 39	9496–9500 9501–9513
260	Plaintiffs' Proposed Second Phase Jury Instructions and Verdict Form	12/06/21	49	12,064–12,072
243	Plaintiffs' Proposed Special Verdict Form	11/19/21	44	10,964–10,973
227	Plaintiffs' Proposed Verdict Form	11/16/21	40	9810–9819
84	Plaintiffs' Renewed Motion for Order to Show Cause Why Defendants Should Not Be Held in Contempt and for Sanctions	03/08/21	16	3863–3883

Tab	Document	Date	Vol.	Pages
287	Plaintiffs' Reply in Support of Cross Motion for Entry of Judgment	02/15/22	53	13,054–13,062
364	Plaintiffs' Reply in Support of Renewed Motion for Order to Show Cause Why Defendants Should Not Be Held in Contempt and for Sanctions (Filed Under Seal)	04/01/21	78	19,157–19,176
366	Plaintiffs' Response to Defendants Objection to the Special Master's Report and Recommendation No. 2 Regarding Plaintiffs' Objection to Notice of Intent to Issue Subpoena Duces Tecum to TeamHealth Holdings, Inc. and Collect Rx, Inc. Without Deposition and Motion for Protective Order (Filed Under Seal)	04/19/21	78 79	19,389–19,393 19,394–19,532
195	Plaintiffs' Response to Defendants' Objection to Media Requests	11/01/21	30	7393–7403
371	Plaintiffs' Response to Defendants' Objection to Report and Recommendation #6 Regarding Defendants' Motion to Compel Further Testimony from Deponents Instructed Not to Answer Questions (Filed Under Seal)	06/16/21	82	20,212–20,265
376	Plaintiffs' Response to Defendants' Objection to Special Master Report and Recommendation No. 9 Regarding Defendants' Renewed Motion to Compel Further Testimony from Deponents Instructed not to Answer Questions (Filed Under Seal)	07/22/21	84	20,751–20,863
110	Plaintiffs' Response to Defendants' Objection to Special Master's Report and Recommendation #7 Regarding Defendants' Motion to Compel Responses to Amended	06/24/21	18	4281–4312

Tab	Document	Date	Vol.	Pages
	Third Set of Request for Production of Documents			
367	Plaintiffs' Response to Defendants' Objection to the Special Master's Report and Recommendation No. 3 Regarding Defendants' Motion to Compel Responses to Defendants' Second Set of Request for Production on Order Shortening Time (Filed Under Seal)	05/05/21	79	19,533–19,581
426	Plaintiffs' Response to Defendants' Trial Brief Regarding Evidence and Argument Relating to Out-of-State Harms to Non-Parties (Filed Under Seal)	11/08/21	109	26,965–26,997
246	Plaintiffs' Second Supplemental Jury Instructions (Contested)	11/20/21	46	11,255–11,261
261	Plaintiffs' Supplement to Proposed Second Phase Jury Instructions	12/06/21	49	12,072–12,077
236	Plaintiffs' Supplemental Jury Instruction (Contested)	11/17/21	42	10,308–10,313
248	Plaintiffs' Third Supplemental Jury Instructions (Contested)	11/21/21	46	11,267–11,272
216	Plaintiffs' Trial Brief Regarding Defendants' Prompt Payment Act Jury Instruction Re: Failure to Exhaust Administrative Remedies	11/12/21	37	9174–9184
223	Plaintiffs' Trial Brief Regarding Punitive Damages for Unjust Enrichment Claim	11/15/21	39	9514–9521
218	Plaintiffs' Trial Brief Regarding Specific Price Term	11/14/21	38	9417–9425
428	Preliminary Motion to Seal Attorneys' Eyes Documents Used at Trial (Filed Under Seal)	11/11/21	109	27,004–27,055
211	Recorder's Amended Transcript of Jury Trial – Day 9	11/09/21	35	8515–8723

Tab	Document	Date	Vol.	Pages
73	Recorder's Partial Transcript of Proceedings Re: Motions (Unsealed Portion Only)	01/13/21	14	3439–3448
125	Recorder's Partial Transcript of Proceedings Re: Motions Hearing	09/09/21	19	4667–4680
126	Recorder's Partial Transcript of Proceedings Re: Motions Hearing (Via Blue Jeans)	09/15/21	19	4681–4708
31	Recorder's Transcript of Hearing All Pending Motions	05/15/20	5	1022–1026
88	Recorder's Transcript of Hearing All Pending Motions	03/18/21	16	3910–3915
90	Recorder's Transcript of Hearing All Pending Motions	03/25/21	16	3967–3970
96	Recorder's Transcript of Hearing All Pending Motions	04/21/21	17	4092–4095
82	Recorder's Transcript of Hearing Defendants' Motion to Extend All Case Management Deadlines and Continue Trial Setting on Order Shortening Time (Second Request)	03/03/21	16	3824–3832
101	Recorder's Transcript of Hearing Motion for Leave to File Opposition to Defendants' Motion to Compel Responses to Second Set of Requests for Production on Order Shortening Time in Redacted and Partially Sealed Form	05/12/21	17	4155–4156
107	Recorder's Transcript of Hearing Motion for Leave to File Plaintiffs' Response to Defendants' Objection to the Special Master's Report and Recommendation No. 3 Regarding Defendants' Second Set of Request for Production on Order Shortening Time in Redacted and Partially Sealed Form	06/09/21	17	4224–4226
92	Recorder's Transcript of Hearing Motion to Associate Counsel on OST	04/01/21	16	3981–3986

Tab	Document	Date	Vol.	Pages
483	Recorder's Transcript of Hearing re Hearing (Filed Under Seal)	10/13/22	142	35,259–35,263
346	Recorder's Transcript of Hearing Re: Hearing	09/22/22	72	17,951–17,972
359	Recorder's Transcript of Hearing Status Check	10/20/22	76	18,756–18,758
162	Recorder's Transcript of Jury Trial – Day 1	10/25/21	25 26	6127–6250 6251–6279
213	Recorder's Transcript of Jury Trial – Day 10	11/10/21	36 37	8933–9000 9001–9152
217	Recorder's Transcript of Jury Trial – Day 11	11/12/21	37 38	9185–9250 9251–9416
224	Recorder's Transcript of Jury Trial – Day 12	11/15/21	39 40	9522–9750 9751–9798
228	Recorder's Transcript of Jury Trial – Day 13	11/16/21	40 41	9820–10,000 10,001–10,115
237	Recorder's Transcript of Jury Trial – Day 14	11/17/21	42 43	10,314–10,500 10,501–10,617
239	Recorder's Transcript of Jury Trial – Day 15	11/18/21	43 44	10,624–10,750 10,751–10,946
244	Recorder's Transcript of Jury Trial – Day 16	11/19/21	44 45	10,974–11,000 11,001–11,241
249	Recorder's Transcript of Jury Trial – Day 17	11/22/21	46 47	11,273–11,500 11.501–11,593
253	Recorder's Transcript of Jury Trial – Day 18	11/23/21	47 48	11,633–11,750 11,751–11,907
254	Recorder's Transcript of Jury Trial – Day 19	11/24/21	48	11,908–11,956
163	Recorder's Transcript of Jury Trial – Day 2	10/26/21	26	6280–6485
256	Recorder's Transcript of Jury Trial – Day 20	11/29/21	48 49	12,000 12,001–12,034

Tab	Document	Date	Vol.	Pages
262	Recorder's Transcript of Jury Trial – Day 21	12/06/21	49	12,078–,12,135
266	Recorder's Transcript of Jury Trial – Day 22	12/07/21	49 50	12,153–12,250 12,251–12,293
165	Recorder's Transcript of Jury Trial – Day 3	10/27/21	27 28	6568–6750 6751–6774
166	Recorder's Transcript of Jury Trial – Day 4	10/28/21	28	6775–6991
196	Recorder's Transcript of Jury Trial – Day 5	11/01/21	30 31	7404–7500 7501–7605
197	Recorder's Transcript of Jury Trial – Day 6	11/02/21	31 32	7606–7750 7751–7777
201	Recorder's Transcript of Jury Trial – Day 7	11/03/21	32 33	7875–8000 8001–8091
210	Recorder's Transcript of Jury Trial – Day 8	11/08/21	34 35	8344–8500 8501–8514
212	Recorder's Transcript of Jury Trial – Day 9	11/09/21	35 36	8724–8750 8751–8932
27	Recorder's Transcript of Proceedings Re: Motions	04/03/20	4	909–918
76	Recorder's Transcript of Proceedings Re: Motions	01/21/21	15	3659–3692
80	Recorder's Transcript of Proceedings Re: Motions	02/22/21	16	3757–3769
81	Recorder's Transcript of Proceedings Re: Motions	02/25/21	16	3770–3823
93	Recorder's Transcript of Proceedings Re: Motions	04/09/21	16 17	3987–4000 4001–4058
103	Recorder's Transcript of Proceedings Re: Motions	05/28/21	17	4166–4172
43	Recorder's Transcript of Proceedings Re: Motions (via Blue Jeans)	07/09/20	7	1591–1605

Tab	Document	Date	Vol.	Pages
45	Recorder's Transcript of Proceedings Re: Motions (via Blue Jeans)	07/23/20	7	1628–1643
58	Recorder's Transcript of Proceedings Re: Motions (via Blue Jeans)	10/08/20	10	2363–2446
59	Recorder's Transcript of Proceedings Re: Motions (via Blue Jeans)	10/22/20	10	2447–2481
65	Recorder's Transcript of Proceedings Re: Motions (via Blue Jeans)	11/04/20	11 12	2745–2750 2751–2774
67	Recorder's Transcript of Proceedings Re: Motions (via Blue Jeans)	12/23/20	12	2786–2838
68	Recorder's Transcript of Proceedings Re: Motions (via Blue Jeans)	12/30/20	12	2839–2859
105	Recorder's Transcript of Proceedings Re: Motions Hearing	06/03/21	17	4185–4209
106	Recorder's Transcript of Proceedings Re: Motions Hearing	06/04/21	17	4210–4223
109	Recorder's Transcript of Proceedings Re: Motions Hearing	06/23/21	17 18	4240–4250 4251–4280
113	Recorder's Transcript of Proceedings Re: Motions Hearing	07/29/21	18	4341–4382
123	Recorder's Transcript of Proceedings Re: Motions Hearing	09/02/21	19	4610–4633
121	Recorder's Transcript of Proceedings Re: Motions Hearing (Unsealed Portion Only)	08/17/21	18 19	4498–4500 4501–4527
29	Recorder's Transcript of Proceedings Re: Pending Motions	05/14/20	4	949-972
51	Recorder's Transcript of Proceedings Re: Pending Motions	09/09/20	8	1933–1997
15	Rely in Support of Motion to Remand	06/28/19	2	276–308
124	Reply Brief on "Motion for Order to Show	09/08/21	19	4634–4666

Tab	Document	Date	Vol.	Pages
	Cause Why Plaintiffs Should Not Be Hold in Contempt and Sanctioned for Violating Protective Order"			
19	Reply in Support of Amended Motion to Remand	02/05/20	2 3	486–500 501–518
330	Reply in Support of Defendants' Motion for Remittitur and to Alter or Amend the Judgment	06/22/22	70	17,374–17,385
57	Reply in Support of Defendants' Motion to Compel Production of Clinical Documents for the At-Issue Claims and Defenses and to Compel Plaintiff to Supplement Their NRCP 16.1 Initial Disclosures	10/07/20	10	2337–2362
331	Reply in Support of Defendants' Renewed Motion for Judgment as a Matter of Law	06/22/22	70	17,386–17,411
332	Reply in Support of Motion for New Trial	06/22/22	70	17,412–17,469
87	Reply in Support of Motion for Reconsideration of Order Denying Defendants' Motion to Compel Plaintiffs Responses to Defendants' First and Second Requests for Production	03/16/21	16	3895–3909
344	Reply in Support of Supplemental Attorney's Fees Request	08/22/22	72	17,935–17,940
229	Reply in Support of Trial Brief Regarding Evidence and Argument Relating to Out-Of-State Harms to Non-Parties	11/16/21	41	10,116–10,152
318	Reply on "Defendants' Rule 62(b) Motion for Stay Pending Resolution of Post-Trial Motions" (*on Order Shortening Time*)	04/07/22	68	16,832–16,836
245	Response to Plaintiffs' Trial Brief Regarding Punitive Damages for Unjust Enrichment Claim	11/19/21	45 46	11,242–11,250 11,251–11,254

Tab	Document	Date	Vol.	Pages
230	Response to Plaintiffs' Trial Brief Regarding Specific Price Term	11/16/21	41	10,153–10,169
424	Response to Sur-Reply Arguments in Plaintiffs' Motion for Leave to File Supplemental Record in Opposition to Arguments Raised for the First Time in Defendants' Reply in Support of Motion for Partial Summary Judgment (Filed Under Seal)	10/21/21	109	26,931–26,952
148	Second Amended Complaint	10/07/21	21 22	5246–5250 5251–5264
458	Second Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits (Filed Under Seal)	01/05/22	126 127	31,309–31,393 31,394–31,500
231	Special Verdict Form	11/16/21	41	10,169–10,197
257	Special Verdict Form	11/29/21	49	12,035–12,046
265	Special Verdict Form	12/07/21	49	12,150–12,152
6	Summons – Health Plan of Nevada, Inc.	04/30/19	1	29–31
9	Summons – Oxford Health Plans, Inc.	05/06/19	1	38–41
8	Summons – Sierra Health and Life Insurance Company, Inc.	04/30/19	1	35–37
7	Summons – Sierra Health-Care Options, Inc.	04/30/19	1	32–34
3	Summons - UMR, Inc. dba United Medical Resources	04/25/19	1	20–22
4	Summons – United Health Care Services Inc. dba UnitedHealthcare	04/25/19	1	23–25
5	Summons – United Healthcare Insurance Company	04/25/19	1	26–28
433	Supplement to Defendants' Motion to Seal Certain Confidential Trial Exhibits (Filed	12/08/21	110 111	27,383–27,393 27,394–27,400

Tab	Document	Date	Vol.	Pages
	Under Seal)			
170	Supplement to Defendants' Objection to Media Requests	10/31/21	29	7019–7039
439	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 1 of 18 (Filed Under Seal)	12/24/21	114	28,189–28,290
440	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 2 of 18 (Filed Under Seal)	12/24/21	114 115	28,291–28,393 28,394–28,484
441	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 3 of 18 (Filed Under Seal)	12/24/21	115 116	28,485–28,643 28,644–28,742
442	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 4 of 18 (Filed Under Seal)	12/24/21	116 117	28,743–28,893 28,894–28,938
443	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 5 of 18 (Filed Under Seal)	12/24/21	117	28,939–29,084
444	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 6 of 18 (Filed Under Seal)	12/24/21	117 118	29,085–29,143 29,144–29,219
445	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 7 of 18 (Filed Under Seal)	12/24/21	118	29,220–29,384
446	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 8 of 18 (Filed Under Seal)	12/24/21	118 119	29,385–29,393 29,394–29,527
447	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 9 of 18 (Filed Under Seal)	12/24/21	119 120	29,528–29,643 29,644–29,727
448	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial	12/24/21	120 121	29,728–29,893 29,894–29,907

Tab	Document	Date	Vol.	Pages
	Exhibits – Volume 10 of 18 (Filed Under Seal)			
449	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 11 of 18 (Filed Under Seal)	12/24/21	121	29,908–30,051
450	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 12 of 18 (Filed Under Seal)	12/24/21	121 122	30,052–30,143 30,144–30,297
451	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 13 of 18 (Filed Under Seal)	12/24/21	122 123	30,298–30,393 30,394–30,516
452	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 14 of 18 (Filed Under Seal)	12/24/21	123 124	30,517–30,643 30,644–30,677
453	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 15 of 18 (Filed Under Seal)	12/24/21	124	30,678–30,835
454	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 16 of 18 (Filed Under Seal)	12/24/21	124 125	30,836–30,893 30,894–30,952
455	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 17 of 18 (Filed Under Seal)	12/24/21	125	30,953–31,122
456	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 18 of 18 (Filed Under	12/24/21	125 126	30,123–31,143 31,144–31,258

Tab	Document	Date	Vol.	Pages
	Seal)			
466	Transcript of Proceedings re Hearing Regarding Unsealing Record (Filed Under Seal)	10/05/22	129	31,923–31,943
350	Transcript of Proceedings re Status Check	10/10/22	72 73	17,994–18,000 18,001–18,004
467	Transcript of Proceedings re Status Check (Filed Under Seal)	10/06/22	129	31,944–31,953
157	Transcript of Proceedings Re: Motions	10/19/21	22 23	5339–5500 5501–5561
160	Transcript of Proceedings Re: Motions	10/22/21	24 25	5908–6000 6001–6115
459	Transcript of Proceedings Re: Motions (Filed Under Seal)	01/12/22	127	31,501–31,596
460	Transcript of Proceedings Re: Motions (Filed Under Seal)	01/20/22	127 128	31,597–31,643 31,644–31,650
461	Transcript of Proceedings Re: Motions (Filed Under Seal)	01/27/22	128	31,651–31,661
146	Transcript of Proceedings Re: Motions (Via Blue Jeans)	10/06/21	21	5202–5234
290	Transcript of Proceedings Re: Motions Hearing	02/17/22	53	13,098–13,160
319	Transcript of Proceedings Re: Motions Hearing	04/07/22	68	16,837–16,855
323	Transcript of Proceedings Re: Motions Hearing	04/21/22	69	17,102–17,113
336	Transcript of Proceedings Re: Motions Hearing	06/29/22	71	17,610–17,681
463	Transcript of Proceedings Re: Motions Hearing (Filed Under Seal)	02/10/22	128	31,673–31,793

Tab	Document	Date	Vol.	Pages
464	Transcript of Proceedings Re: Motions Hearing (Filed Under Seal)	02/16/22	128	31,794–31,887
38	Transcript of Proceedings, All Pending Motions	06/05/20	6	1350–1384
39	Transcript of Proceedings, All Pending Motions	06/09/20	6	1385–1471
46	Transcript of Proceedings, Plaintiff's Motion to Compel Defendants' Production of Unredacted MultiPlan, Inc. Agreement	07/29/20	7	1644–1663
482	Transcript of Status Check (Filed Under Seal)	10/10/22	142	35,248–35,258
492	Transcript Re: Proposed Jury Instructions	11/21/21	146	36,086–36,250
425	Trial Brief Regarding Evidence and Argument Relating to Out-of-State Harms to Non-Parties (Filed Under Seal)	10/31/21	109	26,953–26,964
232	Trial Brief Regarding Jury Instructions on Formation of an Implied-In-Fact Contract	11/16/21	41	10,198–10,231
233	Trial Brief Regarding Jury Instructions on Unjust Enrichment	11/16/21	41	10,232–10,248
484	Trial Exhibit D5499 (Filed Under Seal)		142 143	35,264–35,393 35,394–35,445
362	Trial Exhibit D5502		76 77	18,856–19,000 19,001–19,143
485	Trial Exhibit D5506 (Filed Under Seal)		143	35,446
372	United's Motion to Compel Plaintiffs' Production of Documents About Which Plaintiffs' Witnesses Testified on Order Shortening Time (Filed Under Seal)	06/24/21	82	20,266–20,290
112	United's Reply in Support of Motion to Compel Plaintiffs' Production of Documents About Which Plaintiffs' Witnesses Testified	07/12/21	18	4326–4340

Tab	Document	Date	Vol.	Pages
	on Order Shortening Time			
258	Verdict(s) Submitted to Jury but Returned Unsigned	11/29/21	49	12,047–12,048

CERTIFICATE OF SERVICE

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

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1 what did you rely on this study for, to illustrate, sir?
2 A Same thing in the sense of, you know, this is looking at a
3 particular type of Medicare called Medicare Advantage. So there's --
4 without getting distracted, there's kind of normal Medicare and then you
5 can also get it through Kaiser or some other thing. It's called Medicare
6 Advantage. And again, they're studying the differential in
7 reimbursement rates for different programs. This is an independent
8 study. This wasn't done for Congress. That has been published in an
9 academic journal. But they're doing the same thing. They're getting
10 data from a private insurer that includes both commercial payments and
11 Medicare Advantage payments in doing the analysis.
12 Q And the insurer disclosed in the study?
13 A It's not, no.
14 Q Okay. Now let's move on to the next issue, which is you
15 talked earlier about how charges are set unilaterally by the provider. Do
16 charges typically reflect consistency across providers?
17 A The answer probably is no in a general sense. They --
18 because they're unilaterally set, you really see them kind of all over the
19 place.
20 Q Okay. Well, on this chart, could you explain what it is you're
21 illustrating to the jury here?
22 A Yeah. So what I was interested, as part of my overall
23 understanding of the case, particularly on this focus on bill charges, was
24 to just ask the question of how consistent are the various Plaintiff entities
25 in their setting their charges. Again, if -- from an economic perspective,

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1 if one thinks of market prices, you typically think though, those being
2 kind of constrained by the market realities. Interestingly, what I
3 observed -- and you can see here I'm doing it by CPT code. And this is
4 actually data from 2020. But what I'm doing is each of the three bars are
5 each of the codes. So they get higher because the charge is higher as
6 one gets more severe up to the 99291. And I'm plotting -- each code has
7 three bars. The left-hand bar is the Fremont, the biggest of the entities in
8 terms of total volume. The middle bar is the Team Physicians. That's up
9 in the northwest part of the state. And then Ruby Crest. And the
10 question here is if -- to the extent they're unilaterally set, are they even
11 set consistent among the various Plaintiffs?
12 If they were, you'd kind of expect the steps might go up
13 charge to charge, meaning 99281 to 92282, but the level of the step
14 would be pretty consistent. And what you observe is that with some
15 exceptions, they're really not very consistent. In fact, they're almost 2x if
16 I'd say, or twice as high. For instance, at the most severe code, 99291,
17 Ruby Crest is less than $1000 for that code and Fremont is a little less
18 than $2,000 in that bar.
19 Q Let me make sure I understand what -- and the jury
20 understands what's being represented here. So you have three colored
21 bars for each of the five evaluation of management codes plus
22 [indiscernible] critical care emergency Is that what I've got there?
23 A That's correct. Yes.
24 Q And each of the bars represents what the bill charge is in the
25 data, Plaintiff's date, correct?

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A Yes, correct.

Q What the bill charge is in the Plaintiff's data for this period, which I think you said is January 2020?

A It's 2020. I think it's the whole year.

Q Okay.

A Well, no, sorry. January. I think you're right.

Q And it's showing how those charges are different by code, correct?

A Correct.

Q And how they're different by TeamHealth claims?

A Exactly.

Q And then using that data, you can chart how changes occur across code and across claims?

MR. LEYENDECKER: Your Honor, again, I'd like to hear a little more from the witness and a little less from Mr. Blalack during his questioning.

THE COURT: Objection sustained.

MR. BLALACK: I'll rephrase, Your Honor.

BY MR. BLALACK:

Q What can the jury observe from looking at these bars by code [indiscernible]?

A Well, again, what you see is really a pretty direct illustration of the fact that these are unilaterally set and really not tethered to direct market prices. That even within the TeamHealth entities, you can see wide variations for exactly the same service across their different

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1 entities. And that's not what someone would typically observe in a -- in
2 kind of a market with competitively set prices.
3 Q So just as an illustration, what's the charge at Fremont for
4 99284?
5 A 99284, if you went to Fremont, your billed charge would be
6 $973.
7 Q And what would you be charged if you went to Ruby Crest
8 for that same service?
9 A Just a little more than half that amount, $551.
10 Q If you were to receive critical care --
11 MR. BLALACK: Close that out, Shane.
12 BY MR. BLALACK:
13 Q You receive critical care at Fremont, what would you be
14 charged?
15 A Fremont, you'd be charged $1,853.
16 Q And to receive the exact same critical care at Ruby Crest,
17 what would you be charged?
18 A Less than $1000, 940.
19 Q Which is almost double; is that correct?
20 A Yeah. It's very close to -- you can think of it as either half at
21 Ruby Crest or double at Fremont.
22 Q All right. Let me ask you this. So I mean Fremont is based
23 on Clark County. It's a urban environment. Ruby Crest is a rural area.
24 Would that explain these kind of variances?
25 A No. That typically wouldn't explain it. You can certainly see

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1 some variance sometimes. But when you look at the kind of adjusters
2 that are used by payors, you'd -- it's nowhere close to accounting for this
3 kind of difference.
4 Q Okay. But you're not saying that the geographic variance is
5 irrelevant, are you?
6 A No. I think one needs to think about geography. And I've
7 done that in other analyses I've done. But it certainly can't explain this.
8 Q All right. So you don't quarrel with the notion that
9 geography would be relevant. You're just disputing the extent of it?
10 A Well, I'm saying that geography is not explaining the
11 difference in bill charges here. It really comes back to they're unilaterally
12 set. So there's nothing stopping Ruby Crest from charging more.
13 There's no, again, regulations or things like that. For whatever reason,
14 they've chosen to set them lower than the others. But that's, again,
15 unilateral.
16 Q And we're going to talk about this in a little bit. But have you
17 seen evidence that TeamHealth sets these charges, based on the number
18 of inputs, one of which is the Fair Health benchmark --
19 MR. LEYENDECKER: Again, Your Honor, I'd like a little less
20 leading and hear more from the witness.
21 BY MR. BLALACK:
22 Q Have you seen data --
23 THE COURT: Please rephrase.
24 BY MR. BLALACK:
25 Q -- indicating that the TeamHealth entities utilized Fair Health

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1 data?
2 A I have, yes.
3 Q What is your understanding of the relationship of Fair Health
4 data to how TeamHealth goes about inputting its charges?
5 A So I don't understand that it's complete formulaic, but that
6 generally TeamHealth is looking at, for example, the 80th percentile of
7 the Fair Health data as an input to their process to say we -- I'm putting
8 words in their mouth. I'm not trying to testify for them. But as I
9 understand it, it's a form of, you know, we may be sort of kind of sort of
10 targeting -- like we don't want to be the most expensive out there, but we
11 want to be, you know, kind of close to it. Maybe the 80th percentile of
12 that. So that's -- again, it's not absolutely a formula based on the Fair
13 Health as I understand it.
14 Q Now we'll spend a good deal of time talking about Fair
15 Health when we come back after lunch. Let me ask you about another
16 question.
17 MR. BLALACK: Go to the next slide, Shane.
18 BY MR. BLALACK:
19 Q This refers to one-time changes to charges. So let me ask it
20 this way. Did you look at the data on the chargemasters for the Plaintiff -
21 - TeamHealth Plaintiffs in this case?
22 A Yes.
23 Q And did you track them or how they changed over time?
24 A I did, yes.
25 Q Okay. Can you give a juror -- the jury a sense of from a

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1 timing perspective how some of the codes might change over time in
2 terms of the process?
3 A Yeah. So they -- again, as much as I can infer from the data
4 and, to some extent, the testimony I've seen, they generally try and do a
5 once a year increment. And I see that in some of my data. But again,
6 there's no constraint. They can decide in February they want to change
7 codes. And they sometimes do. Typically, as I've seen it not necessarily
8 changing every code midyear, but they can certainly increase some,
9 decrease some, you know, any of these sort of unilateral decisions on
10 whatever timeframe they want.
11 Q Did you ever -- did you see any illustrations in the data where
12 the TeamHealth Plaintiff changed their charges twice in a period?
13 A Oh, for sure. Yeah.
14 Q Can you give an example?
15 A Yeah. So this is an example here of a CPT code 10120. And
16 you know, you -- the righthand side is the actual chargemaster charge.
17 So this is a -- you can see it says fee schedule download. That's another
18 term for chargemaster. It'd be fee schedule. And you can see, for
19 instance, that they changed in -- starting the second row in December
20 2015 to 204, then in December 2016, a year later, they changed it to 214.
21 So they bumped it up by $10. And then midyear, June 2017, they
22 bumped it more than twice. They went to $450. And then again in
23 December 2017, they went to 473. So you can see they had an annual
24 bump and then a midyear big change and then another change at the
25 end of the year.

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1 Q So for this example, am I reading it right to say that,
2 basically, within the period of a year, mid-December 2016 and mid-
3 December 2017, they increased their chargemaster rate for this code
4 from $214 to $473?
5 A Yes, that's accurate.
6 Q And so, that's more than double?
7 A That's more than double. Yes.
8 Q Now this code, 10120, it says the removal of foreign body, is
9 that an emergency evaluation management code?
10 A No. So remember we talked about the -- what we call the
11 ENM codes, or the 99281 to 285 and 99291. This is what we talked
12 about, if there's a separate procedure. So this is removal of a foreign
13 body. And again, I'm not a clinician, but could be you got some, you
14 know, stick wedged in your arm or something like that, and they have to
15 pull it out. So this would be an actual procedure code. So in addition
16 to -- there'd be an ENM code on top of this, and then this would appear,
17 typically, as the -- as another code.
18 Q Okay. So you're citing an example that doesn't involve one
19 of the primary emergency codes. Is that relevant to your analysis of why
20 you're citing it here?
21 A No. Typically, the ENM codes are done more on an annual
22 basis, but there's no constraint. There are some other changes that can
23 happen midyear. A lot of them that I observed in the data tended to be
24 more on procedure type codes. But again, there's no constraint on this.
25 Q So the illustration here is just to show the process that's used

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1 not -- it's not specific to this one code?
2 A Yeah. It's not the -- my analysis isn't focused just on this
3 code. It's an illustration of the unilateral nature. And again, my overall
4 opinion that bill charges are not a reliable basis for a reasonable value.
5 MR. BLALACK: Your Honor, if you were -- I can break now
6 [indiscernible].
7 THE COURT: This is good. It's 12:15.
8 All right, guys. We'll take a half-hour lunch today. You're
9 instructed during the recess not to talk with each other or anyone else on
10 any subject connected with the trial. Don't read, watch, or listen to any
11 report of or commentary on the trial. Don't discuss it with any person
12 connected to this case, by any medium of information, including without
13 limitation newspapers, television, radio, internet, cell phones, or texting.
14 Don't conduct any research on your own. Don't consult
15 dictionaries, use the internet, or use reference materials. Don't talk, text,
16 use social media, tweet, google issues, or conduct any other type of
17 research with regard to any issue, party, witness, or attorney involved in
18 the case.
19 Most importantly, do not form or express any opinion on any
20 subject connected with the trial till the matter is submitted to you.
21 Have a great lunch. And we'll see you at 12:45.
22 THE MARSHAL: All rise for the jury.
23 [Jury out at 12:16 p.m.]
24 [Outside the presence of the Jury]
25 THE COURT: Okay. Room is clear. Plaintiff, anything for the

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1 record.

2 MR. KILLINGSWORTH: Your Honor, there's one thing that

3 we would just like to bookmark. In the examination of Mr. Deal, counsel

4 put up a JAMA article that referenced data from 2006 to 2010. This is -- I

5 don't know -- the fourth or fifth time that counsel has used data

6 representations during the time during which they were -- United was

7 artificially conflating the bill charges in allowed amounts through the

8 Ingenix issue that we've taken up. And at this time, if we would again

9 ask the Court to be able to present evidence of the deflation that

10 occurred. And not the settlement --

11 THE COURT: Do you want this witness to step out?

12 THE WITNESS: [indiscernible] step out. Sure, no problem.

13 Not a problem.

14 MR. ZAVITSANOS: Judge, we sent the big guns in this time.

15 So --

16 MR. BLALACK: And I'm feeling it too.

17 MR. KILLINGSWORTH: And at this time, we'd ask to be able

18 to present the evidence that there was deflation in market changes

19 because of the Ingenix issue and not the settlement zone amount, but

20 just that they had to use Fair Health, which is already within the scope.

21 But the fact is we have to be able to contextualize the evidence that

22 counsel has put up and that the charges have increased after 2010,

23 because they were artificially deflated before.

24 And so, we'd ask to be able to present the evidence that they

25 were artificially deflated during that timeframe and not the settlement

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1 amount, but be able to discuss that to contextualize all the evidence that
2 counsel has numerously put in front of the jury.
3 MR. BLALACK: May I respond, Your Honor?
4 THE COURT: Any response, please? You may.
5 MR. BLALACK: Let me start with just a consensual point, you
6 know. I'm dying to discuss the network negotiations between the parties
7 and their rates and I'm going to go down swinging. And I know I'm
8 going to lose. And I'm going to make my record. And I appreciate
9 counsel doing the same thing here. I think this is something they've
10 been [indiscernible] been itching to get into for a long time.
11 MR. LEYENDECKER: There's a trademark on that, Your
12 Honor.
13 MR. BLALACK: It is. It is. And I'll be contributing my royalty
14 here shortly. But there's absolutely nothing that happened that got
15 anywhere near the Ingenix settlement. The basic premise here is
16 anytime something -- any source of information or document had any
17 reference to the period before 2010, somehow, that's opening the door.
18 The inference here [indiscernible] a JAMA article that is dated in 2017.
19 And the portion that was referenced by the witness did not refer to the
20 year of the data, did not refer to the data. The only reason this was
21 shown was to note that the -- and the highlighted portion reads the
22 analyzed claims data for MA and commercial from a large national
23 insurer. That was it. That was all that was said and shown.
24 So yes, could Mr. Killingsworth find somewhere in the fine
25 print that there was something from 2007 to 2012? He could, but it

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1 wasn't published to the jury, discussed. And I won't be offering this into
2 evidence. And there's nothing about the Ingenix settlement, the Ingenix
3 data, or anything else related to this slide.
4 MS. LUNDVALL: Your Honor, to the contrary, I mean the
5 reason that we could see that, in fact, that it was during that data from
6 that period of time was because it was on the screen.
7 MR. BLALACK: I'll rest on my argument.
8 THE COURT: I'm going to overrule the objection. And if you
9 have anything further for the record, we can do it at 12:45.
10 MR. BLALACK: Thank you, Your Honor.
11 THE COURT: Thank you.
12 [Recess taken from 12:20 p.m. to 12:47 p.m.]
13 [Outside the presence of the jury]
14 THE COURT: All right. So calling the case of Fremont v.
15 United, and noting the presence of counsel, and as soon as I get the high
16 five sign from the marshal we'll bring in the jury.
17 MR. BLALACK: Thank you, Your Honor.
18 MR. LEYENDECKER: Thank you, Your Honor. Sorry, Your
19 Honor.
20 THE COURT: It's okay.
21 MR. LEYENDECKER: Okay.
22 THE COURT: Let's bring in the jury.
23 THE MARSHAL: All rise for the jury.
24 [Jury in at 12:49 p.m.]
25 THE COURT: Thank you. Please be seated. And please

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1 proceed.
2 MR. BLALACK: Thank you, Your Honor.
3 BY MR. BLALACK:
4 Q Welcome back, Mr. Deal, from lunch.
5 A Thank you. So when we left and broke, we were discussing
6 some of the reasons you had offered the jury for why billing charges are
7 not reasonable -- a benchmark for reasonable value, for this to be
8 accepted; do you recall that?
9 A I do, yes.
10 Q Let's pick up where we left off, and I want to talk about the
11 third reason that you had.
12 MR. BLALACK: And, Shane, could you bring up Ruby Crest?
13 There we go.
14 BY MR. BLALACK:
15 Q Now, sir, reason number 3 is what?
16 A The FAIR -- and this a general point I'm making, this is not
17 using the claims in dispute, using the Fair Health bill charge data, that
18 has increased at a much faster rate than payments. So the inflation and
19 charges has been quite high.
20 Q Okay. Now we're going to need to explain that in some
21 detail. Let's start with some foundational information. I know the jury
22 knows this by now, but just the record's clear, what is Fair Health?
23 A So Fair Health is an organization that collects and provides
24 information on healthcare claims and procedures and charges.
25 Q Okay. Do they have products, using the data they collect

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1 they license to various purchasers?
2 A Yes.
3 Q Tell me about what those products -- the most popular
4 products that have, you know, for the benchmarking data?
5 A Yeah. So one that I've run into a number of times is I think --
6 I don't know the name of the exact product, but it's essentially providing
7 charge information, so very much like the information, in fact identical
8 really to the information that has been presented today, and that I am
9 using for my analysis.
10 Q Okay. And then is there any other benchmarking product
11 that they offer?
12 A So they do offer a module that actually looks at true, like
13 allowed amounts, actual prices paid, but that's not what's being used in
14 this -- in this matter.
15 Q Okay. Now the data -- and did you perform analyses as part
16 of your work of the Fair Health bill charge benchmark data?
17 A I did, yes.
18 Q The data that you used, did you obtain it directly from Fair
19 Health, or did you pay it from other source?
20 A So, generally, directly from Fair Health. So, like Mr.
21 Mizenko --
22 Q Okay.
23 A -- had information, and I'm using some of that information in
24 my analysis.
25 Q Did you also obtain any data relating to Fair Health from any

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1 of the plaintiffs in this case, the TeamHealth --
2 A Yes. Yes. So TeamHealth also provided information.
3 Mr. Mizenko focused on primary E&M codes, we've been talking about,
4 but the Plaintiffs actually provided some Fair Health data on all codes,
5 and I believe Mr. Leathers used that from his analysis.
6 Q And have you reviewed the Fair Health benchmarking data
7 that the TeamHealth plaintiffs produced and provided to Mr.
8 Leyendecker?
9 A I have, yes.
10 Q Did you incorporate it in your analysis?
11 A I did in certain of my analysis, yes.
12 Q Okay. Now just to remind the jury how does the benchmark,
13 the Fair Health benchmarking product work?
14 A Yeah. So it's actually -- it's interesting. So we talked earlier
15 about how a private commercial health plan might provide data for
16 research purposes. This is a little bit like that, where various private
17 payers, they may also get some data from Medicare, but for this product
18 this would focus on commercial, where they'll basically report their data
19 in. It's typically sort of what we call anonymize, so it may not actually
20 have information on the name of the patient, things like that.
21 But they're essentially doing a regular update of claims data, so
22 you might say, here's another 1,000 claims that we paid in the last six
23 months, you know, here's the codes, here's the charges we got, here's
24 how much we allowed for it, that's all been taken in by Fair Health, and
25 then they combine it all and do their statistical work and then they

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1 summarize it and present in the form that we've seen in, excuse me, in
2 this matter.
3 Q And you referred the reference to Fair Health benchmarks?
4 A I have, yes.
5 Q What are the Fair Health benchmarks?
6 A So what they do is -- first of all, they never identify a
7 benchmark as any kind of a favorite or preferred, or anything like that.
8 What they'll do is they'll say, here's all the data I got for a given code, for
9 a given region. So they take all the data and they do it at what's called
10 the geozip level.
11 Q What's a geozip?
12 A Yeah. So it's sort of a term of art that research people like
13 me use a lot, but it's not a term that people would be very familiar with.
14 It's basically the first three digits of a zip code. So that identifies a
15 geographic area, and --
16 Q So is there a geozip, for example, for the area surrounding
17 Clark County?
18 A There is, yes.
19 Q Is there a geozip for other parts of the State of Nevada?
20 A There are, that's right. So for Clark County it's big enough,
21 has enough volume that they have one just for 890, that's the three -- the
22 first three digits of the Las Vegas area. And sometimes if they don't have
23 enough data in a particular geozip they might combine that with say an
24 adjacent one, something like that.
25 So they're combining it all to the code level, and the geozip level.

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1 They're aggregating it, and then what they do, is they think of it as sort
2 of stacking it all up, and they say, well, someone got a charge for a
3 $1,000, and there's another charge for a $1,000, and here's one for 900,
4 and so and so forth, and then they provide percentiles.
5 So they'll say, well, the 80th percentile, and they just start at the
6 top and go down, and they'll say that's $800, or whatever the number is,
7 and here is the 75th percentile, and the 50th, and you can look at, you
8 know, the median, you can look at various percentiles, that -- when
9 people say "benchmarks" they're referring to that statistic that comes
10 from the Fair Health data for a given code and a given geozip, and a
11 given time period.
12 Q You referenced a percentile, is a percentile and a percentage,
13 or percent the same thing?
14 A No. And that's, you know, a common confusion and you
15 sometimes see them being used sort of interchangeably, but a percentile
16 is really a ranking. So it's sort of a -- it doesn't really matter even what
17 the data is, you're basically stacking it from the lowest value to the
18 highest value, and you're saying, I'm going to divide it into different, you
19 know, portions, or chunks of data.
20 And I'm just going to start at -- as I said, if you want the 80th
21 percentile of a string of data like how high -- how tall is everybody in this
22 room? If you add it all up, we'd stack it up. We'd start at the top and
23 we'd go down to the, you know -- if there's a 100 people we'd go down
24 20, and we'd say, ah-ah, that person is 5'10", that's the 80th percentile.
25 Q Okay. So when someone says some value is applied with, or

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1 corresponds with the 80th percentile, could that mean it is either the 80th
2 percentile or something lower?
3 A Yeah. It depends on how you're using the benchmark, that's
4 right. If you -- if you're exactly the 80th percentile it would be that exact
5 value. But if you say I'm above the percentile, I'm below, or I'm
6 approximately that, it kind of depends, but it's referencing that particular
7 percentile that we were talking about.
8 Q So when the jury sees information talking about the 80th
9 percentile of the Fair Health benchmarking data, does that mean that 80
10 percent of the observations of the data are at that level, or lower?
11 A Yes. That's exactly right. So put it the reverse, only 20
12 percent of the data is actually bigger than that number.
13 Q And when we talk about the 80th percentile benchmark a lot
14 in this case, because the allegations from the TeamHealth plaintiffs, now
15 does the Fair Health organization have other percentiles beyond the
16 80th?
17 A Oh, sure, yeah. I mentioned -- you know, again, you can
18 basically think of any percentile. There's nothing magic about 80th
19 percentile. In fact, by definition it means kind of towards the top, but
20 median 50th percentile, I think you may have used the 50-yard line
21 example. 75th percentile, 25th percentile, 20 -- it really is. It's an
22 agnostic concept in the sense of it, just is literally a question of where on
23 the ranking do you want to be.
24 Q Okay. Now I want to talk about your data analysis of Fair
25 Health benchmarking data, and what it says about the rate in these

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1 charges have risen during the period in dispute? But let me make sure
2 that I'm looking at this slide that's in front of you that's describing your
3 reason for the rate. Now I want to make sure we have some -- just
4 foundational concepts, because we're going to go through a number of
5 these, and I want to make sure the jury understands what they're seeing.
6 So first of all, this data, remember we talked about you looked Fair
7 Health data you received from Fair Health itself, and you looked Fair
8 Health data received from the plaintiffs in this case; do you recall that?
9 A I do, yes.
10 Q If you look at the source of the information on this chart, do
11 you see that?
12 A Yeah. It's kind of small print at the bottom.
13 Q And you see there's an open parenthesis that says
14 FESM008657; do you see that?
15 A I do, yeah.
16 Q Let me stop on that. Do you know what a Bates number is?
17 A I do.
18 Q What's a Bates number?
19 A So it's term art. I didn't know until I started doing this work
20 25 years ago, but it's in a litigation like this very document that's turned
21 over by either party, including to what's called the discovery record gets
22 a number. It usually has some letters in the front of it, so it's a unique
23 way of identifying a particular document that's been available in
24 discovery.
25 Q Okay. Do you understand, sir, that the Bates number FESM

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1 is the Bates number that's been used by TeamHealth clinician in this
2 case, for documents that they produced to us?
3 A That sounds right to me.
4 Q Okay. So when you referred earlier, to having looked at the
5 Fair Health data provided by the TeamHealth plaintiffs, do you
6 understand that this analysis was placed on that data that they provided,
7 correct?
8 A Yes. We talked about -- I did have data Mr. Mizenko and
9 from the TeamHealth plaintiffs, and this, as you say, this is identifying
10 the particular data here is coming from the TeamHealth plaintiffs.
11 Q All right. Now looking at the day to day if you can -- oh, by
12 the way, there's also another source here, U.S. Bureau of Labor
13 Statistics, consumer price index, physician services. What does that
14 refer to?
15 A Well, that's been getting a lot of press lately. That's basically
16 the official organization that measures inflation, the U.S. Bureau of Labor
17 Statistics. And I'm -- we'll about it in a moment, I think, I'm using the
18 inflation measure for physician services. So it's how much have
19 payments to physicians gone up over time?
20 Q And when you say "physician services" this is not just like the
21 general consumer price index, this is specific to today?
22 A Yeah. That's exactly right. So, again, if you wanted to, it's
23 fun for economists, but you can look on the Bureau of Labor of Statistic's
24 site and you can get the overall headline level of inflation, and we hear
25 that's 5, 6 percent now, which is a lot higher than it's been. But you can

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1 look at sub-categories. You can say, well, what's it for energy, what is it
2 for XYZ, and one of the lines is "physician services." So this is very
3 specific to physician services.
4 Q So there's one thing -- the data you're relying on here is
5 specific physician services, not just general employee?
6 A It's not even hospital, it's specific to physician services; that's
7 right.
8 MR. BLALACK: Thank you. You can bring it down, Shane.
9 BY MR. BLALACK:
10 Q Now you've got a graph here, what is being plotted on this
11 graph?
12 A Yeah. So what we're -- maybe it's easiest to start on the left.
13 So there's a number, it says $151. So that's what the 80th percentile for
14 the CPT code at the top, this 99281, so it's that basic code. Using the
15 geozip 890, that's where we are right now, the Las Vegas. So if you had
16 looked at the May 2015 report from Fair Health or the data that comes
17 from Fair Health you would observe that for bill charges $151 was the
18 80th percentile --
19 Q Let me stop you. As you said, so that would mean that of all
20 the healthcare providers that bill this code, 99281, USF89, which is this
21 [indiscernible] region, those values, 80 percent of them would have been
22 at 151 or below?
23 A That's right.
24 Q All right. Keep going.
25 A Yeah. So then I'm asking two questions, maybe I'll start with

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1 what we just talked about the inflation. So the first question is, if those
2 charges had increased at the level of payment, so the doctor inflation,
3 think it of that, as a simple term, what would that have been by May of
4 2020? That's my dash line. So if you follow visually that dash line, it
5 goes up a little bit, it's got what we call a little bit of a slope, but not too
6 much, it goes up to $161. And that's equivalent to a 6.6 percent
7 increase -- by the way, not per year, that over the course of several years
8 here.
9 Q So you're measuring a rate of inflation for physician's
10 services starting May of 2015 to May of 2020, that's at 6.6 percent?
11 A Over five years, so a little, you know, one to one and a half
12 percent per year.
13 Q And what do you have noted on the right-hand column there,
14 about Medicare percentages?
15 A Yeah. So we've been talking about kind of how things
16 measure up as a premium to Medicare, so that would have meant by
17 2020, had charges -- had the 80 percentile just increased at the rate of
18 payment for physician services, that would have made it about 6.8 times
19 Medicare, or 688 percent of Medicare, our premium to Medicare, had it
20 gone up that level.
21 But the second thing I'm doing is not this what if, it's a what
22 did happen, at least per the Fair Health data, that's the solid line. So you
23 can see it's bouncing around, because this is literally plotting the 80th
24 percentile, each six-month availability of data.
25 Q And by the way, let's explain that, why is it every six

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1 months?
2 A Just the way Fair Health reports its --
3 Q They release their data every six months?
4 A Every six months, yeah.
5 Q Okay. Go ahead.
6 A Yeah. So you can just visually follow that to the right and
7 you can see it starts at 151 as we said, then goes down a little bit, then
8 goes back up, and it's actually fairly stable for a bunch of years. And
9 then all of a sudden it shoots way up and ends up in May of 2020 at $774
10 is the 80th percentile, based on the date of this reported into Fair Health.
11 Q And this, again the Fair Health data you received from the
12 TeamHealth clients in this case?
13 A That's correct.
14 Q And what is the inflation reflected in that growth rate?
15 A Well, you can see it in the big bold number on the right.
16 That's an increase of 413 percent, as compared to the 6.6 for real
17 inflation.
18 Q And you have a corresponding reference to Medicare, in the
19 right-hand column, what does that refer to?
20 A Yeah. That's equivalent to a premium of Medicare, of $3,308
21 percent, so 33 times Medicare.
22 Q So if you had a reimbursement system that was tied the 80th
23 percentile at Fair Health, and that defined what was reasonable, between
24 May of 2015 and May of 2020, that reimbursement methodology would
25 produce a Medicare reimbursement rate of $3,308 percent?

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1 A That's right.
2 MR. LEYENDECKER: Your Honor, again, I mean I would love
3 to hear more from Mr. Deal --
4 MR. BLALACK: I'll withdraw, Your Honor.
5 MR. LEYENDECKER: -- than Mr. Blalack.
6 THE COURT: Thank you. Objection sustained.
7 BY MR. BLALACK:
8 Q If you had a reimbursement system tied to the Fair Health
9 80th percentile benchmark, what would be the percentage increase in
10 the reimbursement rate, under that methodology, over the period you
11 charge?
12 A Yeah. That would be 413 percent, that would be kind of an
13 inflation over that several year period.
14 Q And what would be the rate relative to Medicare for that?
15 A That would result in a charge that was more than 33 times
16 the Medicare reimbursement.
17 Q Now, so this analysis, did you perform this sort of data
18 analysis for other evaluation of management codes at issue in this case?
19 A Yes. I did it for all of the primary codes and the critical care
20 code.
21 Q All right. Let me show the jury another example.
22 MR. BLALACK: Bring this one up, if you could.
23 BY MR. BLALACK:
24 Q Now that the jury has been oriented -- by the way, just so
25 we're clear, did you use the same data source for all of these you did?

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A I did, yes.

Q Okay. Now that the jury understands what they're looking at, I'm just going to let you explain what your results are on this page?

A Yeah. So you can almost think of this as one of those, you know, flip things, where you sort of see the guy moving or something, you can go through each of these and get a sense of it. This one has a very similar pattern, where inflation would have gone from $445 for this 99282, that's the second -- the second code from the bottom, in terms of severity, to 474. In fact what we see is a big jump. You know, a little bit of a higher rate for a while, and then a big jump ending at $1,450.

The 6.6 is going to be constant across all of them, that's the overall rate of inflation for physician services. So each of the yellow lines at the top, or the orange lines is going to be compared to that, so this one would be 226 percent as compared to 6 percent.

Q Well, for -- if that $425 at the 80th percentile of Fair Health in May of 2015, there's a request at the overall rate of inflation for a physician payment, it would have ended up at what value?

A $474.

Q And what would that be equivalent to on the Medicare fee schedule?

A That would be about 10 times Medicare, that's the 1,055 percent of Medicare in the lower right box.

Q Okay. And but as the Fair Health data shows, where did it end up?

A 32 times Medicare, 3,226 percent.

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1 Q Okay. And which code again is this? This is 99282?
2 A This is 99282, second, second from the bottom. We started
3 with the least severe, and this is the next one up.
4 Q Okay. Let's do the next one, please? What are we looking at
5 here, sir?
6 A Again, the structure of these is going to be the same for all of
7 them, so you start with what the 80th percentile look like in 2015, 669.
8 Had it gone up at just the same level as physician payment, it would
9 have been $713, always that 6.6 percent, and you can see again, big
10 jump. This one was actually for a little while it was below, and then it
11 jumped way up to $1,991, which is almost a 200 percent increase.
12 Q So if the -- if that $669 of the 80th percentile fair amount,
13 99283 here in Las Vegas, had risen at the rate of inflation, what would
14 have been the total amount of the rate?
15 A It would have been $713 in May of 2020.
16 Q And what would that have been equivalent to in the
17 Medicare rate?
18 A Again, a little over ten times Medicare, 10.6 times Medicare.
19 Q Now --
20 A -- 1,061 percent.
21 Q Now you referred to the slope of the slide. Some point you'll
22 see it goes up somewhat gradually from May 2015 to May 2017, so those
23 first two years there's increase relative to physician inflation but modest;
24 is that fair?
25 A Yes, I think that is fair. I mean, it's modest in the sense that

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1 it's not that far from that line, but it's certainly much higher than
2 inflation, but not huge.
3 Q Okay. And then it goes actually down; is that right?
4 A Yes, it does.
5 Q Now from your analysis of Fair Health data, just kind of
6 erratic lines, up, down, up; is that unusual?
7 A No, it's not. I think it's one of the anomalies that makes it a
8 challenge to use Fair Health data for certain purposes.
9 Q All right. Let's go to your next example, and if you could,
10 just highlight for the jury what this one is?
11 A Yeah, so same structure, now we're at 99284, and again,
12 starting at $993, that's what it would have been, the 80th percentile in
13 May of 2015. Had it gone up at the rate of physician inflation, it would
14 have been 1,059. Instead, it ends up at 1,266, so not quite as dramatic a
15 difference, but still 27 percent growth as opposed to 6.6.
16 Q And what were the equivalent Medicare rates for these two
17 values?
18 A So you would have started at 8.5 time Medicare, 857 percent,
19 and ended at 1,024 or ten times Medicare.
20 Q Okay. And just so the jury's clear, I should have made this
21 obvious before, when you're talking about the equivalent to Medicare,
22 you're measuring that at the end of the line, right at 2020?
23 A Yes, that's right. Exactly.
24 Q So it's not -- you're not saying that the value, the 850 percent
25 of Medicare is tied to that 993, you're tying it to the 1,059?

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1 A Yes, that's a -- that's a good clarification. That's right.
2 Q All right. Let's look at another example, sir. What are you
3 showing the jury here?
4 A Yeah. So this is 99285. Remember, that's a very common
5 code in the claims in dispute, and again, you start at $1,481, inflation
6 would take that to 1,579. What you see in actuality is it goes up, and
7 then it goes down below, and then it goes back up again, and it ends up
8 at about 27 percent above the starting point in May of 2015.
9 Q And what are the equivalent values for those two outcomes
10 then for Medicare?
11 A So these are pretty similar to the last one, so it's 879 percent
12 of Medicare with inflation, or 8.7 times Medicare, and 1,051 or 10.5 times
13 Medicare for the actual.
14 Q Okay. Let's look at the next example. What are you showing
15 the jury there?
16 A Yeah. So now we're looking at the most severe, the 99291
17 code, same, same structure as we've been going through, so you start
18 with the 80th percentile being 1,386, you go up at the rate of inflation,
19 the dash line, you end up at 1,478, that's again the same 6.6 percent
20 increase. The dark orange line is again, the actual, which again, you can
21 see the somewhat erratic, goes down, goes back up, and ends up 34
22 percent above the starting point at 1,853.
23 Q What are the Medicare equivalents for those two values
24 there?
25 A Yeah, they -- had it gone up at inflation, it would have been

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1 645 percent of 6 and a half times Medicare, it -- with the actual, it was
2 809 percent of Medicare, or eight times Medicare.
3 Q Okay. Now with all of the examples you've just shown the
4 jury were associated with geozip 890, which is this area, this region,
5 correct?
6 A Yes, that's where 90 percent of the claims were, that's right.
7 Q Okay. Let's look at some examples from some of the other
8 parts of the state that would involve and would cover the other Plaintiff's
9 Team positions than Ruby Crest, so this next example, sir, if you can
10 describe what you're showing the jury?
11 A Yeah, so it's again, exactly the same structure. Here, I'm
12 using the 99285, again, that -- that common code, but now I'm not using
13 the 890 zip code, geozip, I'm using -- it looks like a series of geozips, and
14 the reason it's a series is that's the geographic area that Team -- or
15 excuse me, TeamHealth, that Fair Health has to aggregate to get enough
16 data to be statistically reliable. So it's actually aggregating across a
17 number of different geozips. They actually includes the areas where
18 both Ruby Cress and Team physicians practice, so this is -- it's not
19 available at a more desegregated level than this.
20 Q So this grouping of geozip 893-895 and 897-898, is that a
21 function of the way Fair Health does it or the way you did it?
22 A That's how Fair Health does it, yeah. So Fair Health, again,
23 underneath this, they have statisticians and requirements that say I need
24 a certain, you know, data requirements, and if they can't get it for 893 by
25 itself, they'll kind of expand out. In this case they basically had to get

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1 five geozips in order to have sufficient data.
2 Q So this is just a function of do you have enough observations
3 statistically to be useful?
4 A Yes.
5 Q And where as in this part of the state aren't enough
6 observations to use the single geozip?
7 A That's right.
8 Q Okay. So please explain what code and what you're
9 describing?
10 A Yes, so again, this is the most common code, the 99285 code,
11 and we talked about the geozips, so this is starting at $936. That would
12 have been the 80th percentile in May of 2015, and by May of 2020 that
13 would have gone to $998, a little less than a thousand, and the actual
14 end up at $1,603, an increase of 71 percent.
15 Q And what were the Medicare equivalents for the two
16 outcomes in item 2020?
17 A Yes, so 5.56 times Medicare, or 556 percent of Medicare if it
18 had gone up at inflation, and instead it was almost nine times Medicare.
19 Q All right. Let me ask you this so that -- when we looked at
20 the plotting of the growth in the 80th percentile of the Fair Health
21 charges for the Las Vegas, Clark County area, each of those curves were
22 slightly different, but several of them had a similar spike at about the
23 same time, around November or May of 2019; do you recall that?
24 A I do, yes.
25 Q This one in a different view is it doesn't reflect that spike; do

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1 you agree with me?
2 A Yeah, it has, to the extent it has a quote, unquote spike, it
3 would be back in May of 2017.
4 Q Okay. So there's -- there is a spike, but it occurs at a different
5 time?
6 A That's right.
7 Q And then there's more of a straight-line growth?
8 A Yeah, that's right, between May and November of 2017, you
9 can see it went up.
10 Q All right. Let's look at the next example.
11 A I think that might be the --
12 Q Actually, that might be a -- okay. And we've given the jury a
13 good taste of that. All right. Let's now talk about -- we talk now -- let me
14 back up and make sure the jury is clear on this. Everything we just
15 looked at the Fair Health finish line, was that specific to TeamHealth
16 Plaintiffs in any way?
17 A No, that -- the reason I presented -- no is the answer to the
18 question. The reason I presented is to give a sense of what's happening
19 generally with bill charges, I talked about they're unilateral and they can
20 be set, and this shows that there's sort of an overall increase in bill
21 charges, obviously, with the data anomalies and the spikes and things
22 like that, but a general increase that's meaningfully more than inflation.
23 Q That's independent of anything that TeamHealth Plaintiffs
24 would do?
25 A That's accurate, they -- other than to say they could be part of

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1 the TeamHealth data underneath it.
2 Q Right.
3 A But it certainly is not specific to TeamHealth or claims in
4 dispute or anything like that.
5 Q So those, those trims, those lines might include TeamHealth
6 as one of the contributors of their services might be captured in that
7 data, but it's not just their data?
8 A Exactly, yes, that's right.
9 Q All right. Now let's talk about their charges now, the
10 TeamHealth plan charges, and I'd like to have Shane bring up the next
11 line, please. Okay. What I want you to do, sir, is tell me, based on your
12 analysis of their data and chargemasters, can you tell us whether their
13 charges have increased over time?
14 A I can, and they have.
15 Q Okay. Could you explain that to the jury?
16 A Yes, so I -- remember we talked about the arbitrary and the
17 differences among the different entities earlier, I'm doing a sort of a
18 systematic analysis of that here and looking at it over time. That was a
19 point in time. So this is that kind of starting over at the low code, the
20 99281. What I'm doing on this one is looking at each of the three
21 entities, so that's the sets of three bars, each set of three bars is
22 associated with a different Plaintiff: Fremont, Ruby Crest, and TEAM.
23 Each of the bars represents an observed billed charge per year. So 2017,
24 2018, and 2019.
25 So the stair step, if you will within each of the Plaintiff's is how

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1 much did they increase it year to year, the difference in levels across of
2 them is a -- is making the same point that we discussed earlier, that they
3 clearly don't use the same chargemaster.
4 Q So if I'm looking at this right for this code, between 2017 and
5 2019, which is two of the years in dispute, that this code charges for
6 Fremont went from 155 to 173?
7 A That's right.
8 Q So that's $18 increase over $155 starting point?
9 A Yeah, it turns out to be something like 5 percent a year.
10 Q Okay. And is there similar relationships from the other three
11 Plaintiffs that you found there?
12 A Again, I don't move in lockstep, but yes, you can kind of see
13 that they're sort of stair stepping up over time, sometimes a little higher,
14 sometimes a little lower for one or the other, but they're definitely
15 increasing each year.
16 Q In your review of the information in the record, did you see
17 any data that explained why the TEAM physician's charges for this
18 service are more than double, almost more than double, would that be
19 correct?
20 A No. Again, I think it's sort of consistent with what we were
21 seeing earlier, there really are no constraints and they can set them at
22 different levels, and that pattern, you know, that isn't necessarily exactly
23 the same for all of the different years, as we'll see, or all the different
24 codes.
25 Q All right. Let's look at the next one. Can you explain that to

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1 the jury now, that they understand what they're looking at?
2 A Yeah. So this is 99282, same structure, so each of the
3 entities in the same order. So Fremont, Ruby Crest, and TEAM, and
4 again, you can see the increase, so for example, Fremont was $303 in
5 2017 for 99282, and it went up to $335 in two years, with a stop at $326
6 in 2018.
7 Q All right. And then let's look at 99283 which is the next one.
8 A Yup. Same, same, same structure, and again, you kind of
9 consistently see a stair step, I'll come back to the Ruby Health, Ruby
10 Crest point in a moment, but you see -- and again, here you see the
11 Fremont and TeamHealth being closer to one another, so depending on
12 the code, they might be much higher or much lower than the other, and
13 then the stair step is a, you know, by each entity roughly 5, 6 percent a
14 year.
15 Q When we looked at 99281, I commented on the -- and you
16 addressed the notion that Team Physicians was substantially rare than
17 both Ruby Crest and Fremont; is that right?
18 A Yeah, that's right.
19 Q Okay. And I asked you whether you'd seen anything in the
20 data explaining why there was that difference, and you said
21 [indiscernible]?
22 A Correct.
23 Q All right.
24 MR. BLALACK: Let's go to 99283, please, Shane.
25 BY MR. BLALACK:

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Q Now Fremont for this code is comparable, maybe even a little higher in some places than TEAM, even though they're both still substantially higher than Ruby Crest, did you see anything in the data explaining why there was that variance between the charges of Ruby Crest and the other two?

A No, I didn't.

Q Anything explaining why the TEAM physician's charges were now quite aligned on this code with Fremont?

A No, again, it's not surprising to me in the sense that there really aren't any particular constraints, but I didn't see any particular basis for it.

Q Okay. Let's look at 99284, and what does this data show?

A Again, you see the same pattern of growth each year. For the last point we were just talking about, now you see Fremont is being the highest by a fair amount over the other two entities.

Q And then let's look at 99285, the next slide. What does that reflect?

A Yeah, again, same, very similar to the last one with Fremont being the highest and again, growth each year.

Q All right. Then the final code which is the critical care code 99291.

A Yes, and again, same pattern. You see that Ruby Crest is -- is quite a bit lower than Fremont on this one, so it's at least in the 2017 and 2018, it was less than $800 for that code, and you see it being somewhere between 1,688 and 1,764 for the equivalent years for

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1 Fremont.
2 Q So if I'm looking at this right, for this code between 2017 and
3 2019, the charge on the chargemaster with this service went up by $150?
4 A Yes, that sounds right.
5 Q Okay. Now I noticed something odd about this one. If you
6 look at Ruby Crest, you know how you -- most all of these have had a
7 step up, and I think you said something like 5 or so percent depending
8 on the total year, in 2019 there's a spike in the charges for Ruby Crest; do
9 you see that?
10 A I do.
11 Q In fact, it almost doubled. Did you investigate why that is?
12 A I did, yeah.
13 Q Okay. Do you have an explanation?
14 A I do, yes.
15 Q Okay.
16 A So maybe we can look at the next, the next --
17 Q I will show you the next slide. All right. Could you explain
18 why there's that spike for 99285 for Ruby Crest in 2019?
19 A Yes. So -- and this again, this data comes from the -- from
20 TeamHealth, but the -- what's happening here is this is that -- I think
21 what's been referred to as the sub ten issue?
22 Q Uh-huh.
23 A In this case, where I looked at Ruby Crest, and what I
24 observed is that about half the claims in this year were actually not
25 provided at the Ruby Crest facility up there. There was about 306 claims

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1 from -- at Northeastern, but of the claims that were coded to Ruby Crest,
2 another 254 were actually provided at Fremont, so what we're observing
3 in Ruby Crest is actually a combination of care that's provided at Ruby
4 Crest, and care that's provided at Fremont.
5 All of it's billed at Ruby Crest, so because -- because Fremont has a
6 much higher level of charges, that's driving that bar higher. Again, not
7 because the chargemaster itself at Ruby Crest was going up, but because
8 of this sub ten issue, because of the fact that the -- some of those
9 patients were being billed through the Ruby Crest ten.
10 Q Okay. That's a lot. Let's try to break that down. All right. So
11 when you refer to this bar, and by the way, what's the number at the
12 top? Is that 1,098?
13 MR. BLALACK: Can you enlarge that, Shane? Yeah.
14 THE WITNESS: Yes, 1098, exactly.
15 BY MR. BLALACK:
16 Q So despite you're referring to -- you're attributing to the sub
17 ten issue, that's occurring in 2019?
18 A That's right.
19 Q Okay. What did you mean when the chargemaster's not
20 going up, but the charges are going up?
21 A Yes, so that's where it's a little bit confusing. So we talked
22 about this chargemaster being like a list price, so each of -- each of the
23 entities, Fremont, TeamHealth, and Ruby Crest each has their sort of
24 schedule of prices. If you were to look at the Ruby Crest schedule of
25 prices, it wouldn't have this big jump on it. I don't remember what it

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1 would be, but it might be $790 or $80 or something like that. So what's
2 happening here isn't that the chargemaster's going up, it's that they're
3 taking patients that are effectively in that Fremont bar that are being
4 billed at the -- about $1,400 each, and they're attributing them to being --
5 to Ruby Crest. So you're mixing a high chargemaster. Each have went
6 up say five percent. But when you mix them and you didn't do it the
7 year before, you're going to have a big spike. That's exactly what we see
8 here.
9 Q Okay. So let's pull that -- pull that up. I want to bring that
10 back up for a second. Let's just make sure. The sources you're relying
11 on here for this analysis, sir, are the Mizenko report Exhibit B, and the
12 Phillips report Exhibit 7; is that right?
13 A Yeah. That's right. Especially the Phillips report.
14 Q All right. What is the Phillips report?
15 A So that's -- I think there's been discussion. There was an
16 expert, Mr. Phillips, who I offered a rebuttal analysis -- or opinions on,
17 who didn't end up testifying in court. But this is where I notice this is
18 that -- that Mr. Phillips had data very much like this in his report. And I
19 noticed this pattern, which that's what caused me to go and look at the
20 claims in dispute that were underneath his report in his data because he
21 referenced that data. So it's all part of his backup. And that's where I
22 noticed this issue of the billing through a different tin.
23 Q So just to be clear, this charge information showing how to
24 charge -- what the charges were in the various time periods for the
25 individual claims, you're drawing that from the Phillips' report?

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A Yes. That's right.

Q Which was a Plaintiffs' damages expert who has not been called, correct?

A That's correct. Yes.

Q All right. Now, I don't think the jury has yet heard evidence -- they will -- about the sub tin issue. But -- and we don't -- you're not going to be the witness on that, so I'm not going to get into a lot of it. Just so they understand conceptually what we're talking about. When you say there were charges being reported in 2019 for Ruby Crest that were performed on Freemont, did I understand you say that?

A That's my understanding. Yes.

Q Do you understand from your view of the record and the data that the way this -- the reason this line spiked in 2019 is because emergency room services, including hundreds in dispute from the Plaintiff --

MR. LEYENDECKER: Your Honor, again, leading.

MR. BLALACK: I'll withdraw, Your Honor.

MR. LEYENDECKER: We have an expert witness being paid a lot of money. We'd like to hear from him.

MR. BLALACK: Withdraw the -- withdraw the question, Your Honor.

BY MR. BLALACK:

Q Describe your understanding of the relationship between the services that were performed in Clark County in 2019 through Freemont, and how they ended up being recorded for Ruby Crest in that same year

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1 to lead to that spot.
2 A Yeah. So I can tell you my understanding, which is in the --
3 starting with a not sub-tin situation, the service would be provided by
4 Freemont here in Clark County, sent on the bill -- we talked about the bill
5 earlier -- to the payer. And it would say, I'm billing this through
6 Freemont, I provided service at Freemont, I'm charging you, you know,
7 $1,400 for this service. What we observe at Ruby Crest is a bit of a mix.
8 So some of the claims say, I saw the patient at Ruby Crest, I'm
9 billing it through Ruby Crest. And that charge is again, call it $800. But
10 we also see -- and this is the only place I saw it, was we see several
11 hundred claims where they say patient was here in the -- in the Clark
12 County area, seen by Freemont, but yet I'm not going to bill it through
13 Freemont, I'm going to bill it through Ruby Crest and using their TIN,
14 their tax ID number, their company social security number as I referred
15 to it before.
16 And that -- so they split the actual service, which was being
17 provided here, not up north. And the billing, which made it look like it
18 was being billed from up north. In fact, it was being billed through up
19 north in terms of that TIN.
20 Q So the claim form would say the service was rendered in
21 Clark County, correct?
22 A That's my understanding. Yes.
23 Q But it would be billed through a tax identification number in
24 Elko -- through Elko for the tax identification?
25 A That's my understanding. By Elko, you're referring to the

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1 Ruby Crest. That's right.
2 Q Correct.
3 A Yes.
4 Q So and that's based on your data and analysis from the
5 Phillips' report, explains why you have this odds in 2019?
6 A Yeah. Again, it was an interesting data -- a little mystery to
7 explore. And once we figured out what was going on, it made sense.
8 Q Okay.
9 A It doesn't -- not necessarily made sense in that -- I don't know
10 whether it's okay to do that or not. But it's what happened.
11 Q Okay. And I -- you have not been asked to render an expert
12 opinion on whether it was appropriate, inappropriate, or anything like
13 that?
14 A I have not.
15 Q Okay. Now, let's look at the next reason you have for why
16 the bill charges are not appropriate as a benchmark for a reasonable
17 value of out-of-network services. What is the -- why don't you explain
18 the picture?
19 A Yeah. So this is an interesting one, which sort of mixes a
20 little bit of the next data source, which is the out-of-network providers.
21 So the point that I'm making here is I have some data to analyze, but
22 what happens when payment is less than full bill charges. And this
23 would be a situation where if the market rate was really full bill charges
24 and you -- and you pay less than full bill charges, in some cases
25 meaningfully less than full bill charges, you would expect to see lots of

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1 complaints, lots of concern. So I'm using the kind of appeal type records
2 to say do I see lots and lots and lots of appeals and concerns, or do I not
3 see that many when they're paying less than full bill charges. So it's sort
4 of a -- it's sort of a test of really, if it's full bill charges, you would expect
5 to see a lot. And what I observe in the pie charts is I don't see that many.
6 Q And in fact, the highest number of appeals that you found
7 related to the Data iSight service, and that was appeals or inquiries of
8 14.3 percent?
9 A Yeah. That's right. So there's a -- there's a yellow bar. It's
10 so small you really can't even see it on the ENRP program. And again, I
11 haven't studied these programs in detail, but I am familiar with -- I got
12 data in the case about these programs and about the rate of appeals.
13 And it's less than 1 in 200. So it's very tiny. But it is -- there's a tiny, tiny
14 bar there. Yeah, it's being highlighted.
15 Q And what about Data iSight?
16 A So you see it a little bit bigger on the Data iSight -- the
17 MultiPlan Data iSight. But you reference the far-right emergency room
18 claims. That's the highest. And that's about 1 in 7 there. So it's 14
19 percent. But it's still nothing like the majority of the claims or that. And
20 then Nationwide is not just emergency. It's all out-of-network.
21 Q Okay. So does this data influence your view about whether
22 bill charges are a reasonable benchmark for determining reasonable
23 value of out-of-network claims?
24 A It does. It's -- again, we've kind of been building up. There's
25 a number of reasons for that, starting with the fact that almost never

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1 they're paid. But this is another data point that points in the direction
2 that this is not the market price. Bill charges are not the market price, or
3 we would expect to see many more appeals and complaints.
4 Q Let's look at the next one, please. Mr. Deal, we talked a little
5 bit -- quite a bit, actually, about the Fair Health database. You say here
6 another reason why bill charges are not suitable benchmarks is because
7 the FAIR Health database is not well suited to a reasonable value
8 analysis. Do you see that?
9 A I do. Yeah.
10 Q Are you saying that the Fair Health database isn't a useful
11 tool, or isn't an appropriate data set?
12 A No. I'm not saying that. I'm saying that using the Fair Health
13 data as kind of a reference point, or a check, or a -- or a -- this -- if I
14 compare a billed charge to the 80th percentile, that's somehow kind of
15 blessing that. That's really not -- that particular use of it I don't think is
16 appropriate. And there are a number of concerns with doing that. So
17 this is more about -- the last ones were more about the bill charges
18 generally.
19 This is sort of the interaction of bill charges and Fair Health. And
20 as I understand, the Plaintiffs are essentially making the case that well,
21 our bill charges are within the 80th percentile and therefore the -- you
22 know, they're fine, they're reasonable charges. And I don't think that's
23 the right way to think about it.
24 Q Well, if they're under the 80th percentile and could be
25 reasonable charges, would that make them reasonable?

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1 A Well, first of all, I'm not sure I quite agree with that you
2 would always use the 80th percentile. That's a pretty high percentile.
3 Q Right.
4 A But certainly, my general opinion is bill charges, whether
5 they're at the 70th percentile, or 50th, or 40th, or 80th, that no percentile
6 are they the right thing to use. That's my overall opinion. This is sort of
7 additional analysis to say, why are there additional concerns about
8 trying to integrate or use Fair Health as sort of a justification for bill
9 charges.
10 Q And in fact, you have some language on the screen here.
11 What is that showing you?
12 A So this is actually from the Fair Health website itself. To the
13 extent there's been any concern or thought that Fair Health itself is
14 putting itself out as a reasonable value benchmark, that's absolutely not
15 right in my experience. And I think it may be that there's a Fair Health
16 representative that may come and speak and talk more about it. But
17 certainly, my own experience with it over many years is that that's not
18 how they put it -- put it out. They do not consider themselves to be the
19 reasonable value benchmark.
20 Q Okay. And what is the quote you're quoting there on allowed
21 amount?
22 A So one of the things I looked at was their own website here
23 where they talk about their -- kind of their view of how out-of-network
24 rates can be set. So they first talk about in-network rates. And then you
25 can see what we've highlighted here is they themselves say for out-of-

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1 network providers the allowed amount -- and that's what's at issue
2 here -- may be. And they cite at least three different ways that providers
3 can do it -- excuse me, payers can do it. One is the same as network
4 provider. So you may basically use the same general rates as you have
5 for your in-network providers. That's one.
6 Second, is this percentage of Medicare. And we've talked about
7 that as the premium of Medicare. So 125 percent of Medicare, 175,
8 whatever the ratio. You sometimes see that. And the third one they
9 identify is this UCR. So -- and I've heard -- I've heard that referenced
10 here. An amount that your plan determines is reasonable for that
11 service. So the UCR charges is essentially a charge-based methodology,
12 typically.
13 Although in my experience, people use those terms kind of loosely,
14 UCR, and RN -- reasonable and customary, R&C. They don't always
15 mean it has to be based on a Fair Health charge analysis. But to the
16 extent it is, that's one possible method for doing it. But Fair Health itself
17 doesn't even endorse it. And it certainly doesn't give a percentile --
18 Q Right.
19 A -- that should be used. So it's a -- it's a significant over read
20 in my view to think that Fair Health itself endorses it as a reasonable
21 value measure.
22 Q Okay. It is not enough. Are you aware from looking at the
23 discovery record or even watching in the trial, that one of the out-of-
24 network programs, one of the Defendants -- one of the Defendants
25 utilizes and [indiscernible] during the period at issue is a method that

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1 relies on the Fair Health benchmark data? Very benchmark. Is that
2 something you're aware of?
3 A Generally, yes. But as we talked about, of course I wasn't
4 studying all the programs in detail, but generally.
5 Q Is there anything wrong with a health plan deciding to set its
6 methodology to a Fair Health benchmark?
7 A No. Of course there's nothing wrong with that. It certainly it
8 isn't a requirement. It isn't something that's always done. That can
9 change over time. The percentile can change across payers and even
10 within the same payer. So it's a method that I do sometimes see. But to
11 suggest that Fair Health is endorsing that as the reasonable method --
12 reasonable value approach is not correct. And it's certainly not anything
13 I would endorse.
14 Q Okay. And then you make reference actually to the UCR on
15 there. Where is that coming from? What are you quoting there?
16 A That's -- if you can put that up a little bit. I believe that's also
17 from the Fair Health website.
18 Q And what is it -- what are you referring to there?
19 A So here they're just talking -- it's another way of kind of
20 focusing in on that UCR idea. And you can see it says, "A term often
21 used to determine the level of reimbursement for out-of-network care."
22 So again, it's an option -- certainly an option. And it says if your plan
23 covers some, the insurer may base the payment off a price that it
24 determines to be that. So not only does it not say a particular percentile,
25 it doesn't even say that it would be the full amount of that.

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1 So sometimes you see we'll figure out UCR, and then we cover 50
2 percent of it, for instance. So if the allowed amount is 50 percent. So it
3 can be a -- kind of a starting point. But it certainly shouldn't be
4 understood to be they themselves are putting it forward as a reasonable
5 value, at least in my experience.
6 Q And I'd like to go to the next slide. You have another
7 reference to the Fair Health glossary. What is that?
8 A Again, this is another directly from Fair Health, information
9 that they themselves put out. And this is what I was mentioning a
10 moment ago. So they -- again, they reinforce in my upper highlighting
11 that plans may differ in deciding how they plan. And that's certainly
12 been my experience, that plans can have lots of different approaches.
13 They highlighted three on the last page, and there's others, as well. And
14 I just mentioned this lower part a moment ago where plans may actually
15 base it on a percentage of the UCR charges.
16 So this is your earlier question about percentile and percentage. It
17 gets a little confusing with Fair Health because you can pick the 50th
18 percentile or the 80th percentile and say, okay, I'm going to have no --
19 what's that number. And then I'm going to use that -- a percentage of
20 that. I can say, let's use half of that, 50 percent. So you've got to be
21 careful about the various concepts of percentages and percentiles. But it
22 certainly isn't a -- there's nothing in here that would endorse a particular
23 percentile as being the reasonable value.
24 Q Okay. Now, do you recall hearing Mr. Leathers testify
25 yesterday? When I showed him that growth in the Fair Health

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1 benchmark data and there was that big spike, and I asked him about
2 whether he thought it was a reasonable value to pay based on the level
3 of charge at the end of that spike, do you recall him saying no, because
4 he thought that spike reflected an anomaly in the data?
5 A I do. Yes.
6 Q What do you understand an anomaly to mean?
7 A So an anomaly in general terms would be something kind of
8 unusual or kind of a specific circumstance.
9 Q And is -- do you yourself when you look at the Fair Health
10 benchmark data see anomalies in the data?
11 A Oh yeah. Lots of them.
12 Q Let me -- do you think that affects -- well, strike that. Does
13 that fact that you see anomalies in the data impact your view about
14 whether that data is a useful basis to measure reasonable value for an
15 out-of-network claim?
16 A It does.
17 Q Okay. Well, let's talk about some of the anomalies you see.
18 Let's go to the next slide, please. Now, sir, first of all, you say Fair
19 Health's bill charges data has certain anomalies. And you said likely cost
20 or ability from one provider, as an example. And I want you to explain
21 this slide. We saw one of these yesterday. And do you know what is
22 being depicted on this slide, this graph?
23 A Yeah. So this is -- first of all, the visual on the left is literally a
24 report from Fair Health. So this would be an example of -- you can get
25 the data in the spreadsheet, or you can get it in kind of a picture form.

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Q Is this called a histogram?

A It is a histogram. Yes.

Q And in fact, if you -- if you come out of the chain -- we'll go back in a minute -- you see the source there. That's -- did you get this form -- in your report from Mr. Mizenko?

A I did. Yes. So this is referencing my report. But I was referencing Mr. Mizenko's data. And this is -- this is not something I created. This is from Fair Health.

Q Okay.

MR. BLALACK: Now, Shane, blow that up again, please.

BY MR. BLALACK:

Q So again, I think we went through this with the jury. But this would be a depiction of all of the observations of charges for which CPT code?

A So you can see in the upper-right -- it's a little bit small -- but this is 99282. So that's the second from the bottom in terms of severity.

Q In what location?

A For -- right here, 890 geozip. Las Vegas area.

Q And what time period?

A November of 2019.

Q Okay. So this is data in the November 2019 data release of Fair Health for procedure code 99282 for geos of 890?

A Correct.

Q And then, can you tell how many total occurrences are reflected in this data?

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A Yes. It's in the lower left. It's 27,097. So what they're doing is they're plotting those 27,000 on the histogram bars and writing above each bar how many observations are in each bar.

Q And just so the jury is oriented, what is the median charge for this service, for this doctor?

A 1,450. That -- sorry, you highlighted the mean. You asked about median, which is the 50th percentile. Yes.

Q All right. And what is the mean?

A A little bit lower than that. 1,386.

Q Look at that. The 80th percentile. What is that?

A That's also $1,450.

Q So it's identical to the median, correct?

A It is. Yes.

Q On this case, it's got a provider charge, which you understand that's the TeamHealth Plaintiff's charged here as Freemont, right?

A That would be Freemont for this area. That's right.

Q Which was much lower than both the 80th percentile, the median, and the mean, right?

A That's correct.

Q All right. Well, let's look at why. Let's look at the data. So you see that big spike at the right over there, sir?

A I do. Yeah.

Q Out of the 22-whatever it was, 27,000 observations -- 27,000, how many of them are showing up at the far-right end of the

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1 distribution?
2 A The vast bulk of them. More than 25,000 of them are all in
3 one spike.
4 Q And does that allocation of call of those charges at one place
5 on the distribution impact how you -- the outcome of what is the median
6 -- the median and the mean percentile?
7 A All of those. So the median and the 80th percentile are all
8 contained right inside that stack because more than half the claims are in
9 that so that's going to be the median. And at least 80 percent of them
10 are in that -- or that or below so that's going to be the 80th percentile.
11 It's probably even the 90th percentile, although they didn't report that
12 directly. And then the mean is going to be affected by that giant spike
13 too, which is why the mean, meaning the average, is pretty close to it.
14 Q Now, when the data is reported to Fair Health, are the
15 identified of the providers who report these charges disclosed through
16 Fair Health?
17 A No.
18 Q So is there any way to know unless one of the providers
19 actually identifies himself -- is there any way to know which healthcare
20 providers contributed which of these outcomes?
21 A No. Typically, I think you get the data largely from the
22 payors, but they don't identify -- either the payor or the provider on that.
23 So you don't know which combination or either one of them -- you don't
24 know which payor or which provider on any of these spikes. That's part
25 of the structure of Fair Health. I think largely in my experience, to get

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1 people to be willing to report because they don't want to reveal a lot of
2 other information, but that -- so you can't know who is reporting this.
3 Q Okay. Now do you have at the upper right, left-hand corner,
4 you say example 1, likely customer from billing from one provider. What
5 are you referring to there?
6 A So this is me kind of applying my analytical experience to
7 this, but I don't know for sure because I don't have the underlying data
8 either. But what would result in a spike like this is a particular provider
9 for whatever reason, because it's maybe just one pair and one provider
10 and there was some reason why they reported just that provider's
11 claims. It's very hard to know what's underneath it but the fact that you
12 get a giant spike at exactly the same price suggests that this is coming
13 from a provider because each provider can unilaterally set their rates.
14 So we're seeing a big spike at one rate from -- which would imply
15 it's one provider unless coincidentally a whole bunch of providers all
16 chose exactly the same number which would be unusual in my
17 experience, but possible I guess; but unlikely. So likely, what this is is for
18 whatever reason, in this particular time period, almost all the data was
19 from one provider for this code who happened to charge you know,
20 $1,440 or --
21 Q Now, when you say one provider are you meaning like a
22 group, or you mean like one human being?
23 A It's probably a group. Again, like we saw Fremont, for
24 instance, has a common chargemaster there so whether it's Dr. Jones or
25 Dr. Smith, they're going to be billed the same so it's probably the same

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1 billing entity using the same chargemaster.
2 Q Let's look at another example **1:50:11. What is the one
3 you're showing here?
4 A This one is again, similar to what we've seen before which is
5 demonstrating kind of a big spike up and I'm showing here the 80th
6 percentile and this is a spike between May of 2019 and November of
7 2019. It sort of goes up by 4 times and both the 50th percentile and the
8 80the percentile go up.
9 Q So in this example, you tracked two benchmark percentiles;
10 is that right?
11 A I did. I wanted to see if this was something that was driven
12 probably just by one end of the distribution or something else going on
13 and I see it affecting both the 50th and the 80th.
14 Q Okay. So in this situation, the 50th tracks pretty straight for a
15 while and then spikes; is that right?
16 A Yes, that's right.
17 Q Whereas the 80th kind of moves up, up, up, down, out, up,
18 and then spikes?
19 A Yes.
20 Q Is that type of distribution of data over such a short period of
21 time data that you think is useful for measuring the question here which
22 is reasonable value as opposed to just charges?
23 A No. I think using it either as a direct measure of reasonable
24 value which is not what I understand that the plaintiff is proposing, or as
25 a reference point to confirm that bill charges are a good basis for it -- I

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1 don't think using it for either one of those purposes would be reliable.
2 Q Okay.
3 A It has some value broadly, but this is a good example of why
4 one needs to be very, very careful about how one uses it.
5 Q Okay. Now, I'd like to show you a comment on the analysis
6 that Mr. Mizenko made -- excuse me -- Mr. Leathers made about relying
7 on Fair Health, and based on reviewing his reports and watching his
8 testimony, what do you understand his view of the utility of FAIR Health
9 and a reasonable value about?
10 A My understanding of Mr. Leather's view is that he's not
11 saying that you should use Fair Health directly necessarily but that Fair
12 Health is sort of confirmatory, if you will, or provides support for using
13 the full bill charges of the plaintiffs in this case, as essentially, a measure
14 that oh, those are reasonable charges.
15 Q And I'd like to show you the next slide, and I'm showing you,
16 sir, an analysis that -- do you recognize the charge that's reflected here?
17 A I do, yes. It's from my report.
18 Q What are you depicting in this chart?
19 A So what I'm depicting in this chart is an analysis of the
20 various combinations of entity, year, or even six-month period actually
21 and code to say, if you thought that the 80th percentile provided
22 guidance or ought to be a ceiling or some variation of that, the question
23 is of the different combinations of codes that you see, three entities,
24 various time periods, six different codes, how frequently do we actually
25 observe that the TeamHealth exceeds that 80th percentile.

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1 So this is not an analysis of account of claims. This is an analysis
2 of -- think of a giant matrix of combinations and the question is, if the
3 80th percentile is somehow kind of a -- again, should be thought of as a
4 reference point or a ceiling, how often if ever, do we actually see that
5 80th percentile -- and by we, I mean, in this case, the TeamHealth data
6 on it. So that's what this is is looking at of a given number of
7 combinations, how frequently is the 80the percentile exceeded?
8 Q And the data you're analyzing here, did you generate this
9 data, or did you rely on another source for this data?
10 A No, this is data from Mr. Mizenko's.
11 Q So this is data that comes directly from Fair Health?
12 A Yes.
13 Q Okay. And with respect to the 80th percentile, which is the --
14 kind of the magic percentile we're dealing with -- what did you find about
15 how frequently these combinations -- the TeamHealth plaintiffs' charges
16 actually exceeded the 80th percentile?
17 A About a third of the time. That's the lower right-hand
18 number on this chart. So of a 108 combinations of entity, time period,
19 code, 32 of -- or excuse me -- 35 of those 108 were actually in excess of
20 the 80th percentile. And that equates to about 32 percent or just about a
21 third of the time.
22 Q And did you look also -- it looks like you also looked at the
23 median?
24 A I did. Again, there's nothing magic about the 80th
25 percentiles, so if one said well, how often do they exceed the 50-yard

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1 line on there, you can see that's -- to the left, that would be almost 70
2 percent of the time. So they fairly frequently exceed the 80th and they
3 quite frequently, more than half the time -- 70 percent of the time -- they
4 exceed, based on the cells, the median.
5 Q And in fact, if you look at Team's position, are they over --
6 how often are they over the median?
7 A Every single time.
8 Q And what about Fremont?
9 A Fremont is three-quarters of the time they're above the
10 median.
11 Q Okay. So the data around 70 because Ruby Crest only
12 exceeds the median about 31 percent of the time?
13 A Yeah, and that's consistent -- remember we saw some of the
14 different stair step graphs. We saw Ruby Crest kind of generally being at
15 the lower end and Fremont and TeamHealth being at the higher end, or
16 Team Physicians, excuse me.
17 Q And did you look at Mr. Leather's work papers to see what
18 his pages showed about this phenomenon?
19 A I did, yes.
20 Q Let's look at the next slide. What does this slide show?
21 A So this is an exemplar that he himself finds that they exceed
22 these benchmarks as well. So what I'm highlighting here, this is his own
23 spreadsheet and on the left side, this is -- he kind of combines the years
24 together but he looks at 99291. So this is the most severe code; that's on
25 the left. And he -- there's 371 claims in dispute. He says the average

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1 billed charge for those is 1,820 and then the numbers to the right are the
2 80th percentile numbers over a couple different time periods for each of
3 the entities and he also presents the average as well. And you can see
4 that in every single case, the claims in dispute charges are higher than
5 any of these benchmarks.
6 Q Now, my memory is Mr. Leathers also looked at the charges
7 of TeamHealth plaintiffs -- not just Fair Health -- but also charges --
8 average charges for other out-of-network emergency room providers
9 who submitted claims to the defendant; do you recall that?
10 A I do recall that, yes.
11 Q Did you look to see if Mr. Leathers analysis found
12 circumstances were even under his analysis? The Plaintiffs' charges
13 exceeded the charges of other out-of-network emergency room
14 providers?
15 A I did, yes.
16 Q Okay. Look at the next slide, please. What does this slide
17 show, sir?
18 A So this is sort of a somewhat similar but not exactly the
19 same as we were just looking at. So this is actually looking at individual
20 claims now. So I pulled out a couple of example claims where we see
21 the entity -- I've got one for Team at the top and one for Fremont below
22 it. The billed CPT code, the 99283 and 99291 and I've got the charges.
23 So that's all just information off the claims in dispute sheet. And then
24 what I'm highlighting in the two red boxes on the right -- the far right is
25 the data essentially we were just looking at.

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1 So that's that 80th percentile and we observe that the charges for
2 the 99283, for Team Physicians are well above the 80th percentile, and
3 similarly for Fremont, the 1,853 exceeds that. So that's a similar analysis
4 done at the individual claim level. The part that's different about this
5 analysis is what you just referenced a moment ago which is that middle
6 box where he's saying let's use the data that we have from the
7 defendants and see what other people billed the defendants for these
8 same services and you can see those numbers which are actually a little
9 below the Fair Health 80th percentile, and again, TeamHealth's charges
10 exceeds those benchmarks. So in both cases, whether you use the 80th
11 percentile or the other providers out-of-network for various claims, you
12 see the TeamHealth exceeding those benchmarks.
13 Q Well, but in fairness to Mr. Leathers' deal, he was, I think
14 taking the position that but look, I'm looking at it kind of in an average
15 way collectively, not by the individual codes; is that what you understand
16 that to say?
17 A Yes. It's mathematically true he doesn't reduce anything if
18 he observes it going over. I'm not trying to put words in his mouth, but I
19 think he would say sometimes above, sometimes below but generally
20 consistent with it.
21 Q But what's the utility of that kind of analysis for evaluating
22 the Fair Health benchmarks or the benchmarks of other providers for
23 measuring reasonableness of reasonable value?
24 A There's no value for measuring reasonable value. It -- it's
25 sort of, I suppose modestly interesting if your question is how does your

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1 chargemaster compare, but that's not a relevant question for the
2 assignment here.
3 MR. BLALACK: All right. Your Honor, I've got about two
4 more segments so would now be a good time to --
5 THE COURT: Yeah. It's perfect. Thank you.
6 All right. So we'll take a recess until 2:15. During the recess,
7 don't talk to each other or anyone else on any subject or issue connected
8 with the trial. Don't read, watch, or listen to any report of or
9 commentary on the case. Don't discuss this case with anyone connected
10 to it by any medium of information including without limitation,
11 newspapers, television, radio, internet, cell phones, or texting.
12 Don't conduct any research on your own relating to the case.
13 Don't consult dictionaries, use the internet, or use reference materials.
14 Don't post on social media. Don't talk, text, tweet, or conduct any other
15 type of research with regard to any issue, party, witness, or attorney
16 involved in this case.
17 Most importantly, do not form or express any opinion on any
18 subject connected to the trial until the matter is submitted to the jury.
19 That first hour after lunch is always the hardest. So be ready at 2:15.
20 THE MARSHAL: All rise for the jury.
21 [Jury out at 2:01 p.m.]
22 [Outside the presence of the jury]
23 THE COURT: Mr. Deal, you may step down during the
24 recess.
25 THE WITNESS: Oh, thank you very much.

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1 THE COURT: Okay. The room is clear. Plaintiff, do you have
2 anything for the record?
3 MR. LEYENDECKER: Not at this time, Your Honor.
4 THE COURT: Defendant?
5 MR. BLALACK: Nothing from me, Your Honor.
6 THE COURT: Have a good break.
7 MR. POLSENBERG: I have one thing --
8 THE COURT: Of course.
9 MR. POLSENBERG: I apologize. I'm being asked by the jury
10 instructions lawyers on both sides to see if we can nail down what the
11 schedule is because they have to -- if we're doing it any tonight, they
12 have to come in for it.
13 THE COURT: Well, I was going to try to do it from 5 to 5:50.
14 Hopefully there won't be anything that you all need to put on the record.
15 I mean, if you need to, you should but --
16 MR. BLALACK: I don't -- I'll just previewed where I'm going,
17 Your Honor, while the jury's out of the room, which will describe his
18 remaining opinions and he will -- when we get to the ultimate question
19 which is the reasonable value of the allowed amount, he's going to
20 explain that he believes those numbers are reasonable based on his
21 experience and years in the field and blah, blah, blah. He will not at that
22 phase, explain the why because the why is based on his benchmarking
23 analysis which ties to the network rates of the TeamHealth plaintiffs, the
24 other health insurers and then the network rate of defendants with other
25 out-of-network -- other providers. When we get to that point, and we're

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done, I'm going to ask to speak outside the presence for ten minutes and explain what I want to do at that phase, having court rules. The Court agrees that I will come back and finish it. If the Court doesn't agree, then I'll come back and finish it.

THE COURT: Then you'll have an offer of proof.

MR. BLALACK: Right.

THE COURT: All right.

MR. BLALACK: And I -- yeah, I can just make an offer or proof. I don't need him to do it.

THE COURT: Right.

MR. LEYENDECKER: Hey, Lee, how much more do you think you have?

THE COURT: You guys had estimated five hours total for him.

MR. BLALACK: Yeah, I think I've got at least another -- depending on what happens in that situation, I've probably got another hour.

MR. LEYENDECKER: Your Honor, I can tell you in light of the content and the material today, I'm going to be more than what I originally thought with the time.

THE COURT: Good enough.

MR. ZAVITSANOS: And Jane, I don't know if you were listening, but I don't know if you heard Her Honor, but we're going to take up joint instructions again today so --

MR. POLSENBERG: If you don't have more questions, so

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1 then --
2 THE COURT: Tomorrow I want to work for an hour as well
3 after.
4 MR. POLSENBERG: Very good. How about Sunday?
5 THE COURT: Any time after one o'clock.
6 MR. LEYENDECKER: Okay. Well, Jane can't. I think she's
7 getting in at 2.
8 THE COURT: At 2. You can have from 2 to 5.
9 MR. POLSENBERG: Great. And I'm making arrangements to
10 do it in my office if that's okay with --
11 THE COURT: I -- how will --
12 MR. LEYENDECKER: Your Honor, I think there was a
13 suggestion concerning rather than doing it at Mr. Polsenberg's office,
14 that we could do it either via BlueJeans.
15 THE COURT: Well, we can't do it via BlueJeans because I
16 would have to bring in the operator.
17 MR. POLSENBERG: Right. With all the paper involved, I
18 think we ought to do it in person.
19 THE COURT: Okay. Let me see about that. I'll have to look --
20 MR. POLSENBERG: Okay. Well, we can do it hybrid.
21 THE COURT: The Court -- there is no security here on the
22 weekends.
23 MR. POLSENBERG: No, that's what I'm saying we can do it
24 at my office.
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THE COURT: Let me talk to people during the break before I commit anybody to anything.

MR. POLSENBERG: When I try with Mr. Eglet, I always agree to do it at his office as long as it's not in that courtroom.

THE COURT: The last thing is, why don't you guys check with Nicole on exhibits. Nicole was on vacation. She's our regular court clerk and it's a really hard job. There's some -- she has some questions because we had temps. Thank you.

[Recess taken from 2:05 p.m. to 2:20 p.m.]

THE MARSHAL: All rise for the jury.

[Jury in at 2:21 p.m.]

THE COURT: Thank you. Please be seated. Mr. Blalack, go ahead, please.

MR. BLALACK: Thank you, Your Honor.

BY MR. BLALACK:

Q Mr. Dean, welcome back.

A Thank you.

Q We want to move -- we completed our discussion of your opinions regarding the suitability of bill charges as a benchmark for reasonable value of network ER services. So now I want to talk about the next question you said you focused on which is whether the rates paid on out-of-network basis are a suitable benchmark for -- the same question. Suitable benchmark for reasonable value of these services. And I think this is just a regurgitation of the slide you had earlier that you disagreed with that as a benchmark. Is that right?

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1 A That's right. I do not think it's a proper basis for it. It's closer
2 but it's not -- it's not a good basis for it.
3 Q Okay. Let's go to the next page. Now sir, yesterday when I
4 spoke with Mr. Leathers -- actually Mr. Leyendecker raised it first. Mr.
5 Leyendecker showed him a slide which you may recall had a value that
6 Mr. Leathers had calculated for the average rate of reimbursement on
7 out-of-network basis from the Defendants in this case, other out-of-
8 network E.R. providers, not the TeamHealth Clinics. Do you remember
9 that?
10 A I do, yes.
11 Q And something on the order of 500 and some odd dollars or
12 something in that area.
13 A Yeah, that's right. I was going to say 523, maybe.
14 Something like that.
15 Q Mr. Leathers indicated that that was a calculation he made as
16 an average; is that right?
17 A That's my understanding.
18 Q And he compared it then to the amount that the Defendants
19 allowed for disputed parts.
20 A Yeah, 246 per claim, yes.
21 Q On an average per claim basis?
22 A Correct.
23 Q Which was then characterized as almost double?
24 A That's my recollection.
25 Q Then when I got my opportunity to speak with Mr. Leathers, I

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1 asked him to confirm if my understanding of his testimony was correct.
2 And then I asked him to do the math to show the jury what the total
3 amount of the allowed would have been if that had been the proper
4 benchmark for these claims. Do you remember that?
5 A I do, yes.
6 Q And I asked him to basically take that average 11,500 some
7 odd claims and it produced a number north of $6 million. Do you recall
8 that?
9 A I do, yes.
10 Q Now did -- Mr. Leathers' testimony, was that testimony
11 that -- or consistent with the opinions he provided in his -- one of his
12 reports, his supplemental expert report?
13 A Yes.
14 Q And did you review that report?
15 A Yes, I did.
16 Q Okay. Now could you describe for the jury what's reflected
17 on this slide here, as it relates to Mr. Leathers' opinions in his reports?
18 A Yes, so the left bar we seen before, that's the actual allowed
19 amount. The 2.84 million. The far right bar we've seen that number
20 before, that's the 13.24 million. That’s full bill charges. Mr. Leathers'
21 calculations that you took him through yesterday and more specifically
22 this is coming out of his expert report, which had the detail calculations
23 on it, was that it -- if you used the Defendant's out-of-network rates to
24 non-Plaintiff entities, it would be 6.16 million. And that's what's reflected
25 in the height of that purple bar there with the amount between the dash

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1 line, meaning the actual allowed amounts and that 6 million number
2 being 3.3 million.
3 Q What is the 3.3 million representing?
4 A If one were to use the out-of-network rates as the proper
5 measure of reasonable value, which I don't endorse that, I think that's
6 not an accurate approach, but if one were to, that would be a damages
7 calculations.
8 Q Okay.
9 A That would be the amount that would be owed.
10 Q Okay, so that would be the difference between the amount of
11 6.16 million in Mr. Leathers' calculation and the 2.84 million that the
12 evidence shows the Defendants allowed for disputed claims?
13 A That's accurate, yes.
14 Q Now above each of those bars, you have those values
15 expressed as a percentage of Medicare. Can you explain so the jury has
16 a sense of how it relates to one another?
17 A Yeah. Again everything is expressed as a premium to
18 Medicare. So the actual allowed amount was 164 percent of Medicare.
19 And Mr. Leathers' damages calculation would be based on a benchmark
20 of 355 percent of Medicare or three and a half times Medicare. And, of
21 course, the full bill charges are nearly 8 times Medicare.
22 Q All right. Now I take it you don't believe that the benchmark
23 that -- this alternative benchmark that Mr. Leathers identified, you don't
24 believe that's a suitable benchmark to measure unreasonable value?
25 A That's true.

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1 Q Well, let me understand why, sir. I mean the services at
2 issue in this case are out-of-network services, right?
3 A They are, yes.
4 Q Well, why wouldn't it be appropriate to measure as a
5 benchmark for out-of-network services the rates paid to providers who
6 are out-of-network?
7 A Again, as I think I described early on the proper framework
8 for a fair market value, or reasonable value analysis is a willing
9 buyer/willing seller, both parties able to walk away. That's not the set up
10 for an out-of-network claim. So it's not -- I realize that they have
11 comparability in a sense that they're out-of-network. But we actually
12 don't' want comparability here. We actually want to look at a market
13 benchmark.
14 Q All right, so --
15 A So there's a number of reasons related to that.
16 Q All right. I want to talk about that a little bit more.
17 MR. BLALACK: Shane, go to the next slide.
18 BY MR. BLALACK:
19 Q You have here why not to use out-of-network grade three,
20 and one that's spread about [indiscernible]. Do you see that?
21 A I do, yes.
22 Q Can you explain what you're discussing there?
23 A Yeah, this is -- this is a conceptual slide. And it discusses, we
24 talked about surprise billing a little earlier. The balance billing or the
25 threat of balance billing is sort of a variation of that point, where there's

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1 always the risk unless there's some regulatory or legislative solution,
2 that overrides it.
3 In a situation like this, an out-of-network situation where the
4 difference between the full bill charges, so that's what I'm showing on
5 the left, and the amount that's allowed, based on whatever methodology
6 is used by the payor, that's an amount that's at least potentially at risk
7 for balance billing. So the patient could get that as a separate bill.
8 So I'm breaking that into two pieces here in the middle two bars.
9 I'm sort of imaging a situation where let's say the CPT code for 99285
10 was a charge of $1,888. The payor uses a methodology of whatever type
11 that says well $375 is the reasonable value for that service. The
12 difference between the full bill charge and that allowed amount, that pink
13 bar in the middle, that's what I call the risk. That's the possible threat of
14 balance bill.
15 So the insurer could say 375, you owe $20 is your copay. We'll pay
16 the rest. But then separately you'd get a bill for the whole rest of the
17 difference between that, and the bill charged. That's what balance billing
18 means. Now I call this a threat of balance billing. It doesn't mean that it
19 always happens, but there's always this overhang in out-of-network
20 emergency care. It's different than out-of-network voluntary care.
21 If you selectively say I'd rather go to some orthopedic surgeon out-
22 of-network because I think the guy's' great or whatever, that's one thing.
23 But an emergency you don't have a choice, and you have this threat of
24 balance billing. In my experience, payers are very concerned about
25 putting their patients at the threat of that. And what that has a tendency

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1 to do in my experience, and the analysis that I've done over the years, is
2 it tends to increase the allowed amounts.
3 So the true no threat situation might be 375. Whereas as I note in
4 my narrative on the right, you want to kind of reduce that risk or
5 eliminate that risk. The way to do that is to increase the allowed amount.
6 To not put the patient at risk of having a balance bill.
7 Again, it doesn't mean you're going to get one, one way or
8 the other. But what you see is the different plans and the different
9 employers will have different levels of -- shall we say risk tolerance. And
10 it tends to directionally drive up the allowed amount. So you tend to
11 observe allowed amounts that are in excess of what you would observe
12 without the threat of balance billing. So it's a directional concern that
13 effects out-of-network emergency care.
14 Q So when you're talking about balance billing, you're talking
15 about risks. Have you seen claims from the -- in the record in this case,
16 claims from the TeamHealth Plaintiffs that they don't balance bill
17 patients. Have you seen those assertions?
18 A I have -- I have seen those assertions, yes.
19 Q In fact, they claim to have a formal policy that says it. Are
20 you aware of that?
21 A I think I have heard reference to that. Yes.
22 Q And we will -- we will -- maybe we'll see that. But what I'm
23 asking you is does it matter to your analysis from an economic
24 perspective whether the individual has a provider, voluntarily chooses to
25 balance bill or not balance bill? Is that relevant to the analysis from

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1 your perspective?
2 A I mean certainly it would be relevant to the individual patient
3 who is facing that, but what I'm making here is a directional point. So
4 whether or not an individual provider does or doesn't balance bill a
5 particular patient, isn't changing the overall economic framework and
6 the incentives and the risks. And this has certainly been my experience
7 over the years, that this risk of balance billing -- and it doesn't have to
8 happen very often, even, or in some cases even ever. But there's always
9 a threat of it to cause the out-of-network rates to be higher than they
10 would otherwise be.
11 Q Okay. Now you can go to the next slide. Okay. You refer
12 here, one of these use out-of-network grade three, so two out-of-network
13 payments occur after a forced transaction. Neither side can walk away.
14 Why don't you explain that?
15 A So I mentioned early on that the economic framework for a
16 reasonable value or fair market value assessment is a willing
17 buyer/willing seller. Again, think of a house purchase. It's sort of a --
18 someone makes an offer; the seller can accept or not. Or be part -- both
19 parties can say no, I don't like that price. Or I don't like those terms. The
20 ER services or the emergency department services here, and the
21 physician services are an interesting economic situation where it's a
22 forced transaction. There's not actually very many examples of this in
23 the world.
24 And typically you can decide to buy a pair of pants or not. You can
25 decide to buy a house or not. In an ER you typically need to get the care

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1 for, you know, health reasons on it. So it's' a forced situation and that
2 changes the economics. Neither party can walk away. So suddenly you
3 say here's what I actually want to see. I want to see a market transaction
4 where both parties can make an agreement and walk away if they don't
5 like it. Here neither party can walk away.
6 The care has happened. You have to provide the care, the
7 clinicians. We've heard some testimony on that. The payor has to pay.
8 So the dynamics and the resulting prices are just fundamentally different
9 than what you observe in a fair market value kind of transaction. So it
10 just -- it sets it up that that isn't the right place to look for market prices
11 for benchmarks. You don't want to look for forced transactions. You
12 want to look for voluntary transactions.
13 Q And so what's the core conclusion here?
14 A Again, that they're forced transactions and therefore that it's
15 not appropriate that there's going to be a bias in that to not be a willing
16 buyer/willing seller situation.
17 Q Sir, in the field of economics is there a term known as in
18 elastic or elastic demand?
19 A There is, yes.
20 Q Can you explain to the jury what that term means?
21 A Yes. So it's an interesting -- it's -- some people may have
22 heard of it, may have not. It's kind of a technical term in economics.
23 What it refers to is how sensitive is the buyer to the price. So the --
24 what's -- if something's very elastic, it means if the price is a little bit
25 higher, I'm not going to buy it. So my -- the volume that you sell is

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1 going to be much, much lower. So think about the -- you know, gasoline
2 example. If there's' four gas stations, one on each corner and one guy
3 tries to raise his price by 50 cents and nobody else does, he's not going
4 to get any business.
5 That's very elastic. Meaning he tries to raise his price; he's going
6 to lose all his volume. Super elastic. The opposite end of the spectrum
7 is what we call inelastic demand. And that's a situation exactly the
8 opposite where it doesn't matter what your price is effectively. People
9 are going to have to buy that service.
10 Now when I -- when I taught economics at Harvard, I would
11 use two examples for in-elastic services. One is you're in the middle of a
12 desert and you come across an oasis. You got it; you're dying of thirst.
13 You willingness to pay, you'd pay anything for that water. So I don't
14 care if it's a little more little less, you're going to get it.
15 The other one I'd use is emergency services. If you -- if you
16 need -- if you're bleeding, if you've got an injury you need to get that
17 service. So you're not shopping around. It's not a willing buyer/willing
18 seller sort of situation. So again, the dynamics of a forced transaction
19 and in-elastic demand, meaning they're going to show up no matter
20 what the price is. That's a phenomenon that suggests that the out-of-
21 network prices are not the right ones to use.
22 Q All right. Is there academic literature that studies this
23 question of inelastic demand for emergency services that's been studied
24 and researched?
25 A Yes, there is.

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1 Q And have you consulted and reviewed that research in
2 connection with forming your opinions in this case?
3 A I have, yes.
4 Q I'd like to show you a slide next. All right, sir, could you
5 please describe what study is -- you're referring to here and what the
6 findings are?
7 A Yes, this is a study coming from the Journal of Health
8 Economics, which is a leading journal in, as you'd expect economics, but
9 particularly the study of healthcare economics. 2017 article. And this is
10 actually quite interesting, at least to economists, where they were
11 actually trying to measure and quantify the elasticity. So we've talked
12 about it kind of in the abstract. There's' literally measurements for it. So
13 if you're in-elastic, that means it's zero. Meaning your quantity won't
14 change at all with the price. If you're very elastic it's going to be a
15 number greater than one. Could even be very, very much greater than
16 one, where you lose it.
17 So what they were trying to do is to look at different
18 healthcare services and say are these relatively more elastic, meaning a
19 higher number, or in-elastic meaning a low number. And what I'm
20 noting on here is that emergency room spending has an extremely low
21 elasticity. Almost zero. Negative .04. That means very, very little
22 change in quantity with a change in price. Maternity, also, it's not very
23 surprising. I have three children. So when those babies were going to
24 come, they were going to come out there.
25 So -- and where there's other services that have higher

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1 numbers. So this was an actual quantification which demonstrated
2 the -- it's very inelastic. So not sensitive to price.
3 Q And that -- is that a function of this forced transaction
4 dynamic in the market?
5 A It is. It's a function of just the nature of the immediate
6 healthcare need is obviously swamping any ability to search for
7 alternatives.
8 Q Now we discussed -- I want to show you another study that
9 you cited in your analysis. It's the Yale study. We talked about this
10 earlier today, right, this study?
11 A Yes, we've talked about the Yale study.
12 Q Did the Yale study also look at the inelasticity of demand for
13 emergency services?
14 A It did. It wasn't trying to do the same thing of independently
15 quantify it, but in their modeling, they looked at the demand and
16 modeled it as being very inelastic. And that's what I'm highlighting on
17 here. Increase in price does not lead to a decrease in demand. Again
18 that's no like most goods and services. And at the bottom they say they
19 make the realistic assumption, meaning that for the modeling, they look
20 at demand being in-elastic.
21 Q Okay. Now did -- in connection with the Yale study, did the
22 Yale researchers also examine the role of staffing companies in
23 connection with inelastic demand for emergency services?
24 A They did, yes.
25 Q Okay. And if you go to the next slide, you'll see some

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1 findings from the Yale study that you relied on in your report. Can you
2 describe what they were?
3 A Yeah, they basically were studying two large staffing
4 companies, TeamHealth and MCare. And what they found is the fraction
5 of bills that were out-of-network went up when TeamHealth takes over a
6 hospital and when MCare. In fact when MCare takes over, it goes up
7 even more. But they found that this out-of-network element was true of
8 both of these staffing companies.
9 Q Okay. Now let's' go to the next slide. And it says the risk of
10 disputes can distort the rate of pay. What do you mean there?
11 A So this is in sort of the same category if you will, of the threat
12 of balance billing. So because we're in a forced transaction, there is this
13 unusual feature of well, the care's been provided, we need to have a
14 price, but there's no price that's been independently set in the market.
15 So that's why you see these varying methodologies. It's just the nature
16 of these transactions.
17 And from the payor's perspective, even if their patient isn't balance
18 billed, there's always the question of are they going to get in a dispute
19 over this. Could be an appeal. Could be a litigation like this. And again,
20 directionally that means it's not a willing buyer/willing seller situation.
21 So what I'm illustrating here is very similar to the dynamic with the
22 threat of balance billing. They might say, oh, the reasonable value of
23 that is $300. But I need to add a little bit to that because, you know, even
24 if that's the right number, they may not agree with it, or they may decide
25 to dispute it. They being the provider. So I'll add a little bit of that, just

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1 to try and reduce that risk. So again, these are directional points. Both
2 the threat of balance billing and the concern about disputes. That means
3 it's not a good benchmark for willing buyer/willing seller.
4 Q Okay. Now, I want to kind of try to conceptualize in a more
5 practical why out-of-network rates may or may not represent reasonable
6 value. And I'm trying to take you through a hypothetical illustration.
7 MR. BLALACK: Ms. White, could I have the Elmo on real
8 quick?
9 BY MR. BLALACK:
10 Q All right. So sir, I have my chicken scratch here. And it's got
11 a hypothetical situation where we have an emergency room patient who
12 encounters a dire, important emergency, a real emergency. He calls an
13 ambulance. An ambulance comes and picks them up and has the option
14 of taking them to one of two hospitals with emergency rooms that are,
15 let's say equidistant from where the patient is. You with me so far?
16 A Yes. I am. I am, yes.
17 Q Okay. Now, in one of those hospitals, the emergency
18 department physician group, the staffing company, is a par group,
19 contracted with the health plan of the patient, and one is not contracted
20 with the health plan of the patient. You with me so far?
21 A I am.
22 Q So in my hypothetical, the number one hospital would be the
23 one where the physician group and the hospital are all in the patient's
24 network, okay?
25 A Yep.

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1 Q Hospital two, same scenario, the hospital is in the network
2 but the staffing company and physicians that the staffing company
3 handles are not. You with me?
4 A I am.
5 Q So we're trying to -- if you assume that an ER service is going
6 to be rendered at one of those two hospitals, okay, just the question is
7 which one. They're going to go to hospital one, go to hospital two. Let's
8 assume that the hospital, instead of turning left to go -- I mean the
9 ambulance driver, instead of turning left to go to hospital one, turns right
10 and goes to hospital two and deposits this patient safely at the
11 emergency room of hospital two, where that patient is then treated by a
12 non-participating out-of-network provider that's associated with a
13 staffing company. You with me so far?
14 A I am.
15 Q Here's my question. Is there anything about the randomness
16 of how that patient arrived at this hospital and received services from
17 this emergency department as opposed to the ambulance driver
18 deciding to turn left and go to this hospital, that impacts from an
19 economic perspective what the underlying reasonable value is of the
20 service that would be rendered at every -- each hospital?
21 A No. And I think that's actually a good illustration of why you
22 want to look at the situations where you can turn left or right and say
23 what would the reasonable value be in the left turn situation, for
24 example, and say, that's a willing buyer/willing seller kind of transaction.
25 So you don't -- from a I think public policy perspective and certainly from

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1 an economic perspective of reasonable value, you don't want to have the
2 vagarities [sic], if you will, of just left turn, right turn, particular distance
3 from an ER. That isn't what should be driving it because that -- that's
4 sort of, if you will, kind of exploiting the fact that these are not willing
5 buyer/willing seller transactions, that you have an elastic demand here.
6 So that's a good example of why this isn't the right framework.
7 Q Okay. Because in this case, what determines, in a world
8 where out-of-network rates paid to out-of-network ER providers is
9 what -- is the benchmark for determining reasonable value. For this
10 patient, what would have made that possibility a reality is the
11 decision-making of the ambulance driver, right?
12 MR. LEYENDECKER: Your Honor, we're leading again.
13 THE COURT: Yeah.
14 MR. BLALACK: I'll rephrase.
15 THE COURT: Thank you.
16 BY MR. BLALACK:
17 Q What would be the variable that would influence the
18 outcome of whether this --
19 MR. LEYENDECKER: Also leading, Your Honor. He can say
20 what's the variable.
21 MR. BLALACK: I don't even have the question out yet, Your
22 Honor.
23 THE COURT: Objection sustained. It was leading.
24 BY MR. BLALACK:
25 Q Okay. Let me ask you this, sir. Is there any choice available

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1 to the --

2 MR. LEYENDECKER: Your Honor, he's leading again. Is

3 there any choice. He's leading.

4 BY MR. BLALACK:

5 Q What choices does the ER patient have to impact the value

6 for the service in this scenario?

7 A In this scenario, the ER patient and certainly the payer would

8 have -- wouldn't have a choice. They would be -- it would be the

9 ambulance driver and the medical necessity itself that would be driving

10 the decision. If you think of the alternative, if you're driving, let's say to a

11 dermatologist for a skin infection or something like that, you can choose

12 to go left or right to an in-network or an out-of-network provider and

13 make that choice. But that's not true in an emergency situation.

14 Q Thank you, sir.

15 MR. BLALACK: Ms. White, you can take that off now.

16 BY MR. BLALACK:

17 Q Okay. Now, sir, I know you are not a fan of Mr. Leathers'

18 analysis of an alternative benchmark using out-of-network rates. But for

19 the sake of completeness, did you review his computations and analysis

20 to determine whether at least accepting as true his position if you

21 thought he arrived at the -- at a number in a way that you felt was

22 perfect?

23 A I did, yes.

24 Q Okay. Let me show you the next slide. So you say here on

25 this slide, even based on Mr. Leathers' flawed methodology, damages

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1 would decrease by more than $1 million if he had prepared separate
2 benchmarks for each Defendant. Do you see that?
3 A I do, yes.
4 Q What are you referring to there?
5 A So Mr. Leathers actually combined all of his out-of-network
6 data for Fremont and Team Physicians and Ruby Crest. And I know
7 during my deposition, the issue was raised about doing it separately,
8 which Mr. Leathers himself didn't do. So I did a calculation to say, well,
9 what would have happened had he done it separately? And using his
10 exact same methodology, it would have resulted in more than a million
11 dollars lower in terms of the difference.
12 Q Okay. And analytically, do you have any fundamental
13 dispute with the notion of aggregating benchmark values for purposes of
14 a reasonable values analysis?
15 A Obviously, it depends on the individual situation. But in this
16 case, not particularly. And it's not -- it's nothing that's per se, if you will,
17 or just de facto wrong with it. But in terms of the consistency with the
18 concerns, I just provided this alternative calculation.
19 Q Okay. Just so the jury is clear what you're talking about, in
20 the analysis that's reflected as 355 percent of Medicare, with a delta of
21 3.3 million, Mr. Leathers took all of the disputed claims and the allowed
22 amount and compared it to a benchmark tied from claims from all of the
23 Defendants together. So there was one group of claims benchmarked
24 against the aggregate group of claims; is that right?
25 A That's my understanding, yes.

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1 Q So Defendants bucket of claims versus Defendants' bucket of
2 claims.
3 A Right.
4 Q What is it that he would have -- what did he -- what would
5 have been done if he had done a benchmark placed on each Defendant
6 in the case?
7 MR. LEYENDECKER: Your Honor, may we approach?
8 THE COURT: You may.
9 [Sidebar at 2:49 p.m., ending at 2:49 p.m., not transcribed]
10 BY MR. BLALACK:
11 Q Okay. So let's pick up where we were. And just, I think we
12 established that in the initial analysis Mr. Leathers did of this alternative
13 benchmark, he just took a collection of all claims for all Defendants as
14 one, compared it to a benchmark of all --
15 MR. LEYENDECKER: Again, Your Honor, he's leading. I'd
16 like to hear from the witness, who's making a lot of money today to tell
17 this jury what he thinks.
18 THE COURT: You know, I'm going to strike your comment
19 about money. That's just irrelevant and inappropriate.
20 MR. LEYENDECKER: I apologize.
21 THE COURT: But, please, you can't lead the witness.
22 BY MR. BLALACK:
23 Q All right. Let's do this. I'm going to hand you over. You
24 explain what the difference is, is it -- in the left-hand column and the
25 right-hand column.

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A Sure. So the left-hand column is taking all of the claims in dispute and comparing them to the Defendants' out-of-network payment data to all the rest of Nevada combined. And what -- the right-hand bar is doing it more entity by entity. So it's saying let's take all the Fremont claims and let's compare those to other Fremont-related geographic areas, and we'll do it for each of the different areas and sort of do it separately, one by one. And what you see when you do it that way is you get a little bit lower total dollars in terms of the difference.

Q And so if there were benchmarking Defendant by Defendant, what is the total delta between the amount that was already allowed by the Defendants collectively in the benchmark?

A $2.1 million.

Q And what does that translate to as a -- expressed as a percentage of Medicare?

A The allowed amount, which would be the actual benchmark amount of 4.93 million would be 2.84 times Medicare, or 284 percent of Medicare.

Q As compared to what percent of Medicare for the allowed amount?

A One hundred and sixty-four percent.

Q Okay. Now, sir, if we go to the next slide, you indicated that there was a methodology that you believe represents an appropriate methodology for measuring reasonable value; is that right?

A That's correct. Yes.

Q Okay. So I'm going to ask you to describe the concept of

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1 your methodology and the probable reason for it, and then I'm not go
2 any further. Do you understand?
3 A I do.
4 Q Okay. So why don't we start with the next slide, which is
5 how does one determine market value, reasonable value. What does
6 that mean?
7 A So again, this is sort of framing a conceptual question or a
8 conceptual framework of how to think about it. And I've talked about it I
9 think a fair amount during my testimony here. On the left side, I used
10 this Latin term "quantum meruit", which is sort of a fancy term for a
11 reasonable value. Or I guess -- I don't know if it's fancy or not. It's Latin.
12 So it means reasonable value. The way to think about that is, again, the
13 going rate for the services.
14 We've talked about willing buyer/willing seller, where each side
15 can walk away. So that's the framework, is I have a choice of gas
16 stations, I have a choice of buying a house, I have a choice of buying a
17 pair of pants. That's the right framework. And the factors that you want
18 to think about on the right-hand side, again, are the -- you want to look at
19 prices that were actually paid and accepted. You typically want to look
20 at it for the same service and you typically want to look at it in the same
21 geographic area, same time period. Again, willing buyer/willing seller
22 transactions. You then want to think about the facts and circumstances
23 of what economists call the relevant market to see if there's some other
24 distortion going on there. But that's the basic framework because you
25 want to look for market prices.

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1 Q And if you go to the next slide, what does this slide
2 represent, sir?
3 A So this is kind of a, again, a conceptual slide. Start with the
4 little dots. Those represent, again, these are -- these are representations
5 of market transactions, what I call voluntary transactions. Voluntary
6 meaning each side can walk away. The price, low to high. And what you
7 typically observe in this situation and frankly, other business, is you
8 don't see that all of them happen at exactly the same price. So you
9 know, here, I'm giving an example of a particular CPT code, say a 99285,
10 although it could be any. This is just a conceptual.
11 You don't usually see every voluntary transaction happening at
12 exactly the same time. So you need to look at the overall set of
13 transactions. And then, depending on the situation and the distribution
14 of the transactions, you typically want to look at a measure of central
15 tendency, meaning where are we in the middle, and that becomes the
16 market price.
17 In this case, I've illustrated that my view, median, in this kind of a
18 situation would be the right way to do it, meaning half the observations
19 are higher than this, half of them are lower than this. So the 50th
20 percentile, the median, the 50-yard line, another representation, that's
21 how to think about the market price. That's the reasonable value
22 measure in this situation.
23 Q Now, yesterday, did you hear me questioning Mr. Leathers
24 about the concept of using a mean or average versus a median?
25 A I did, yes.

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Q And we discussed something called a normal distribution or a Bell curve. Do you remember that?

A I do, yes.

Q Are you familiar with those concepts?

A Very.

Q Could you describe your understanding of -- well, first of all, are median and mean statistical terms?

A They are, yes.

Q What are they, measure -- terms of measurement?

A Yeah. They're -- again, they're terms of what we call central tendency. It's some measure of -- you're trying to represent the data with a single statistic.

Q Okay. And in your experience, are there occasions where it makes sense to use a mean versus median or otherwise?

A For sure. It's a -- it's professional judgment. But there are some -- definitely circumstances where the median would be preferred and others where the mean might be the reasonable one to use.

Q What tends to be the driver of that kind of decision?

A Again, getting a little bit statistical here, but basically, the distribution of the claims and -- I think Mr. Leathers actually gave kind of a nice example the other day about market price for houses and we got a couple of mansions. So if it's more of a normal curve, meaning a lot of them clustered in the middle and a few on either side, that's what we call a Bell curve or a normal curve, in that case, your mean and your median are typically going to be very close. And it might be reasonable to use

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1 either one of them, frankly.
2 If you tend to have, okay, there's -- it kind of looks like a bunch
3 here, but then you've got kind of a big hump out one side or the other,
4 that would be a situation where the median might be preferred, because
5 then, you're not getting as influenced by, you know, outliers, one side or
6 the other. And he gave the example of a couple mansions among 50
7 houses or something like that.
8 Q Okay. Based on your experience and analysis of the data in
9 this case, did you choose -- well, do you believe a median or a mean
10 would be more appropriate?
11 A In this case, I think the median is the appropriate. This is not
12 a Bell curve situation. We definitely have some outlier situations.
13 Q Okay. Now, I'd like to show you the next slide, sir. And this
14 is, I think, one that the jury has seen before. Not this one. Please go up.
15 Go up. Keep going. There we go.
16 Now, sir, this slide, what is being compared on this slide. Is this
17 the same slide we saw earlier?
18 A Yeah. This is the slide that we started with -- or early on in
19 the case, just showing the allowed amounts of 2.84 million on the left
20 and on the right, we have the per claim amounts and the bill charges.
21 Q Okay. Now, based on the work you've done in the case, do
22 you have an opinion about whether the full bill charges represented in
23 the red bar, 13.24 million, 763 percent of Medicare, represents the
24 reasonable value for the two claims in this case?
25 A I do have an opinion.

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1 Q What is that?
2 A That it does not. That it should not be used for reasonable
3 value, that it does not represent the reasonable value in this case.
4 Q Okay. Now, after looking at the blue bar, representing the
5 amount of dollars already allowed by the Defendants to the TeamHealth
6 Plaintiffs in this case for the given claims, which is 2.84 million, using
7 your experience working in these kind of cases, do you have an opinion
8 about whether that represents reasonable value for these services?
9 A I do.
10 Q And what is that?
11 A I believe it does represent reasonable value for these
12 services. So when I use the metrics and look at the willing buyer/willing
13 seller, I find that 2.84 million does represent reasonable value.
14 Q Okay. Now, in addition to doing this analysis, did the
15 Defendants, me, ask you to look at the data to determine whether the
16 claims in dispute matched up to the types of claims that the TeamHealth
17 Plaintiffs contended were in dispute?
18 A You did ask me to do that, yes.
19 Q And what were the types of claims that you understood the
20 TeamHealth claims alleged were disputed in this case?
21 A You mean the -- what were the differences in the --
22 Q Let me explain.
23 A Okay.
24 Q You understand that the TeamHealth Plaintiffs were
25 challenging only certain types of claims in this case?

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A Yes.

Q In other words, do you have an understanding of whether they were contesting reimbursement on government benefit type claims?

A Oh, yes. Commercial. Commercial claims, they were focusing on, not government benefit ones. Not Medicaid or Medicare.

Q All right. So your understanding from their allegations was they were not focused on government type program claims?

A That's correct, yes.

Q Just commercial.

A Correct.

Q Okay. And based on our request that you review the data to determine whether there were any claims on the disputed claims list that nonetheless did not fit their own definition of what is in dispute?

A Yes, I did. I was able to review the claims in dispute list and review the underlying data, and I determined that there were claims that in fact were not commercial claims, were either Medicare or Medicaid claims.

Q Okay.

A And when I say Medicare or Medicaid, they would be programs that would be administered potentially by one of the Defendants, but the underlying care is under the auspices of Medicare or Medicaid. So the rate structure is different.

Q Okay. Now, did you --

MR. BLALACK: Turn the page, please, Shane.

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1 BY MR. BLALACK:
2 Q Did you perform that analysis and determine which claims
3 did or did not qualify within the Plaintiffs' own definition of a disputed
4 claim?
5 A I did, yes.
6 Q Is that what's reflected here?
7 A That's right. So there's three categories, one of which we
8 just talked about, the government-funded ones.
9 Q Could you explain the three categories that you said do not
10 satisfy their own criteria?
11 A Sure. So maybe we just start with the one we just talked
12 about, which is the row that says government-funded. So of the 11,563
13 claims in dispute, on the most recent spreadsheet, I identified 59 of those
14 claims with total bill charges of $63,000 and a little bit and allowed
15 amounts of $15,000 that were actually not commercial claims. So those
16 should be removed. They're what we call MediCal or Medicaid and
17 Medicare Advantage that we talked about that's a form of Medicare. But
18 either way, they're covered under the rate structure of those programs.
19 So those should not be in the case.
20 There's two other categories, as well. What we -- the first one is --
21 is kind of a straightforward one at the top, called "unmatched claims".
22 So there's 270 claims where it's on a claims in dispute list but when I
23 carefully reviewed all of the Defendant data in this case, neither Analysis
24 Group nor the experts on -- for TeamHealth were able to actually find a
25 corresponding claim in the Defendants' data. So I don't know what the

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1 basis for the claims in dispute list is, but we don't find it in the
2 Defendant's data, so therefore, it doesn't appear to be an actual
3 Defendant's claim.
4 Q Okay.
5 A I don't know how it got labeled as that, but there's about 270
6 of those, representing bill charges of a little over 300,000 and allowed
7 amounts of 84,000.
8 Q Okay.
9 A And then the last category I mentioned earlier on there was
10 that little sliver of other, so there were a number of cases that I think may
11 have been parties at one point to this case, I'm not quite sure. But there,
12 as of the claims in dispute list now, and as of the five entities who are
13 defendants, they're actually not defendants. So there's 221 of those
14 claims.
15 Q Sir, when you add up those categories you identified from
16 the dispute claims list, how many did you determine did not meet the
17 Plaintiff's criteria for including?
18 A 550.
19 Q All right. And so how many disputed claims will remain after
20 removing those claims?
21 A Just over 11,000. 11,013.
22 Q And then those numbers to the right on the chart, what do
23 those represent?
24 A That's, if you think of this as sort of taking off the different
25 slices, if you will, of the claims in dispute, so those 11,000 claims would

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1 correspond to $12,598,016 of bill charges, and $2,681,335 of allowed.
2 Q Okay. And if we go to the next slide then, we'll see that same
3 chart we showed to the jury just a moment ago. Is this different from the
4 chart we just looked at?
5 A It's the same idea, but it's taking that bottom row from the --
6 those, so it's identifying those categories of claims, the unmatched
7 claims, the government claims, and so forth, and doing the same bars
8 with those claims removed. So we see the left-hand side, both bars go
9 down a little bit by a few hundred thousand dollars. The right-hand
10 claim, the right-hand set of bars wouldn't necessarily need to go up or
11 down. It depends on the mix of claims. They go down a little bit, so it's
12 not $243 of allowed per claim, and $1,144 of the -- of the billed charge
13 per claim.
14 Q Okay. Fair enough. Thank you, sir. Now, I want to wrap up
15 with a discussion with dispute of Plaintiffs. Just a moment ago, you
16 pointed out that you had done an exercise to match the claims on the
17 disputed claims list to the underlying claims data for each of the
18 Defendants in the case; do you remember that?
19 A I do. I do, yes.
20 Q And there was -- were there some instances where you could
21 not find the claim at all in the data?
22 A Yeah, those are the unmatched claims that I just talked
23 about, yes.
24 Q Okay. And then there were occasions, and then the vast bulk
25 of the claims, you were able to locate the claims somewhere in the

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1 middle?
2 A That's right, yeah. Most of them, we could actually figure out
3 on a claims and dispute list, oh, they're actually referring to this claim
4 over here in the underlying defendant data.
5 Q Okay. Now, when you did that matching exercise, did you
6 audit each and every value on the disputed claims list to verify that each
7 [indiscernible] among the disputed claims list actually shows up as
8 represented on that list in the claims data of the defendant?
9 A I wouldn't call it an audit perse. We did do that review and
10 certainly noticed differences. Ultimately, for purposes of my analysis, I
11 used the claims in dispute list, since that's what they're asserting with
12 the changes we talked about, but I did do a review of them, and I did
13 notice differences.
14 Q And when you say your notice difference, did you disclose in
15 your report that you noticed differences between the disputed claims list
16 and what was in the underlying data of the defendant?
17 A I did, yes.
18 Q Okay. Now, did you hear Mr. Leathers testify yesterday that
19 he, like you, basically accepted the values of the master claims as
20 accurate?
21 A Yes, I did.
22 Q Okay. Now, let's show you the Plaintiff's disputed claims list
23 again.
24 MR. BLALACK: Yes, this is 473. Sorry, I should have said
25 that. Is this the XL version, Shane?

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1 MR. GODFREY: Yes.
2 MR. BLALACK: Okay.
3 BY MR. BLALACK:
4 Q So if you go all the way to the left? So, sir, again, you
5 recognize this, what we showed the jury earlier, is 473?
6 A Yeah. By the way, it may be useful to show that -- that row
7 number as well. Make it a little bit -- there you go. Yes.
8 Q Is that better?
9 A It is.
10 Q Okay. Now, I want to talk about some specific dispute claims
11 that the TeamHealth Plaintiff showed other witnesses in this case earlier
12 in this trial, okay?
13 A Sure.
14 Q Okay. Now, sir, did you see or hear the testimony of Scott
15 Ziemer from UMR earlier this week?
16 A I didn't see all of it, but I saw some of it, yes.
17 Q Okay. I'd like to show you and remind the jury of some e-
18 passages [phonetic] related to the disputed claims that Mr. Ziemer
19 provided in his testimony.
20 MR. BLALACK: And if I could ask Shane to pull up the trial
21 transcript from November 15th, and he can go to page 238, line 9.
22 BY MR. BLALACK:
23 Q You'll see there, sir, starting at line 9, I believe Mr. McManis
24 was doing the questioning and you said, okay.
25 "Q Well, I want to take a look at another excerpt from Plaintiff's

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1 Exhibit 473, which again is the disputed claims. It says I'm not going to
2 read the name, but can you see that on this excerpt, there was a patient's
3 name, sir?
4 "A I see it. There's a patient's name."
5 If you go down further.
6 "Q I'm not going to ask you to read it out loud because I want to
7 make sure that we don't put that in the record, but do you see this is
8 another 99285 claim with the date of service of August of 2019?
9 The answer. Yes. Well, I see the date of service in August of 2019.
10 "Q When the employer is Medical Transportation Management,
11 Inc.; do you see that?
12 "A I see a portion of that, yes.
13 "Q All right. Do you know whether that's UMR, slash
14 [indiscernible] of customers?
15 "A I do not know if that's UMR customer off the top of my head.
16 Then he keeps going. He says,
17 "Q All right. Well, I'll represent to you that in the data we have,
18 it shows up as being a planned administered by UMR. Okay.
19 "A Okay.
20 Then he says,
21 "Q All right. So we've got this patient, the 99285, and an
22 allowed amount of $315.25; do you see that?
23 "A I see it.
24 "Q What do you suppose happens? Well, let's just take a look.
25 All right. The same patient back to the emergency room in the same

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1 year, with the same code, what's the allowed amount this time?
2 "A $he allowed amount, 814.19, 315.25, and 11/27/2019, the
3 allowed amount is $409.82.
4 MR. LEYENDECKER: Your Honor, may we approach real
5 quick?
6 THE COURT: You may.
7 [Sidebar at 3:09 p.m., ending at 3:10 p.m., not transcribed]
8 THE COURT: All right. I'll sustain the objection. Give some
9 direction.
10 BY MR. BLALACK:
11 Q All right. Mr. Deal, I'm going to --
12 MR. BLALACK: And bring the transcript back up for me.
13 BY MR. BLALACK:
14 Q Mr. Deal, I'm going to ask you and the jury to read -- continue
15 to read down to line 16. Tell me when you're there.
16 A I'm there.
17 Q Okay. Now go to page 239, line 22. All right. If you would,
18 read 239, line 22 to 240, line 4. I'll ask the jury to do the same.
19 A Not out loud, right? You want to just --
20 Q You --
21 A Yeah.
22 Q You don't need to read that. We'll just -- we'll all read to
23 ourselves.
24 A Yeah.
25 Q Do you see that, sir?

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1 A I do, yes.
2 Q Okay. Now, let's look at these claims that Mr. McManis was
3 discussing with Mr. Ziemer.
4 MR. BLALACK: Would you please pull up Plaintiff's
5 demonstrative that is titled summary PX 473? And then turn to page 11.
6 BY MR. BLALACK:
7 Q Do you see that? All right. Mr. Deal, I'll represent to you that
8 this document is a summary of several disputed claims from Plaintiff's
9 disputed claim list, Exhibit 473, okay?
10 A Okay.
11 Q Now, based on the testimony for Mr. Ziemer that we just
12 reviewed, do you have an understanding of what this demonstrative,
13 based on your reading, is attempting to show?
14 A Yes, I do.
15 Q What was that?
16 A So as I understood the testimony and the examination to be
17 saying that basically to point out maybe there's a problem with the way
18 that the claims were being adjudicated when you see the same code in
19 the green, the 99285 in the same year, 2019, column I for the same
20 patient, for the same employer, having different allowed amounts, that
21 there were some, that difference is somehow maybe some indication --
22 there's an inference, perhaps, that there was some error inexplicable
23 reason for a difference. If it's the same employer, the same year, the
24 same code, everything else the same, the same charge, then the allowed
25 amount should be adjudicated in a consistent way.

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1 Q Okay. Now, based on your analysis of the disputed claims
2 list, which again is Plaintiff's Exhibit 473, are you able to determine if
3 these two claims on demonstrative PS473 can also be found on Plaintiff's
4 disputed claims list, PS -- or P47 through Plaintiff's 473?
5 A Yes. So this was a demonstrative that you should be able to
6 find the claims both in their electronic version of the full claims in
7 dispute; that's what you're referring to, the Excel file.
8 Q Right.
9 A Yes.
10 Q Okay.
11 MR. BLALACK: If you could, Shane, please -- well, you
12 already have it. At least put the demonstrative at the top back there, and
13 I think that's what you got on top. And then if you could, scroll down on
14 Plaintiff's Exhibit 473 so that row 8,925 and the headers are both
15 showing. When you find that, just bring that up.
16 BY MR. BLALACK:
17 Q You highlight, you can see 925?
18 A Yeah, it's 8,925, yeah.
19 Q I'm sorry, yeah, 8,925. Okay. Now, Mr. Deal -- okay. He's
20 highlighting that and bringing it out. Can you confirm whether the first
21 row of the demonstrative summary, PS473, is the same claim as this line
22 chains, identified on Exhibit Plaintiff's 473?
23 A Scroll a little bit to the right in Excel. I should be able to
24 confirm it, if you can. I see it's the same patient name. Date of service is
25 August 14th, 2019. That's the same bill code, looking to the right. You

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1 can scroll a little more. Same code. I see the charge being the same,
2 and I do see the allowed amount being the same as well, $315.25.
3 Q Okay.
4 MR. BLALACK: Now, please, Shane, go to row 9094 -- 9,094.
5 Highlight that row, too. Okay. And if you could, please, hide the rows
6 between row 8925 and 9094 so we could see them both at the same
7 time. Sorry to the jury, but this is the only way to do it.
8 BY MR. BLALACK:
9 Q Okay. Now, sir, are you able to confirm whether that second
10 row of the demonstrative up top, separating PS473 is the same claim as
11 the claim referenced in row 9094 on Exhibit P473, which is the disputed
12 claim?
13 A Yes. If we scroll to the right, I should be able to do the same
14 thing. If I'm checking the date of service, 11/27/2019, I'm looking at -- if
15 you scroll to the right, the same code, 99285, same charges. Scroll to the
16 right a little more. $1,428, and I see the allowed amount of $409.82, yes,
17 I see that.
18 Q Okay. Now, Mr. Deal, as part of your analysis of the disputed
19 claims in this case, I think you said you would need the claims data, but
20 the underlying actual raw claims that were produced by both parties?
21 A Correct.
22 Q And the TeamHealth claims produce claim data?
23 A They did. That's what we're observing here.
24 Q And did the Defendants produce claims data?
25 A They did, yes.

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1 Q I guess the data that you reviewed from the actual claim
2 system maintained by the Defendant?
3 A Yes, it is.
4 Q Okay. Now, I want the jury to understand a little more about
5 this data. Did the Defendants UMR, Sierra, Health Plan of Nevada,
6 United Healthcare, United Healthcare insurance company, all produce
7 separate claims data in this case? Or did they produce just one big
8 claims data?
9 A It was -- it was different data sets. Certain of the defendants
10 produced data together. There was three -- ultimately there was three
11 different data sets that were produced.
12 Q Across five defendants?
13 A Across five defendants.
14 Q Okay. Now, I'm going to show you, sir, a document that's
15 already been admitted into evidence, Defense Exhibit 4006, which is the
16 claims data that UMR produced, or claims submitted to UMR by the
17 Plaintiffs. Do you recognize this claim file, sir?
18 A I do, yes.
19 Q And do you know whether these claims shown on the
20 demonstrative that we've looked at, which is summary Exhibit 473, and
21 the underlying disputed claims list, Plaintiff's Exhibit 473, may also be
22 located in the UMR claims data, which is Defendant's Exhibit 4006?
23 A All but the, was it 270 that were unmatched, they should be
24 able to, yes.
25 Q Now, does -- can you do that by matching data elements

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1 from the two lists?
2 A Yeah, much like I was doing verbally a moment ago, we
3 should be able to look and find the same date of service, patient, so on
4 and so forth.
5 Q All right.
6 MR. BLALACK: Now, Shane, if you would please close
7 demonstrative summary PS473, but keep the spreadsheet for the
8 disputed claims list, Plaintiff's Exhibit 473 open, and please then pull up
9 Defendant's Exhibit 4006. And scroll down so that the heading and the
10 row 989 show. Go ahead and highlight that row.
11 BY MR. BLALACK:
12 Q All right. Now going from left to right, sir, I'm going to ask
13 you, if you could say what is the employer for this claim in the UMR
14 claim's data that's listed -- or excuse me, what is the -- yeah, what is the
15 employer listed in column B of the UMR claims data?
16 A Yeah, column B on the left is medical transportation
17 management.
18 Q Okay. Is that the same employer as what's listed in the
19 disputed claims list, Plaintiff's Exhibit 473?
20 A It is for that first claim, yes.
21 Q And what is the group number in column E of the UMR
22 claims number -- claims data?
23 A 76411009.
24 Q Is that the same group number as what's on the disputed
25 claims list?

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A 76411009, yes.

Q So that's saying the name is the patient name and column of the UMR claims data are the same as the patient name on the disputed claims list, Plaintiff's Exhibit 473?

A Yes, it is.

Q And what is the data service in column O of the UMR data?

A If you could go to the lower part? Scroll to the right a little bit. 2019, August 14th. Yes, that's the same.

Q So that matches the date and the Plaintiff's disputed claims?

A It does, yes.

Q What is the charge amount of column R of the UMR data?

A $1,428.

Q Does that match what's in the Plaintiff's disputed claim?

A It does, yes.

Q And finally, what is the allowed amount of column S of the UMR data?

A Those both match at $315.25.

Q Okay. So does this claim line and UMR data completely match the claim line and the disputed claims list that Plaintiffs have marked as Plaintiff's Exhibit 473 and the demonstrative that Mr. McManis showed Mr. Ziemer?

A Every element that we've reviewed matches, yes.

Q All right. Let's do the same exercise for now, for row 990 in the UMR data. Going from left to right, does the employer in column B of the UMR data match what's in the Plaintiff's disputed claims list?

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A It yes, it does, medical transportation management.

Q What about the group number that's in column E, does it match?

A Yes. If you could go to the upper part and just show -- yes, it does.

Q What about the patient name in column J?

A Yes, it does.

Q What about the data service in column O, does it match?

A Yeah. That's November 27th, and up above is also -- yes, November 27th, yes, matches.

Q Do the charges in column R of the UMR data match the amount of the charges in disputed claims list?

A They are -- they do, yes.

Q And look at this, Mr. Deal, when you get to column S of the UMR data, the underlying raw data, the allowed amount, does the UMR claims data match what is in the Plaintiff's disputed claims list, Plaintiff's Exhibit 473 when it comes to the allowed amount?

A No. The UMR data matches it's -- it's equivalent claim from earlier at $315, and there's a penny difference, 26 versus 25 cents, but it does not match the claims in dispute list, which is $409.82.

Q So it doesn't match the disputed claims list and it doesn't match the demonstrative, and Mr. McManis showed Mr. Ziemer and questioned him about it, correct?

A That's correct.

Q So for this claim --

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1 MR. BLALACK: Strike that.
2 BY MR. BLALACK:
3 Q So according to UMR's claim data, UMR allowed payment of
4 almost the exact same amount, that's off by one penny, on both claims,
5 just as Mr. Ziemer testified he would have expected, right?
6 A Yes, I believe that's accurate.
7 Q All right. Let's look at the other example that Mr. McManis
8 showed Mr. Ziemer.
9 MR. BLALACK: So Shane, could you pull up Mr. Ziemer's
10 testimony from November 15th again? On page 231, line 12. Pull it up a
11 little bit.
12 BY MR. BLALACK:
13 Q And so instead of reading it like I did before, I'm going to ask
14 you and the jury, sir, to start on page 12 and read down to the next page,
15 page 232 at line 11.
16 A You meant row 12; is that right?
17 Q Line 12. Yes, starting line 12.
18 A Line 12? Line 12, yeah.
19 Q At the question, "All right, Mr. Ziemer".
20 A Yeah.
21 Q Read to the bottom of the page, and then go to the next
22 page, and read to line 11 of the next page. Once you're done and the
23 jury's done, if you could now skip to page 233, line 11?
24 A Okay, I'm done.
25 Q And read line 11 to 25, so the bottom of the page.

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A Okay.

Q And go to page 235. There's a final Q and A I want to show you and the jury. Line 10 to 13 on page 235. Do you see that, sir?

A I do, yes.

Q All right. Mr. Deal, based on the testimony from Mr. Ziemer and the questioning from Mr. McManis, what did you understand Mr. McManis was purporting to show with this summary, Plaintiffs' Exhibit 473-A?

A So basically, the same point, which is perhaps casting aspersions or doubts on the adjudication of the claims by saying, same employer, same year, same codes, same seeming things that one would expect to similar allowed amounts, same bill charges. And yet, he sees some varying allowed amounts across these different claims. In this case, I think it was three different amounts that he referenced across four claims.

Q In fact, the Plaintiffs' Exhibit, PX 473-A, is up on the screen now. If you look at the allowed about row, row 9, how many different values are there?

A There's three unique values there. $230.30 that shows up twice, $253.33 shows up once, and $315.25 shows up once.

Q Do you know if these four claims on Plaintiffs' Exhibit 473-A can also be found on Plaintiffs' disputed claims list, Plaintiffs' Exhibit 473?

A Yes, they can.

MR. BLALACK: Shane, would you bring up Plaintiffs'

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disputed claims list? 473, and in the bottom half. I'll represent that this is exactly the same data as Plaintiffs' Exhibit 473. I've just done some of the -- I think we've got some highlight beforehand. Do you have that, Shane? There we go.

BY MR. BLALACK:

Q Now, you see, Mr. Deal, that I've highlighted -- pre-highlighted those four claims?

A I see that, yes.

Q Now, can you --

MR. BLALACK: Shane, please scroll down to 6773. Do you have it?

MR. GODFREY: Yes, sir.

BY MR. BLALACK:

Q All right. If you can, Mr. Deal, confirm whether that first row, the demonstrative Mr. McManis showed you -- or excuse me -- showed Mr. Ziemer and the jury Plaintiffs' Exhibit 473-A; is that the same claim as row 9130 on the disputed claims list? If you want, I can take you through some of the data?

A Yeah, I should be able to do it. If you can scroll so I can see date of service? Just pause there for a moment. Yes, I see all four of the dates of service match. I see all four of the billed CPT codes match. I see all four of the charges match.

Q Okay.

A So these appear to be the same claims.

Q Mr. Deal, does the claim on row 11202 of the disputed claims

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1 list, Plaintiffs' Exhibit 473, correspond to the second claim on Mr.
2 McManis' demonstrative?
3 A Yes, it does.
4 Q What are you relying on for that?
5 A Again, the data of service, the CPT code, the charge, and the
6 allowed amounts. I believe the employer also -- if we can scroll to the
7 employer? I'll just verify that as well. Yes, yes.
8 Q Okay. Mr. Deal, does this claim on row 10817 of the disputed
9 claims list correspond to the third claim on Mr. McManis' demonstrative
10 473-A using the same criteria you just described?
11 A It does. Yes.
12 Q Finally, Mr. Deal, does the claim on row 6774 on the disputed
13 claims list correspond to the fourth claim his demonstrative, again, using
14 the same criteria?
15 A Yes, it does.
16 Q Mr. Deal, were you able to locate all four of these claims and
17 underlying claims data that UMR produced in this lawsuit which is
18 contained in Defense Exhibit 4006?
19 A I was, yes.
20 Q I want to start by looking more closely at the third claim on
21 the demonstrative that Mr. McManis used.
22 MR. BLALACK: Shane, could you please keep the
23 demonstrative open, but close Plaintiffs' 473? And then pull up Defense
24 Exhibit 4006, again, the UMR claims data. If you would go to row 949
25 and highlight that row?

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BY MR. BLALACK:

Q Okay. Mr. Deal, were you able to determine whether the third claim on Mr. McManis' demonstrative, 473-A, and the corresponding claim on the disputed claims list, Exhibit 473, are the same claim as shown on row 949 of the UMR claims data?

A Yes, the third one is October 23rd of 2019, and that's highlighted up above as well. Same bill charges.

Q Well, let me just ask it this way. What is the employer listed in column D?

A Scroll to the left there. Las Vegas Sands.

Q And what's the group number in column E?

A 76411 -- excuse me. 76410018.

Q And on the -- is the employer with the new number the same as in the demonstrative that Mr. McManis used?

A Yes, they are.

Q And the date of service; is it the same?

A It is.

Q Is the charge amount 1,428 the same?

A Yes.

Q Look at this, Mr. Deal. When we get to column S, the allowed amount, what does the actual historical data the UMR claims system show was the amount that UMR allowed for this claim?

A $230.30.

Q And that's for, again, claim number three, row -- which is 5893 in the demonstrative?

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A That's right. So that would match the first and the fourth row, the allowed amounts for this.

Q Now, whereas before you had two claims that were reimbursed at 230.30. Now, you have three?

A That's correct. Yes.

Q Now, does the third claim on Mr. McManis' demonstrative and the corresponding claim on Plaintiffs' disputed claims list, Exhibit 473, accurately report the amount that UMR actually allowed for the disputed claim as reflected in the claims data produced by UMR?

A No, it doesn't.

Q According to UMR's data, the amount was the 230?

A And 30 cents. That's right. $230.30.

Q Now, let's look at that second claim on the demonstrative. The one that has allowed amount 315.25. Do you see that?

A I do. Yes.

MR. BLALACK: Now, please pull up Defense Exhibit 4006 again, Shane. That's the underlying UMR claims data. Go to row 3 and highlight row 3. You got that?

BY MR. BLALACK:

Q And Mr. Deal, are you able to tell me whether the second claim on Mr. McManis' demonstrative, the one that's got the amount of $315.30 as the allowed. Are you able to determine whether that claim and the corresponding claim on the Plaintiffs' disputed claims list are the same claim as the one shown in row 3 of UMR's claims data?

A Yes.

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1 Q How can you confirm that they are the same?
2 A Again, looking at the charge, the code, the date of service.
3 Q Mr. Deal, at this time, we're going right to left. Right to left,
4 starting with column S. Is the allowed amount of UMR's claims data
5 insist on the same allowed amount that's in Mr. McManis'
6 demonstrative?
7 A It is. Yes.
8 Q As $315.25?
9 A That's correct.
10 Q And going to column R. Is the charge amount the same?
11 A It is. $1,428.
12 Q And is the date of service in column O of UMR data also the
13 same date of service in Plaintiffs' demonstrative?
14 A Yes. June 21st of 2019 in both data sets.
15 Q Well, looky here, sir. Look what we found. What's in column
16 D of UMR data? What is the employer listed for this claim in the UMR
17 claims system?
18 A Switch, Ltd.
19 Q Mr. Deal, for this claim, do you see any reference anywhere
20 in the UMR claims data, Las Vegas Sands?
21 A I didn't -- well, not for this claim. For the ones we just looked
22 at, the other three, yes. But for this claim, no.
23 Q For the claim that's in UMR data, row 2 that corresponds to
24 the demonstrative claim in the second line of Mr. McManis'
25 demonstrative, Mr. McManis' demonstrative refers to the employer as

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1 being Las Vegas Sands, correct?
2 A That's correct.
3 Q Which is the same employer sponsor identified for the other
4 three claims, right?
5 A That's correct.
6 Q Which might lead one to think that the allowed amount
7 would be the same as the other three claims, right?
8 A That's what I understand the line of questioning was sort of
9 implying that it should have been the same and it wasn't.
10 Q But in fact, when you go to the underlying raw data that UMR
11 produced in this case, the employer sponsor is not Las Vegas Sands.
12 A That's correct.
13 Q What's the name of the employer again, sir?
14 A Switch, Ltd.
15 Q And just so that there's no confusion and it's not just a typo.
16 When you went to see whether the group number in column E of UMR
17 data is different from the group number that Mr. McManis showed Mr.
18 Ziemer and the jury in the summary?
19 A It's different. Yeah. The first three digits, I think, are the
20 same. But then it's 12707 for Switch, Ltd. And it's 10018 for Las Vegas
21 Sands.
22 Q You have two different employers are listed in these
23 documents, is the fact that you have different group numbers surprising?
24 A It's not at all surprising.
25 Q That would be surprising if they weren't different group

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numbers?

A It wouldn't surprise me one way or the other. It could occur, it couldn't, it could be different. But certainly, there would be no reason to think they'd be the same.

Q Okay. After your review of the underlying claims data for UMR here, did you have a view about whether the demonstrative PX 473-A and the corresponding claims referenced in the demonstrative and disputed claims list, Plaintiffs' 473, accurately captured employer information listed in the underlying claims data produced by UMR in this case?

A It got it right for three of the four claims, but not the fourth one.

Q Now, Mr. Deal, given that there are different employers for these claims, Las Vegas Sands and Stitch, Ltd., is there anything surprising to you about the fact that this claim has a different allowed amount from the other three claims on Mr. McManis' demonstrative?

A No, it's not surprising at all.

Q Is there anything in the data you have discussed with the jury about these claims that Mr. McManis showed Mr. Ziemer which led you to conclude that the reimbursements reflected here are arbitrary?

A No, in fact, they look quite consistent. When it's the same employer and the same code and the same year, all the alloweds are the same. When it's a different employer, same code, different amount; not surprising at all.

MR. BLALACK: Okay. I'm going to run through quickly just a

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1 handful of other examples, and then I can wrap up, Your Honor. Do you
2 want to take a break?
3 THE COURT: We're close. I would say can you go till 3:45?
4 Or do you want to take a break now?
5 MR. BLALACK: I've got about -- I've got about 10 minutes,
6 but I'm fine to come back and tie it off and juts give it to Mr.
7 Leyendecker.
8 THE COURT: Everybody okay with taking a break now and
9 then having a one last hour? Okay. So let's take a recess. We'll be back
10 at 3:55.
11 During the recess, don't talk with each other or anyone else
12 on any subject connected with the trial. Don't read, watch or listen to
13 any report of or commentary on the trial. Don't discuss this case with
14 anyone connected to it by any medium of information, including without
15 limitation; newspapers, television, radio, internet, cell phones or texting.
16 Don't conduct any research on your own relating to the case.
17 Don't consult dictionaries, use the internet or use reference materials.
18 Don't talk, text, tweet, Google issues or conduct any other book or
19 computer research, and don't post on any social media with regard to
20 any issue, party, witness or attorney involved in the case. Most
21 importantly, do not form or express any opinion on any subject
22 connected with the trial until the matter is submitted to you.
23 Have a good break. See you at 3:55.
24 THE MARSHAL: All rise for the jury.
25 [Jury out at 3:38 p.m.]

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1 [Outside the presence of the jury]
2 THE COURT: You may step down.
3 THE WITNESS: Thank you, Your Honor.
4 THE COURT: Okay. Room is clear. Plaintiff, anything for the
5 record?
6 MR. ZAVITSANOS: I'm sorry, Your Honor?
7 THE COURT: Anything for the record?
8 MR. LEYENDECKER: No, Your Honor.
9 THE COURT: Defendant?
10 MR. BLALACK: I have something, Your Honor. As I
11 previewed when we were at the sidebar, I'm almost at the end of my
12 examination now, so I'd like to raise what I'd like to do to conclude my
13 examination in forming my basis for it.
14 So what I'd like to do is, as I mentioned, Mr. Deal's
15 reasonable value opinion is based on two things. It's based on a range
16 that he had, which was the range of the median range in the out of the
17 network rates that UnitedHealthcare had with other ER providers. And
18 then the median rates that TeamHealth claims had with other health
19 insurance. That was his definition of what is a fair market rate and
20 reasonable value, which he basically laid the predicate for, but did not
21 articulate the basis for it.
22 Based on the in limine rulings that the Court had before the
23 beginning of trial, it's my view that that top value is not admissible, and
24 I'm not asking to revisit that. That's been resolved and ruled on. We've
25 made our record, and there's no need to -- we'll put in our offer of proof,

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1 but no need to revisit the [indiscernible]. The bottom measure though is
2 still an available option, and here's why.
3 When Plaintiffs moved to exclude in motion in limine
4 number 3 the offering of evidence regarding network rates, I objected to
5 that argument and made a number of points. One of which was that Mr.
6 Deal, our primary expert, I explained, would be relying on this
7 benchmarking value as a core opinion for our liability in the case. And I
8 explained why it was sound in economics, independent of any legal
9 analysis, and that it should be admitted on that basis.
10 Your Honor did not grant the motion at that time. Your
11 Honor specifically said -- and I'm quoting here. This is at page 211 of the
12 transcript on October 19th, line 25 written over to 212. The Court said,
13 "Okay, you know, I'm going to defer this to the time of trial only because
14 I want to see how the Plaintiffs' evidence comes in". You did say, "I'm
15 inclined to say that in-network just are relevant. But if I preclude your
16 witness from testifying on that, I'll make sure you have an offer of proof
17 on the record, and an objection on the record, and we'll take it on its time
18 in front of the jury". So where we left it on that argument was you were
19 leaning in that direction but didn't rule and reserved on the issue until
20 the appropriate time. It's my view that now is the appropriate time.
21 THE COURT: So I'm -- did I interrupt you?
22 MR. BLALACK: I had one more point to make, Your Honor.
23 THE COURT: Go ahead, please.
24 MR. BLALACK: In question of your ruling. Separate from
25 that, Your Honor, we moved in limine concerning Plaintiffs' agreements

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1 with other health insurers. And because of the Court's prior ruling on
2 motion in limine 3 would acknowledge that that was an issue that had
3 been resolved against us and was moot. But we know that we had a
4 paired motion to that, which meant that the Plaintiffs should not be able
5 to consult with evidence, offer evidence of our network rates and
6 agreements with other ER providers.
7 So I said if we can't offer evidence of their network rates and
8 agreements, they shouldn't be able to offer evidence on our network
9 rates and agreements. Plaintiffs opposed that position, they opposed
10 our motion. And the Court agreed with them and said that they should
11 be able to offer. There should be evidence of our agreements and our
12 rates with other ER providers was admissible and prevented and denied
13 our motion in limine to exclude.
14 So where we stand as of now is that the expressed question
15 of network rates being relevant to expert opinions was reserved and
16 unresolved at settlement [indiscernible]. Our request to -- if we were
17 going to not be able to offer theirs, then they shouldn't be able to
18 introduce evidence on ours was denied. Meaning the evidence of our
19 network rates and agreements with other providers is fair game. This is
20 not the way I wanted to present my liability defense, but it's better than
21 nothing.
22 So my request, Your Honor, is that I be able to have Mr. Deal
23 explain the basis of his opinion that he just gave beyond just his
24 experience and knowledge and judgment about why the allowed
25 amounts represent a reasonable value by not referring to the range, but

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at least explaining that he's got a benchmark for network, union, network rates, and that that represents a reasonable basis for [indiscernible]. So that's my [indiscernible].

THE COURT: I need to go and refresh my memory on the issue.

MR. BLALACK: Sure.

THE COURT: Let's argue this at 3:55. That gives you guys a chance to discuss it too.

MR. LEYENDECKER: Sure. Thank you, Your Honor.

MR. BLALACK: Thank you, Your Honor.

THE COURT: Thank you.

[Recess taken from 3:43 p.m. to 3:54 p.m.]

[Outside the presence of the jury]

THE COURT: Are we going to ask the witness to leave?

MR. BLALACK: Oh, sure.

THE COURT: Thank you, Mr. Deal.

THE WITNESS: Of course.

THE COURT: Okay. Plaintiffs?

MR. LEYENDECKER: A few things, Your Honor.

MR. BLALACK: Hold on.

THE COURT: Well, let me make sure that I can see everybody.

MR. BLALACK: He's out, Your Honor.

MR. LEYENDECKER: Okay. Two things, Your Honor. It's very straightforward.

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1 Number one, we have not put on any evidence of their in-
2 network contracts, so I'm not sure where that came from. Number two,
3 and honestly, more importantly, I think it was in February of this year
4 that -- whether it was Your Honor or a Master issued a first ruling that
5 said no in-network rights. At least two or three times since then, they've
6 tried to come back to that. And each time you've been consistent in your
7 rulings.
8 Now, with 100 percent clear knowledge and understanding of
9 Your Honor's rulings on that, they chose to hire an expert and chose to
10 put together an in-network file. And the reason for that is painfully
11 obvious. It's because they pay us less than half of what they pay every
12 other provider in-network.
13 And so how could they come in here and make a defense if
14 they're going to make an analysis of the most obvious, fifth grader could
15 understand, apples to apples comparison, which is out-of-network -- out-
16 of-network. They can't. And so with full knowledge that you had said
17 no, knowing they didn't want to go their route because it says they owe,
18 they now say, save us from ourselves. And you should not.
19 MR. ZAVITSANOS: And one other thing, Your Honor. When
20 this issue came up during pretrial, Your Honor, made some kind of a
21 comment like, you don't like the idea of not having a -- of preventing a
22 party from calling an expert. At that point, both Ms. Lundvall and I
23 alerted the Court that we are willing to let him do a new analysis. We're
24 not going to depose him. We just need -- I think Mr. Leyendecker said
25 we just need his work papers, but we gave them plenty of opportunity,

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1 without jamming them, without taking their deposition, and they elected
2 to stand pat on what they were doing. So I don't think there's anything
3 to talk about, Your Honor.
4 MS. LUNDVALL: Your Honor, the only additional point that I
5 would make and add to this presentation is this. Topic Number 4 of our
6 very first motion in limine dealt with the in-network negotiations that --
7 [indiscernible] contracts --
8 MR. ZAVITSANOS: You okay?
9 MS. LUNDVALL: More water.
10 UNIDENTIFIED SPEAKER: Can you get her some water
11 please, gentlemen?
12 THE COURT: So Marshall, will you let the jury know it will be
13 five more minutes?
14 Marshall, let them know it'll be five more minutes.
15 THE MARSHAL: Five minutes?
16 THE COURT: You were very polite to mention you've been
17 triple-teamed.
18 MR. BLALACK: Oh, well, I'm just assuming that Mr. McManis
19 is going to jump in here.
20 MR. ZAVITSANOS: Well, he's three times the lawyer, so
21 that's -- we're just making it fair.
22 MR. BLALACK: Well, go ahead.
23 MS. LUNDVALL: But the point being is that Topic Number 4
24 of our first motion in limine dealt with the healthcare provider's in-
25 network negotiations as well as the contracts that -- with United. That

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1 was granted. That was not going to be part of this trial. As part of the
2 reason the Court deferred ruling on topic number 3 was based upon
3 whether or not --
4 THE COURT: Because I didn't know where you were going.
5 MS. LUNDVALL: -- that their [indiscernible]. We did not.
6 And so to the extent that we have had this issue does not -- they're
7 voluntarily trying to stick it in. You should not allow them to do so.
8 THE COURT: Do you guys want a couple of minutes?
9 MR. BLALACK: No, I'm ready, Your Honor. I mean, unless
10 there's -- is there anybody else on that side?
11 MR. ZAVITSANOS: No, sir. No.
12 MR. BLALACK: Okay. So Your Honor, a couple of things.
13 One, I don't think the description of the sequence of the discovery rules
14 is accurate, but we do not have a ruling barring us from offering
15 evidence on network rates, network contracts, or anything of the kind at
16 the time we gave Mr. Deal -- just the chronology is off. And, in fact, we
17 have hours and hours and hours of testimony about network rates,
18 network negotiations, network contracts of those [indiscernible].
19 Plaintiffs produced thousands and thousands of documents about
20 network negotiations and network contracts. And both sides -- both
21 sides in response to discovery requests voluntarily produced claims
22 [indiscernible] showing their network and non-network rates for people
23 other than [indiscernible].
24 So it's just not an accurate statement to say by the time of
25 engagement we had some fully knowledge that the central premise of

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1 our liability defense was somehow off limits. Now, over time, and
2 particularly with rulings that the Court had in the summer based on
3 rulings from the Special Master, it became more clear to us that that was
4 where it was heading, which is why, obviously, we filed a motion in
5 limine seeking confirmation that we be permitted to do -- to rely on this
6 opinion. And in the event we weren't, making sure that the evidence of
7 network rates involving us that might be used against us would be
8 offered and available.
9 So that's where the state of the world was at the time of the
10 in limine hearing. And Your Honor heard the arguments on network
11 rates and reserved, which is fine. And as a result the Court has not
12 heard me say one word to this jury in opening or in -- in any witness
13 about network contracts and network rates. And I've got a pile of
14 material this high to do it, and we [indiscernible], but we're at the point
15 where our expert witness has given an opinion which -- and by the way,
16 Your Honor, is an opinion he's been qualified to give in court after court
17 after court from California to Florida.
18 THE COURT: I don't doubt his qualifications.
19 MR. BLALACK: And -- well, but it's not just that he's
20 qualified. The opinion that network rates can inform a basis for a
21 reasonable value of an out-of-network service is something he has done
22 many, many times. And he is on record on that. It's not like I went out
23 and got some guy who believes out-of-network rates are the appropriate
24 comparison when they're not even the same network. He's said it
25 courtrooms all over the United States. And then -- qualified to do it by

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1 courts, by judges.
2 So I know that's -- you know -- an open question in this case,
3 but it is not the case that this is some aberrant opinion. It's an opinion
4 given in many other cases from the children's hospital case to
5 everywhere else.
6 And so our view is given the predicate that's been laid, given
7 that the issue was not ruled out of bounds in the in limine hearing and
8 was left open, and in fact, specifically, the motion in limine we made to
9 give out our network contract rates being offered against us was denied.
10 That was denied. They opposed that so they could offer it.
11 Now, they may have chosen not to offer it, but it was fair
12 game. And so my view is, given the Court reserved, given the prior
13 ruling, we ought to be able to at least show half of the benchmarks, so
14 the jury has some understanding of the basis. And that's all.
15 MR. ROBERTS: And --
16 MR. BLALACK: We're going to tag team too, Your Honor.
17 MR. ROBERTS: And I did want to briefly add one thing, Your
18 Honor.
19 THE COURT: Come on up, Mr. Gordon.
20 MR. ROBERTS: Just in fairness to the Court, in case you
21 missed it, this was Slide 37. The demonstrative that was shown to the
22 jury.
23 THE COURT: Yeah, I don't have access to that, but I have it
24 on my screen here.
25 MR. ROBERTS: And it does -- and this is what Mr. Deal

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1 testified to. And as you know, the Plaintiffs have pointed to Fair Health
2 throughout the trial as the source for what the jury should look to for fair
3 and reasonable compensation. And Fair Health itself on the Fair Health
4 database says that there are three possible approaches for payers may
5 use for out-of-network allowed amounts. "For out-of-network providers
6 the allowed amount may be, number one, the same as for in-network
7 providers." And it's one of the accepted industry standards. And that's
8 already --
9 THE COURT: All right. So --
10 MR. ROBERTS: -- been read to the jury.
11 THE COURT: All right.
12 MR. ROBERTS: Thank you, Your Honor.
13 THE COURT: I'm going to deny the request, Mr. Blalack. his
14 is a case -- and I know this is a corny way to put it. This is a case about
15 apples and apples, not apples and oranges. I find that should you be
16 allowed to go that -- in that direction, it would be confusing to the jury.
17 MR. BLALACK: Okay.
18 THE COURT: Because the Plaintiff didn't go there.
19 MR. BLALACK: Understood, Your Honor.
20 THE COURT: And at 5:00 you can make your offer of proof.
21 MR. BLALACK: Your Honor, on this I think -- I don't want to
22 waste more time. We'll just include that in a big written offer we were
23 going to make and just --
24 THE COURT: Good enough.
25 MR. BLALACK: -- put it all in there.

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THE COURT: Thanks. So --

MR. BLALACK: But I can finish up this witness in five or ten minutes, Your Honor.

THE COURT: Great. Somebody get the Marshal, please, if you will?

THE MARSHAL: All rise for the jury.

[Jury in at 4:05 p.m.]

THE COURT: Thanks. Thank you, everyone. Please, be seated. Mr. Blalack, go ahead, please.

MR. BLALACK: Thank you, Your Honor. All right. Mr. Deal, let's try to wrap it up.

BY MR. BLALACK:

Q I want to continue our discussion on the excluded claims list and the extent to which it represents a reliable source of information to make judgements about the arbitrariness or randomness of any particular reimbursement, okay?

A Okay.

Q Individual reimbursement. All right. So we just went through a list of claims that were shown to Mr. Ziemer earlier this week by Mr. McManis, where the suggestion was that the claims data showed that the claim had been reimbursed in a random and arbitrary manner and Mr. Ziemer couldn't offer an explanation. And you just now walked the jury through the underlying claims data for the UMR data related to those claims; is that right?

A That's accurate, yes.

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1 Q And do you have a view of whether the data in the UMR
2 system reflects anything arbitrary about the reimbursement for those
3 claims?
4 A I -- generally, I don't have a sense that there's anything
5 arbitrary about it, and the examples we went through were actually
6 consistent.
7 MR. BLALACK: Now, let's look at two other examples, which
8 we can do at the same time.
9 And I'm going to ask Shane if we could pull up Plaintiff's
10 disputed claims list and go to -- again, that's 473. And go to row 218.
11 My apologies. Let's go to a different -- my apologies, I jumped ahead.
12 All right. Let's go to Defendants' Exhibit 4005. It's the claims data
13 produced by United Healthcare Insurance Company. UnitedHealthcare
14 for claims submitted.
15 BY MR. BLALACK:
16 Q Okay. Do you see that, sir?
17 A I do, yes.
18 MR. BLALACK: Okay. Now, that I figured out where I am.
19 All right. Shane, if you could please pull up the disputed claims list?
20 That's Plaintiff's Exhibit 473. And I want you to highlight row 10183 of
21 the disputed claims list.
22 Okay. Now, in Defendant's Exhibit 4005 -- which again is the
23 data from United Healthcare's claim system for the at issue claims --
24 would you please go to row 64094 and pull that up?
25 BY MR. BLALACK:

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1 Q All right, sir. Mr. Deal, could you tell me if row 64 of -- from
2 the disputed claims list, Exhibit 46 -- 473 -- describes the claim I'm
3 showing you from the underlying claims data, Defense Exhibit 4005?
4 A Yeah, maybe you could scroll on the lower one to the right
5 just a little bit so we can see -- so it's the same date of service.
6 Q If you look at the patient, provider, CPT code, and date of
7 service --
8 A Yeah, that's what I was trying to -- there we go. Oh, that's
9 the service provider. Yeah. Same patient name. Yeah, based on the
10 variables I've seen so far it does appear to be the same claim.
11 Q Okay. If you look at the information in Column W of
12 Plaintiff's disputed claims list -- 473 -- what employer is identified in that
13 column?
14 A Walmart.
15 Q That's one of the employer sponsors -- employer clients of
16 UnitedHealthcare we've heard testimony about in this trial?
17 A Yes, that's correct.
18 Q If you look at Column AO of United's actual claims data in
19 Defendants' Exhibit 4005 that was produced in this case, can you tell
20 what was the patient's employer?
21 A United States Postal Service.
22 Q So the -- and that's another client of the Defendant's in this
23 case, correct?
24 A That's my understanding, yes.
25 Q So the employer data in Plaintiff's disputed claims list,

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1 Exhibit 473, showed the employer as Walmart. But the actual underlying
2 claims data maintained by United shows that the employee worked for
3 the Postal Service; is that correct?
4 A That's accurate.
5 Q So does the disputed claims list identify a different employer
6 than the employer reported in United's actual claim system?
7 A Yes, it's inconsistent with the underlying United Defendant
8 data.
9 MR. BLALACK: Shane, before we pull up another example,
10 let's go back to Plaintiff's disputed claims list, 473, and highlight row
11 4719. Please keep that up. And let's turn back to Defendant's Exhibit
12 4005, the United claims data. Row 67964. Highlight that.
13 BY MR. BLALACK:
14 Q Okay. Mr. Deal, were you able to match the claim on Row
15 4719 from Plaintiff's disputed claims list, Exhibit 473, to the highlighted
16 claim I'm showing you on row 67694 of Defense Exhibit 4005?
17 A Yes, it appears -- it -- the same date of service, the CPT code
18 is the same, the --
19 Q If you need to move -- need us moving into the row
20 [indiscernible]?
21 A Yes, maybe down below if you could just scroll to the left a
22 little bit? Yes, there we go. I see the name. Yes, they're the same claim.
23 Q Okay. All right. If you look at the information in Column W
24 of Plaintiffs' Exhibit 473; do you see that? Do you see the employer?
25 A I do, yes.

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1 Q Another Walmart?
2 A I -- yes.
3 Q But if you look in United's own claims data, Defense Exhibit
4 4005 produced in this case; what employer is listed in Column AO?
5 A It's not Walmart. It's for -- excuse me. Full House Resorts.
6 Q Different company?
7 A Correct.
8 Q So once again, Mr. Deal, does the employer data in Plaintiff's
9 disputed claims list, Exhibit 473, match the employer data contained in
10 United's claim system? The data produced to the Plaintiffs in this case?
11 A No, the claims in dispute list is inconsistent with the
12 underlying United Defendant data.
13 MR. BLALACK: Let's look at another variable. We see two
14 examples where the employer information in the disputed claims list
15 does not match the employer information in the United claims system.
16 Let's look at a different type of error now.
17 So let's go back to the disputed claims list, Plaintiffs' 473, and
18 turn to row 1781. 1781. And highlight that if you would, Shane? Keep
19 that up on the screen and then turn to Defendants' Exhibit 4005, the
20 UnitedHealthcare claims data. And this one is going to get a bit more
21 complicated, Mr. Deal, so hopefully you, and more importantly, the jury,
22 can follow along. Shane, please pull up row 30737 and then row 31466.
23 And if you would then, once you've got them, Shane, hide the rows
24 between 30737 and 31466 so they both appear on the screen together.
25 Do you have those two? Okay.

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BY MR. BLALACK:

Q You see those, Mr. Deal?

A I do, yes.

Q Now does this row from Plaintiffs disputed claims list Exhibit 473, which is the one that purport to detail the claims I'm showing you from Defendants' Exhibit 4005? Do you want me to move --

A Yeah. Can you scroll to the left a little bit? Yes. The date of service matches -- if you can scroll the bottom one to the right a little bit. Can you go down to the lower one and scroll to the right? So -- sorry, go to the left a little. Start at the charges. So that's 783 and then if you go to the top one and find the charges. A little bit to the left. Yeah. So it's the sum of those two, yeah. So it's the same one.

Q Okay. And that's what I was going to ask. If you look at the CPT codes that are listed on the disputed claims list row 1781 and compared to the CPT codes listed for the two claims in the United Healthcare data, can you tell me what you see?

A Yeah. So they're organized a little differently so the top one is each row is its own -- if you leave it to the right so we can see it a little bit, you can see in column -- right there. Column M we see a 99283 and a 12001, those two CPT codes. The corresponding claim on the bottom we see 99283 with a modifier .25. That just means there's another code coming. And then 12001. So think of the top one as being sort of flipped into one row on the bottom.

Q And are you able to confirm if these two rows from Defense Exhibit 4005 contain the claims in Plaintiff's disputed claims list Exhibit

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1 473?
2 A Yes.
3 Q Now if you look at the allowed amount on the disputed
4 claims list -- Plaintiff's disputed claims list, can you tell the jury what the
5 allowed amount is?
6 A Yeah, $235.55.
7 Q But if you look at the allowed amounts for these claims in the
8 Defendant's data, United Healthcare's data, Defense Exhibit 4005, do you
9 see 235.55 or no?
10 A No. You need to add it up, but it's 112.44 plus 83.85. So
11 that's what, 195 or 196 and 20 some cents, I think.
12 Q Okay. So according to my math you add those two figures
13 together you get $196.29, is that about right?
14 A That sounds right.
15 Q Okay. Would you expect the combined allowed amounts for
16 these two rows to match the allowed amount in Plaintiff's disputed list,
17 Plaintiff's 473 if they were accurately capturing the data?
18 A I would, yes.
19 Q So does the allowed amount listed in Plaintiff's Exhibit 473
20 match the allowed amount for this claim in the United claims system?
21 A No, it doesn't.
22 Q Now let's look at the two last examples, which we can do at
23 the same time. And if you'd please turn to row 218, Plaintiff's disputed
24 claims list Exhibit 473.
25 MR. BLALACK: And if you would read the column headers at

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1 the top of the page and please highlight that row.
2 BY MR. BLALACK:
3 Q Mr. Deal, if you can, tell me what is the entity listed in
4 column A for these?
5 A It's Ruby Crest.
6 Q And what is the facility listed for these claims in column B?
7 A The ER at Aliante.
8 Q And what county is listed in column B?
9 A Clark County.
10 Q Where we are right now, right?
11 A Yes. This is one of the entities typically served by Fremont.
12 Q Mr. Deal, I'm going to show you and the jury some more trial
13 testimony from earlier this week.
14 MR. BLALACK: Shane, will you please pull up the trial
15 testimony from November 15. That was earlier this week, page 171, line
16 2 to 5. I'll represent to you sir that this is the testimony of Dr. Scheer
17 who is I believe the regional medical director for Fremont, a TeamHealth
18 employee. He testified to the following if you can see there:
19 "Q Okay. What about for Ruby Crest? What are some of the
20 [indiscernible]?
21 "A Well, it's in Elko -- Nevada, Elko County. There's only one
22 hospital, it's Northeastern Nevada Regional Hospital."
23 Do you see that?
24 A Yes.
25 Q Okay. And based on the testimony of Dr. Scheer you had an

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1 understanding that Ruby Crest only provides services at one facility in
2 Northeastern Nevada?
3 A Yes. That was my understanding before it was confirmed by
4 his testimony, yes.
5 Q Okay. And now going back to the disputed claims list,
6 Exhibit 473, look at row 218. Does it indicate that Ruby Crest performed
7 services at a hospital in Clark County?
8 A Yes. The entity is Ruby Crest, but again the facility is the ER
9 at Aliante in Clark County, which again is normally serviced by Fremont.
10 Q So if you were looking at just this claim, this spreadsheet
11 does it appear that some of the information on row 218 is incorrect?
12 A Certainly the entity that provided the service would not have
13 been Ruby Crest. It would have been in Fremont.
14 Q So either the entity is wrong, or the facility is wrong?
15 A Yes. I suppose if the facility is wrong then the county would
16 also have to be wrong. It would be a number of fields that would have to
17 be wrong if that's the case.
18 Q So Mr. Deal, in your professional opinion does the
19 information contained in Plaintiff's disputed claims list Exhibit 473 offer
20 this jury a reliable basis to draw any conclusion about whether the
21 Defendant's claims reimbursements were random or arbitrary?
22 A No. I don't -- you couldn't make that conclusion from the
23 data.
24 Q Did you rely on the information in Plaintiff's Exhibit 473 when
25 performing your reasonable value analysis?

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A I did, yes.

Q If the data in the disputed claims list contains error, and you clearly show it does, why did you rely on it?

A So for the purposes of what I was analyzing the errors were not material for that analysis. And of course it's the Plaintiff's burden so I was going with what the Plaintiffs were asserting to be the basis for their claim.

Q Thank you for your time, sir. I'm going to pass you to Mr. Leyendecker.

A Thank you.

THE COURT: Cross-examination please.

MR. LEYENDECKER: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. LEYENDECKER:

Q Okay. Mr. Deal let's start with what I like to think of are the rules of the road. You've heard that quote before, haven't you, sir?

A Yes.

Q And one of the rules of the road is that good experts don't pick a side; do you agree?

A Yes. In the sense that obviously you're being hired by a particular client, but our job is to analyze the facts.

Q Okay. Let's just be clear. In the first five minutes you told this jury even though you have been hired and testified more than 200 times on behalf of insurance companies, did I get my notes just right?

A Is that a question.

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Q Not going to pick a side, right? That's what you told the jury.

A Yeah. That's not exactly what I said, but I'm happy to elaborate.

Q Well, I wrote it down in quotes and the jury will reflect whether I'm wrong or not, okay. Good experts don't pick a side, right, sir?

A They certainly don't --

Q And because of that they're trustworthy?

MR. BLALACK: Could he have a chance to answer the question he was asked?

THE COURT: Okay. Don't interrupt.

MR. LEYENDECKER: I thought he said yes. I'm sorry, Your Honor.

THE WITNESS: I said I certainly don't pick a side for the sake of picking a side.

BY MR. LEYENDECKER:

Q Okay. Good experts -- and because of that, that makes these good experts trustworthy, right?

A That's the idea, I think.

Q Right. You would agree with me that if a -- bad experts do the opposite, they pick a side?

A I'd say bad experts typically do bad analysis and draw bad conclusions.

Q You don't want to agree --

A It's not necessarily about picking a side.

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Q You don't want to agree -- you're telling me that if an expert picks a side and when given an opportunity to look object -- first of all, should experts be reviewing the data with an independent objective state of mind?

A Sure.

Q Okay. Good experts, independent, objective, would you also agree, neutral state of mind?

A Sure.

Q Okay. Certainly we can agree that if an expert doesn't have the independent objective neutral state of mind that makes them a bad expert?

A It's -- I'm not even sure exactly what you're getting at, but I think they should have those things.

Q Well, did you take your medication today?

A No.

MR. BLALACK: Objection. That's argumentative and rude.

MR. LEYENDECKER: I'm just trying to -- I'm not --

MR. BLALACK: I don't know.

MR. LEYENDECKER: -- give me a little leeway here, Judge.

MR. BLALACK: Argumentative captures it.

THE COURT: Objection sustained.

BY MR. LEYENDECKER:

Q Well, is there something that's preventing you from understanding my questions and answering simple questions in a straightforward way?

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A I think that's what I'm trying to do.

Q Well, here's my question. Do you agree that bad experts are not independent, are not objective and don't put themselves in a neutral state of mind?

A I said I agree with those things.

Q Okay. And a bad expert is not trustworthy?

A I mean if you're a bad expert presumably you shouldn't be trustworthy.

Q Right. Bad experts pick a side and advocate on behalf of their client. And that's why you told the jury, even though you've been hired over 200 times, testified over 200 times for insurance companies, you weren't picking a side in this case. That's what you told the jury, right, sir?

A Yeah. Again, your statement about the 200 times for the insurance company is not accurate but.

Q Okay. We're going to get to that. So bad experts not trustworthy and pick a side, right, sir? And advocate. Because that means they're not independent, they're not objective and they don't have a neutral state of mind, fair enough?

A Again, I agree with those things.

Q Okay. So we just spent about an hour looking at a variety of claim files where there was a comparing contrast, and you gave the opinion that the Plaintiff's claim file is not reliable. That's what you just said, right, sir?

A I think the question was, is that -- is it a basis in which you --

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1 Q Excuse me, sir. Did you just tell this jury in response to Mr.
2 Blalack's opinion that in your professional opinion the Plaintiff's claim
3 file was not reliable because we had a different employer name or
4 because there was a slight modifier code on one of the examples, or
5 because the dollar amounts weren't the same? Isn't that what you just
6 told the jury, sir?
7 A That wasn't what he asked me. It was a different question.
8 Q Okay. So you did tell the jury, you spent a bunch of time
9 studying the claim file on the Plaintiff's side and studying the
10 Defendant's files, and in your professional opinion there were about 270
11 claims that should come out of this case, right, sir? Because you
12 couldn't find them when you looked at Defendant's match file, isn't that
13 what you told them?
14 A There were 270 claims that were unmatched, that's right.
15 Q I've got my quotes here again. You said, carefully reviewed
16 and, "I couldn't find a claim in Defendant's data". Did I get that right?
17 MR. BLALACK: Object to the form, asked and answered.
18 THE COURT: Overruled.
19 THE WITNESS: Yes.
20 BY MR. LEYENDECKER:
21 Q So you couldn't find 270 claims in the Defendant's data and
22 your testimony to the jury is, those should come out, right?
23 A That would be my standard approach, yes. Is that --
24 Q Okay.
25 A -- if I can't find them in the underlying data then they

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1 shouldn't be considered to be a part of the set of claims, but of course I
2 presented both sets of data.
3 Q You mean if you can't find them in the Defendant insurance
4 company's data, right, sir?
5 A That's the standard approach on doing these cases all the
6 time, is to look at the claims in dispute and to try and find them in the
7 underlying insurance claim data.
8 Q Are you suggesting that TeamHealth and their entities'
9 record keeping is unreliable?
10 A It's hard for me to know why they're in the data, but they're
11 not in the underlying Defendant's data.
12 Q Well, how many claims do you think United processes a day?
13 A Which United, Defendant?
14 Q Any of them? Millions?
15 A I doubt it's millions a day, but it's a lot.
16 Q Okay. Here's my point. You know that -- you expect
17 TeamHealth is a sophisticated entity, right, sir?
18 A That'd be my expectation.
19 Q Right. In fact, they are to use your words, along with sound
20 physicians, and that's where the case is going to get real interesting in a
21 hurry, I promise you that sir. You told this jury that TeamHealth and
22 sound physicians are "some of the biggest staffing companies in the
23 country", right?
24 A I think I mentioned MCare [phonetic] as well, but yes, there
25 are.

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1 Q And you would expect some of the biggest staffing
2 companies in the country would have sophisticated, reliable computer
3 record keeping abilities, wouldn't you, sir?
4 A In general, sure.
5 Q Just like the Defendants, you would think they would have
6 sophisticated, reliable computer keeping capabilities?
7 A Sure.
8 Q And what you did, even though in this case you've seen the
9 testimony from the folks at TeamHealth for example Mr. Ocasio
10 describes an intricate detail, the steps they go to, to collect and maintain
11 that data on a routine basis, right?
12 A I don't know if I saw that testimony, but I'm sure they do.
13 Q Right. So what you're doing here simply because you
14 couldn't find it in the Defendant's data, you knew it was in the Plaintiff's
15 data. You know that we're sophisticated data keepers, but you're
16 choosing a side, you're picking a side. And you didn't tell this jury well, I
17 found some over here, but I couldn't find them over there. That's for you
18 all to decide. You figure out whose company you think keeps better
19 records. Did you tell them that?
20 A I didn't use those words. I certainly presented both numbers,
21 but --
22 Q Right. No. You said, take them out. They should come out.
23 A That based on my experience that's exactly what I would
24 recommend doing, but it's up to them to decide what to do.
25 Q Did you tell them that earlier? Did you tell them, that I

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1 understand TeamHealth has sophisticated record keeping and they have
2 a record of those 270 cases? I couldn't find them in United's, but I know
3 that the sophisticated record keepers over here at TeamHealth, they have
4 them. Jury, you all figure out whether they should stay or not. Did you
5 tell them that? No, sir. You said, take them out.
6 MR. BLALACK: Object to form. It's compound.
7 THE COURT: Objection sustained.
8 BY MR. LEYENDECKER:
9 Q Mr. Deal, you could have sat in that chair right there if you
10 truly were not picking a side, if you truly were trustworthy, if you truly
11 put yourself in an independent, objective, neutral state of mind, you
12 could have said, ladies and gentlemen, there were 270 claims that I know
13 the Plaintiffs had the record of and I know they have a sophisticated
14 system. I couldn't find those same 270 on United's side. That's for you
15 to decide whether you want to count them or not. You could have done
16 that, but you didn't, did you?
17 MR. BLALACK: Your Honor, that's another compound -- it's a
18 speech actually. It's not even a question.
19 THE COURT: Objection sustained.
20 BY MR. LEYENDECKER:
21 Q Why didn't you just tell the jury, you all decide? They've got
22 it over here; they don't have it here. Why didn't you just tell the jury to
23 decide? Why did you tell them, take them out, they should come out?
24 A Because that is my experience is that's what they should do.
25 That you start with the -- all the claims data that we have from the United

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1 Defendants. Not just the claims in dispute. We have all of their data.
2 And that is a discovery. That's typically done as a complete set of data.
3 So it represents the totality of everything they receive. So when I can't
4 find them from the other entity, that to me is sufficient evidence to say
5 that they didn't receive them.
6 Q Are you saying these Defendants that in tens of thousands if
7 not hundreds of thousands of claims have never made a mistake in their
8 claim system?
9 A I'm sure they've made mistakes in their claim system.
10 Q Okay.
11 A But this is a more basic point of, did they even receive the
12 claim and is it in the data.
13 Q So you just think it came out of thin air from the Plaintiffs?
14 A I don't know where it came from. I'm certainly -- mistakes
15 are made on all sides on these things so.
16 Q That's my point, sir. Okay. You could have said in a very
17 simple way, I couldn't find these. They're over here. I couldn't find them
18 over here. You all figure it out. You could have said, couldn't you have?
19 A I --
20 MR. BLALACK: Objection; calls for speculation.
21 THE COURT: Overruled.
22 THE WITNESS: I could have used those words, but it's -- that
23 wouldn't be my opinion. My opinion is that they should come out.
24 That's my consistent opinion in all these cases.
25 BY MR. LEYENDECKER:

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1 Q Because you pick a side sir. You pick the side of the
2 insurance companies each and every time they've hired you to testify on
3 the more than 200 occasions in your career, right, sir?
4 A I disagree with that.
5 Q Okay. Since you're so concerned and believe our records are
6 so unreliable, go ahead and tell the jury how much you totaled, how
7 much the -- when you found for the matched claims, when you did all of
8 this record keeping to figure out whether our stuff was reliable, go ahead
9 and tell them what was the total amount of charges on what you thought
10 were the claims you found on the Defendant's record keeping side.
11 A I'm sorry; I'm not understanding your question.
12 Q Yes, sir. It's real simple. We've got $13.2 million in charges
13 and $2.8 in allowed amount.
14 A Okay.
15 Q Did you lift one finger to see whether the Defendant's
16 records were $10,000 difference in one direction or the other?
17 A Oh, between the two data sets?
18 Q Yes, sir.
19 A I don't remember the exact number. They certainly weren't
20 $8 million different. No.
21 Q Well, what were they? Go ahead and tell them -- just go
22 ahead and tell them how much they were apart.
23 A I don't recall off the top of my head.
24 Q Is there a single word in any of your hundreds of pages of
25 reports and work papers that would identify there is any meaningful

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1 difference in the total charges or the total allowed amount on the claims
2 at issue in this case?
3 A I think we talked about this with Mr. Blalack that for my
4 analysis, I assumed the data from the claims in dispute.
5 Q No, sir.
6 MR. BLALACK: Could he be allowed to finish?
7 THE COURT: Don't interrupt him. Did you finish your
8 answer?
9 THE WITNESS: Yes. I didn't put a difference of calculation in
10 my reports. I ultimately assumed the numbers in the claims in dispute
11 list were -- I used those for the basis of my analysis.
12 BY MR. LEYENDECKER:
13 Q So our file's not reliable, but you did not -- did not check to
14 see if any meaningful difference in total charges or total allowed. Is that
15 a true statement?
16 A Not quite. I do -- I did look at it. I don't remember what the
17 difference was. It was not anything close to 8 million. It was --
18 Q Okay. Was it 10,000?
19 A I don't recall off the top of my head. It wasn't a huge
20 difference. I just don't remember how much it was.
21 Q Of the -- of the $13.2 million that TeamHealth records say are
22 the charges, how big of a difference did you find on the United side?
23 A I think I've answered that question. I don't remember.
24 Q Was it 100,000?
25 MR. BLALACK: Objection. Asked and answered.

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A You can ask it again, but I'm not going to remember because you asked it again.

THE COURT: He can explore the -- his memory. So overruled.

BY MR. LEYENDECKER:

Q Was it less than 10,000?

A I don't remember.

Q How about -- how about in the 2.8 million in allowed, was the difference less than 10,000?

A Again, I don't remember.

Q Did the United file have a greater amount in charges than our file?

A Again, I don't remember.

Q Did the United file have a greater amount of allowed?

A Same answer. I don't remember. I just remember -- I do remember looking at it, and it wasn't a big difference. And ultimately, I used the claims in dispute.

Q Okay. There we go. And when you say wasn't a big difference, you -- what you mean by -- what that means in expert talk, sir, is that it's not enough to get your attention to come in and say, this data's not reliable because I'm showing significant differences between the charges and allowed. That's what you mean when you say that, wasn't a big difference, right, sir?

A No. There's a lot of thoughts in that statement there. But it certainly wasn't big enough to suggest to me that I -- that for purposes of

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1 my analysis, I couldn't assume that the claims in dispute was largely
2 accurate.
3 Q Let's just stay on this subject for a second. Remember all of
4 those two to three examples Mr. Blalack showed you when he was
5 putting up the UMR claim file?
6 A Yes.
7 Q Tell the jury what the coinsurance column said on the UMR
8 file on those claims where you said, no, no, this -- it's not 409, it's 315.
9 Go ahead and tell the jury what the coinsurance file, that -- that column
10 on the UMR spreadsheet for the ones you said were different numbers,
11 what did that coinsurance column say on these claims?
12 A I don't have it memorized.
13 Q Did you even look?
14 A I was looking at the allowed amounts.
15 Q Do you think a good expert just says yes to whatever the
16 lawyer asks?
17 A Of course not.
18 Q Did you bother to look before you said, yes, yes, yes, these
19 are all wrong, these are all different, did you bother to look even if the
20 UMR file identifies the coinsurance? Did you even look for that?
21 A It wouldn't particularly be relevant for the analysis of the
22 allowed amounts. But I did -- I did -- as we were looking through it, there
23 were other amounts for coinsurance and copay and deductibles and
24 things like that.
25 Q Did you bother to see if the difference between -- in those

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1 occasions, where there was a slightly different number between the
2 Plaintiffs' claim file and the Defendants' -- UMR's claim file, did you
3 bother to check to see if the difference was the coinsurance, sir?
4 A That wouldn't make sense in a -- in a general way because
5 the coinsurance is underneath the allowed amounts. So you want to
6 compare the allowed to allowed. And that -- what you're talking about is
7 the breakdown of the allowed into patient responsibility and --
8 Q Did you check it out?
9 MR. BLALACK: Will you please let him finish, Your Honor?
10 THE COURT: You have to stop interrupting him.
11 BY MR. LEYENDECKER:
12 Q Did you check those examples before you told this jury there
13 was a problem?
14 A I'm not sure exactly what you mean. I think I've described
15 what I did.
16 Q Did you check the math? Before you told the jury there's a
17 problem, did you check the math on the coinsurance, what the UMR
18 coinsurance said, to see if that lined up? Maybe there was none. Did
19 you check it?
20 A I'm not quite sure what you're asking. But I compared
21 allowed to allowed. I think it was clear from --
22 Q Okay.
23 A -- the analysis.
24 Q Did you --
25 MR. BLALACK: Could he finish, please, Your Honor?

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THE COURT: Yeah. Stop interrupting, please, Mr. Leyendecker.

MR. LEYENDECKER: Okay.

BY MR. LEYENDECKER:

Q Do you know whether the UnitedHealthcare file that was displayed, did it have coinsurance in it?

A My recollection is it did. But I don't remember the exact amounts.

Q And do you know if the UMR file had coinsurance I it?

A It typically would. Yes.

Q I'm asking you if you know that it did. You just went through testifying before the jury about different amounts. And I just want to know, do you know for a fact sitting there, did that UMR file have a coinsurance column?

A That's my recollection is it did. Yes.

Q Okay. Do you think it would be common or uncommon whether it's TeamHealth's claim system or the Defendant's claim system, that there might be a mistake about who the employer is?

A Certainly in theory there could be mistakes on either party. In my experience, it'd be much more likely to be on the provider side.

Q Okay. Does a differing employer have any impact on whether the charges or the allowed amounts are accurate, sir?

A Sure. In terms of the accuracy because I mean, we -- I'm happy to elaborate if you -- if you'd like.

Q Go on, please.

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A That the allowed amounts are dependent upon the individual plans. So of course, you know, Walmart versus the postal system, that could certainly be different.

Q I asked a poor question. What I mean to say is if I'm looking at any particular claim and it says charge $145, allowed amount $245, does it matter whether the employer is correctly or incorrectly identified on either of the two spreadsheets if both of them have the same charge and same allowed?

A It depends on the point you're trying to make. I mean, in terms of the dollars of charge and allowed, no. But if you're trying to say that there's a problem with the adjudication of the claims, then the employer could matter a lot.

Q And you know this case is not about the adjudication. It's about the amounts, right, sir?

A That's been my view. But that wasn't my understanding of the demonstrative that was being shown and that we were talking about with Mr. -- with Mr. Blalack.

Q Now, I wrote something else down that you said. One of the examples -- one of the examples I think was 99283:25, and then another CPT code, right, sir?

A Yes.

Q And you told the jury that that -- was it colon or semicolon?

A I believe it was a colon.

Q That's the two dots?

A That's right.

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1 Q Okay. You told the jury that that modifier of two dots 25
2 meant another code was coming, right?
3 A That's my general understanding. Yes.
4 Q Well, do you have training in coding?
5 A Not formal training in the sense of being a formal coder. But
6 I've worked with insurance claims data for a long time.
7 Q And it was your point to the jury that that -- the two -- the two
8 claim files are different because one had that colon 25? Is that what you
9 said?
10 A Oh, no, no, no. Not at all. Not at all.
11 Q Do you know whether the colon 25 actually represents when
12 the nurse practitioner is providing a service?
13 A I don't think the point -- the 25 does. No.
14 Q Okay.
15 A No. It was -- I was -- I'm happy to elaborate. It was -- the one
16 is shown on a row, and the other one was showing two different lines.
17 So I was just noting the fact that you see the two codes on the row in a
18 .25 is simply noting there's -- it's -- you would -- you would expect to see
19 two codes.
20 Q So my question is do you know one way or the other
21 whether when that colon 25 appears, if in fact that's an indication that a
22 physician's assistant or a nurse practitioner?
23 A I don't believe that code is. No.
24 Q Okay. Well, go ahead and tell the jury if it's a straight 99283
25 that's performed by a nurse practitioner on a United insured, go ahead

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1 and tell the jury how that gets identified on the claim file.
2 A You'd have to look at the service provider.
3 Q Okay. Do you know whether United issued instructions a few
4 years ago -- about a year ago to our clients that said whenever a nurse
5 practitioner performs a service, we want you to put a colon 25 after the
6 code?
7 A I don't know.
8 Q Did you do any investigation into that?
9 A No.
10 Q Okay. Now, let's get to the -- honestly, I have [indiscernible]
11 Mr. Deal, for three weeks to get to the real issue in the case. Sound
12 physician. The jury has not heard anything about Sound Physicians,
13 who they are. A little bit yesterday from Dr. Frantz. You know who they
14 are, right?
15 A A little bit.
16 Q Well, do you know that they are one of the largest physician
17 services companies in the U.S., along with TeamHealth, right?
18 A They are a large -- yeah. We talked about that a few minutes
19 ago. I do know that.
20 Q And you know that in 2019, they started doing business in
21 Nevada?
22 A I didn't know that.
23 Q Okay. All these charts that you were showing the jury where
24 the charges were sky -- use their words, skyrocket into 2019, did you
25 bother to look to see whether that's when Sound Physicians came into

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1 state?
2 A Like I said, I'm not aware of when and how they came into
3 the state.
4 Q Okay.
5 A I'm aware they're providing service.
6 MR. LEYENDECKER: Brandon, may I please have the Elmo?
7 BY MR. LEYENDECKER:
8 Q Okay. Can you see this okay?
9 A Yes, I can.
10 Q This is a summary of one of the claim files produced in the
11 case. Defendant 097900, you recognize that as a base number, right, sir?
12 A That is a base number. Yes.
13 Q You studied lots of claim files in the case, didn't you?
14 A I did. Yes.
15 Q Did you study the Defendant's 097900 Sound Physician's
16 claim file?
17 A I don't recall off the top of my head.
18 Q This is an excerpt from it, sir. You see, it's got two claims on
19 here. Date of service, April of '19. What's the amount charged?
20 A $1,761.
21 Q What's the CPT code?
22 A The 99285.
23 Q $1,761, is that egregious?
24 A I'm not sure what you mean by egregious. It's sort of -- it's --
25 Q Well, you -- I know you didn't, you know, study it with a fine-

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1 tooth comb. But I heard you tell the jury that you studied the underlying
2 documents and things of that nature, right, sir?
3 A I've reviewed some of the underlying documents and things.
4 Yeah. Mostly my --
5 Q And depositions?
6 MR. BLALACK: Can he please be allowed -- Your Honor, I'm
7 going to ask for the last time --
8 MR. LEYENDECKER: It was an accident.
9 MR. BLALACK: -- could I ask for the last time that opposing
10 counsel not interrupt the witness? Show just the slightest courtesy as a
11 human being to another person who's giving testimony.
12 THE COURT: All right. You have to --
13 MR. LEYENDECKER: Mr. Deal, I apologize.
14 THE COURT: -- you have to dial it back.
15 BY MR. LEYENDECKER:
16 Q I apologize, Mr. Deal.
17 A Okay.
18 Q Let me ask you again. Did you see here on 297A, August of
19 '19, one claim for a non-provider and one claim for a contract provider?
20 A I see that.
21 Q Okay. Here in Las Vegas?
22 A Yes.
23 Q All right. Let's just look at how the Sound Physicians claim
24 charged amount compares to the Plaintiffs. You've -- have you seen my
25 summary here of the Freemont charges?

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1 A I have not seen it before. No.
2 Q Okay. I notice that when you put your slides together with all
3 those Fair Health charges, you didn't also chart what the Plaintiffs' actual
4 charges were?
5 A Yeah. That's right. I remember I said I did all the Fair Health
6 ones to illustrate the impact of using Fair Health and the overall inflation
7 in the market. And then I separately analyzed the charges from
8 TeamHealth.
9 Q Now, the Plaintiffs -- the Freemont Plaintiff, their charges in
10 2019 were somewhere between -- somewhere a little under $1,400,
11 would you agree?
12 A I'll take your representation. I'd have to go back and look at
13 the data. But I'll take your representation.
14 Q Okay. Do you recall reading any of the emails or any of the
15 documents or depositions Mr. Haben's and Ms. Paradise and the out-of-
16 network programs reference to egregious charges, egregious bills being
17 the source of some of these problems?
18 A I think I heard some reference to that in the trial.
19 Q Okay.
20 A But I -- it's not something I've studied carefully.
21 Q Have you offered any opinion about whether the Plaintiffs'
22 charges or Sound Physician's charges, do you consider these to be
23 egregiously high, sir?
24 A I --
25 Q 1,761.

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A I don't really ever have an opinion abut egregiously high. It's my opinion that you should never use bill charges for reasonable value. So the fact that one's higher than the other I wouldn't say is necessarily egregious. They're high, and they're much higher than the actual market prices you see in the -- in the market, so.

Q You do know that Sound Physicians is owned by one of the United entities, right, sir?

A I think I heard you say that. I actually didn't -- I don't know that. It doesn't surprise me. But I don't know, and I haven't studied it.

Q Well, let me ask you, Dr. Frantz testified, he knows about it, and they're owned by United. Okay, sir?

A Yeah. I heard that. Well, at least I heard that he knows the outfit. I don't remember if he said who they were owned by. But --

Q You've read a lot about the shared savings programs?

A I read some. I wouldn't say a lot. But I read some.

Q Where the concept was various United Defendants would take a fee of 30, 35 percent on the difference between the billed charge and the allowed amount. You recall seeing that, don't you?

A I have seen reference to that. Yes.

Q Okay. And so -- and that was happening in cases where it was the employer's dollars at stake, not United's? Those are charges claimed, right, sir?

A I believe SSP, the shared savings program, I think that is something that's used by the ASO, the TPA. I don't remember whether it's also used in the fully insured. But I think it is used by that. That's the

010903

1 best of my recollection. It's not something I've studied.
2 Q Well, if it's fully insured it wouldn't make a difference for
3 United to take a 35 percent fee because it's all they're going to get
4 anyway?
5 A Generally, I would agree with that. Yeah.
6 Q Okay. So is United getting -- in this situation, when they're
7 owning Sound Physicians, are they getting one dip of ice cream with
8 these high charges when it's an ASO plan at 35 percent?
9 MR. BLALACK: Objection. Foundation.
10 THE COURT: Objection's sustained.
11 A I don't -- it's not something I studied. I don't know.
12 THE COURT: I sustained the objection.
13 THE WITNESS: Oh, thank you. I'm sorry.
14 BY MR. LEYENDECKER:
15 Q Assume with me that this is an administrative service only
16 claim and that there is a shared savings plan in place where United is
17 going to make a fee of 35 percent off whatever it saves the employer
18 who's paying. Make that assumption, okay, sir?
19 A Okay.
20 Q In that scenario, United would be making a fee, what I call
21 the first dip, between this and whatever they allow. Can we agree on
22 that with that assumption?
23 A Assuming the allowed is below either one of those numbers,
24 then I agree there would be some difference between 1,761 and 1,423,
25 and they would get some portion of that fee.

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1 Q On top of the regular fee they're paying just to administrate
2 these claims?
3 MR. BLALACK: I object to the foundation of the question.
4 THE COURT: Overruled.
5 THE WITNESS: Yeah. You're certainly getting beyond my
6 knowledge of any of these programs. But I -- generally, there's a
7 standard fee for processing a claim. And I understand shared savings is
8 separate from that.
9 BY MR. LEYENDECKER:
10 Q Okay. So the fee for processing the claim. The shared
11 savings fee would be a second fee, right, sir?
12 A Yeah. You're getting pretty -- pretty quickly getting beyond
13 my -- the scope of anything I know in terms of details. But that's my
14 general understanding.
15 Q Well, do you have enough knowledge to understand that
16 Sound Physicians owned by United would be submitting claims to all
17 sorts of other insurance companies around the State of Nevada for these
18 claims?
19 A To the extent they're servicing emergency departments and
20 there's out-of-network and they don't have contracts with them, then
21 presumably they would be submitting claims to other insurance
22 companies.
23 Q Do you have any idea where the Sound Physician ever
24 attempts to get their bill charges?
25 A I don't know.

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1 Q Now, by the way, were you aware that Sound Physicians is
2 not -- this is an emergency room practice group, right, sir?
3 A I thought they started out as more hospitalists as I recall, but
4 they may also provide emergency services.
5 Q Right. And United bought them.
6 MR. BLALACK: Objection. Foundation.
7 THE WITNESS: I don't know that, but it sound -- again, we've
8 talked about it.
9 THE COURT: Sustained.
10 THE WITNESS: Oh, sorry.
11 THE COURT: Objection sustained. You have to give me a
12 chance to rule.
13 THE WITNESS: Sorry about that.
14 BY MR. LEYENDECKER:
15 Q You recognize these numbers, don't you, Mr. Deal?
16 A Yes, I do. Although, are -- I do recognize the numbers. The
17 heading is kind of funny but --
18 Q That's because I'm not a very good speller but we've been
19 over that.
20 A My wife is a nurse, and my daughter is a nurse so -- or she's
21 becoming a nurse, so I like it. It's kind of creative but -- anyway, sorry I
22 got distracted.
23 Q Let me ask you a hypothetical question. Do you understand
24 that 246 is the average allowed by the United defendants, these
25 defendants in this case, for all of the claims at issue, right, sir?

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1 A Yes, that's right.
2 Q And you understand that $528 is the average allowed as
3 calculated by Mr. Leathers of what United paid all the various other ER
4 doctors in the state, right, sir?
5 A Yes, that's right based on his methodology and so forth. But
6 generally, that's right.
7 Q Can you think of any economic reason why these defendants
8 would want to pay the plaintiffs well under half of what they pay all other
9 emergency room doctors in the state?
10 A I'm not sure what you mean by want. I can certainly imagine
11 why it's happening. It depends on the plan documents and the
12 programs that are in the place and the various methodologies that are
13 used. But I'm not -- you -- I'm not quite sure that the want part of your
14 question, but --
15 Q Do you think there are any different plans insuring that the
16 members treated for this 246 that are insuring the members are treated
17 for this 528?
18 A I mean, the mix could certainly be different. I don't know.
19 It's not something I've studied in detail.
20 Q Here's the hypothetical. If one or more of the United
21 defendants wanted to weaken TeamHealth and the plaintiffs here in
22 Nevada by paying them a fraction of what they pay everybody else in the
23 state, do you think that might make them attractive to purchase?
24 A You're asking if United wanted to buy TeamHealth, would
25 they try and weaken them financially; is that what you're asking?

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1 Q Yes, sir.
2 A I've never, ever heard that so I can't really comment on that.
3 I suppose it's always better if you're going to buy something to buy it
4 less expensively but that's not something I've seen any information on.
5 Q We know they're now in the ER doctor business and my last
6 question for the day is can you give us any economic explanation,
7 rational explanation for why if they're not trying to weaken TeamHealth
8 by dramatically cutting their rates relative to everybody else, can you
9 offer some other rational economic explanation for why that's
10 happening?
11 MR. BLALACK: Objection. First of all, this entire line of
12 examination has no foundation, but it's also argumentative.
13 MR. LEYENDECKER: It's a hypothetical, Your Honor.
14 THE COURT: Overruled.
15 MR. BLALACK: It is that.
16 THE WITNESS: I -- as I said, there certainly could be different
17 plans and different out-of-network payment methodologies so there can
18 be lots of reasons why you would observe that. I haven't studied
19 anything about want or intent or things like that.
20 MR. LEYENDECKER: Your Honor, it's 5 --
21 THE COURT: Yeah. Time --
22 MR. LEYENDECKER: -- and I think it's time for the day.
23 THE COURT: Very good. So we'll take a recess until
24 tomorrow at 8:30. During the recess, you're instructed do not talk with
25 each other or anyone else on any subject connected with the trial. Don't

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read, watch, or listen to any report of or commentary on the trial. Don't discuss this case with anyone connected to it by any medium of information including without limitation newspapers, television, radio, internet, cell phones, or texting.

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

Most importantly, do not form or express any opinion on any subject connected with the trial until the matter is submitted to you.

Thank you for a great four days this week. Tomorrow we'll wrap up the week. Have a good night. See you at 8:30.

THE MARSHAL: All rise for the jury.

[Jury out at 5:00 p.m.]

[Outside the presence of the jury]

THE COURT: Mr. Deal, you may step down during recess. Okay. The room is clear.

MR. BLALACK: I don't have [indiscernible], Your Honor.

THE COURT: I was just going to kind of agendize a couple of things. One, I've been asked to do some deposition transcripts for Harris and Jones. Do you need them at 8:30? When do you need them tomorrow? Without holding you to it on the time --

MR. BLALACK: Yeah, let me tell you the plan, Your Honor. I don't know if -- Mr. Leyendecker, how much more do you think you have

010909

tomorrow?

MR. LEYENDECKER: I would guess some two hours-ish depending on whether I am able to control my [indiscernible]

THE COURT: I know it's not intentional --

MR. LEYENDECKER: -- and get the rattle, Your Honor.

THE COURT: But it's not fair when the witness doesn't get to tell us --

MR. LEYENDECKER: I apologize. You're right.

MR. ZAVITSANOS: Your Honor, we're going to give him a valium in the morning so --

THE COURT: Well, I don't want to know that but just --

MR. BLALACK: So Your Honor, if he goes another two hours, my guess is I've got 30. So we're starting at --

THE COURT: 8:30 --

MR. LEYENDECKER: -- 8:30 tomorrow.

THE COURT: So I'll do --

MR. LEYENDECKER: So we'd be done by -- and then at that point and Mr. King will probably go about an hour and a quarter.

MR. ZAVITSANOS: Joe, who do you have with King?

[Counsel confer]

MR. BLALACK: Okay. So let's assume three hours for Ms. King. That gets us to the afternoon and then Mr. Mizenko.

THE COURT: Good enough.

MR. BLALACK: I think if we could get -- who all do you have, Your Honor? You're going to have Ms. Harris?

010910

THE COURT: Harris and Jones.

MR. BLALACK: If it was possible to get through Ms. Harris --

THE COURT: Do that first.

MR. BLALACK: If we're -- yeah. If we run -- I think we're going to go the whole day tomorrow with those live witnesses but if we have any space, Ms. Harris would be a good --

THE COURT: Good enough. I'll do my best to have them free --

MR. BLALACK: Thank you, Your Honor.

THE COURT: -- tomorrow. Okay. Next, confirm with me you'll make your offer of proof on your expert in writing?

MR. BLALACK: I will, Your Honor.

THE COURT: Very good.

MR. BLALACK: I'll put that in the large -- we're going to do one large offer of proof. We'll --

MR. ZAVITSANOS: And we have no -- just for the record -- we have no objection to them doing it in writing. They're not waiving anything, and we will not argue that at any point.

THE COURT: Okay. Next thing is if we do jury instructions over the weekend, the rules require that to be done on the record. Do you both stipulate to waive the rule so that it won't be an issue on appeal?

MR. ZAVITSANOS: Plaintiffs do, Your Honor.

MS. LUNDVALL: Well, hold on. Hold on. No we don't --

THE COURT: No, it wouldn't be -- meaning there would not

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be a BlueJeans record.

MR. POLSENBERG: But there would be a court reporter?

THE COURT: There will be a record but --

THE COURT RECORDER: BlueJeans is not the record.

THE COURT: BlueJeans is not the record anyway.

MR. POLSENBERG: Right. It'll add two hours to it if we do it without a court reporter.

MR. LEYENDECKER: I understand, Your Honor, but the client is wanting to have jury instructions on the record.

THE COURT: They -- does it need to be public?

MR. LEYENDECKER: No, it does not need to be public.

THE COURT: All right. So I just want to verify that I'm not leaving an issue on appeal for either side by doing it Sunday afternoon with a court reporter.

MR. POLSENBERG: Like I say, I've done it several times.

MS. ROBINSON: I mean, our understanding is that there will be after the record -- after we've all made our arguments about the instructions to the Court, the Court will present with a charge and then we'll have an opportunity for formal objections.

MR. POLSENBERG: No.

THE COURT: It doesn't work that way.

MS. ROBINSON: Okay.

THE COURT: We resolve the --

MR. POLSENBERG: That will add two hours.

THE COURT: We do the jury instructions and then I have you

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agree as to the order of them and then I make you put on the record that you -- all of your objections are in the record and then I read them right before the closings.

MR. POLSENBERG: And that's precisely why we need to have a reporter so it --

THE COURT: Yeah, I have no problem with the reporter --

MR. LEYENDECKER: But we've already -- I guess I already arranged for a --

THE CLERK: The reporter is not the official record. It would have to be one of the [indiscernible]

THE COURT: Well, can we send that to someone to do a transcript?

THE CLERK: It would have to be on the record as far as here. We can't have like an outside --

MR. POLSENBERG: We can stipulate to it. I said I've done this several times this way.

THE COURT: Put it in writing. Just if you can come to terms, put it in writing and tell me about tomorrow. We'll talk about it again tomorrow.

MR. POLSENBERG: Thank you, Your Honor.

THE COURT: Yeah. All right. It wasn't my intention to put you guys on the spot so --

MR. POLSENBERG: That's all right. I was trying to figure out the same kinds of stuff.

THE COURT: All right. So let's jump into jury instructions,

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what we can do and let's see if we can remove these so that I can see everyone.

MR. ROBERTS: Your Honor, I did have one question before we move on.

THE COURT: Sure.

MR. ROBERTS: One request from the defendants and that's that the jury be admonished that there's no evidence that any of the [indiscernible] purchased Sound Physicians. The question was asked. It was sustained. He didn't give an answer and he went on to ask another question --

THE CLERK: I'm sorry. Can I have everyone -- the record is getting really messed up here now.

THE COURT: Thank you, Brynn.

MR. ROBERTS: And then he went on to ask another question which assumed that he got an affirmative answer and doubled down on his testimony to the jury that United bought Sound Physicians. And they know from our interrogatory answers that is not true.

THE COURT: Then you can cure that on your redirect.

MR. ZAVITSANOS: So, Your Honor, just for the record, yesterday there was uncontroverted, unobjected evidence that they did buy them, and I got news for them, that's what this case is about going forward. So --

THE COURT: Well, I guess we'll have to talk about that more tomorrow then.

MR. ZAVITSANOS: All right. Dr. Frantz.

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THE COURT: Are you guys -- you're getting daily transcripts?

MS. ROBINSON: Yes.

MR. ZAVITSANOS: We are.

THE COURT: All right. So you -- hopefully you'll be prepared on that issue tomorrow?

MR. LEYENDECKER: I will, Your Honor, thank you.

MS. ROBINSON: So we were conferring. I'm sorry. We missed the opening part of the conversation about the charge. I was just saying that my plane lands in Nevada at 2:15. The reason I requested the option of having a remote hearing was in part just because you know, there's a concern as plane schedules are that there might be a delay which is --

THE COURT: And you don't need to be worrying about that. We're going to accommodate your schedule.

MS. ROBINSON: Thank you. I appreciate it --

MR. POLSENBERG: Right. And I also pointed out that she can't live closer to the airport than my office is. She could just come right over.

MS. ROBINSON: The other thing that I wanted to mention and with the Court's indulgence, I -- the issue is that I have a family obligation this weekend that was -- I tried -- I spent about an hour-and-a-half last night trying to --

THE COURT: We cannot do jury instructions tomorrow to get you home if you can give me -- if we can get it done Sunday.

MS. ROBINSON: Okay. Well, I was going to say with the

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1 Court's indulgence, I can do it over BlueJeans tomorrow. I just couldn't
2 move my flight to be after --
3 THE COURT: I certainly have no objection to that.
4 MS. ROBINSON: Okay. Thank you, Your Honor.
5 THE COURT: Did you have an objection, Mr. Polsenberg?
6 MR. POLSENBERG: No and I've even said on the record
7 earlier we can do hybrid where we can have some of us --
8 THE COURT: Sure --
9 MR. POLSENBERG: -- in person. Because moving all the
10 papers around, I think it's easier if we're in person, but you can come in
11 on BlueJeans or Zoom or whatever you want to use.
12 MS. ROBINSON: Yeah, in my experience, hybrid hearings
13 tend to be a little bit rougher than all in person or all --
14 THE COURT: They're far more informal which is why I came
15 back full time in March because I just needed to move my cases along.
16 We were already in a backlog.
17 MS. ROBINSON. Understood.
18 THE COURT: So --
19 MR. POLSENBERG: Yeah, but I want to be in person because
20 of --
21 THE COURT: That's fine.
22 MR. POLSENBERG: -- papers and writing words.
23 THE COURT: Okay.
24 MR. POLSENBERG: Okay.
25 THE COURT: Now, are we ready now to tackle jury

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instructions?

MS. ROBINSON: Yes, yes. Thank you, Your Honor.

THE COURT: And have you two agreed on an order to take them?

MS. ROBINSON: We -- I just assumed we would continue progressing as we had through unjust enrichment and contracts but --

THE COURT: So let me make sure I have the right -- I think that I have the plaintiffs and my notes show that we were arguing page 5.

MS. ROBINSON: Of our contested?

THE COURT: Yes.

MS. ROBINSON: I'm just standing here for a moment because there's a lot of activity --

THE COURT: Sure.

MS. ROBINSON: -- back there.

THE COURT: You guys, take a minute and let me know when you're ready to go.

MS. ROBINSON: I'm ready, Your Honor. Yes, I agree. We're at page 5. I can just transfer, or I can stand here or go there either way.

COURT RECORDER: I just need everyone else to lower the volume, please.

MR. POLSENBERG: This is why when the jury leaves I come in here because I can't hear over there with everybody talking.

COURT RECORDER: Well, the record is going to be really difficult to hear.

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THE COURT: Well, and -- yeah.

MR. POLSENBERG: Do you want to just give --

THE COURT: Yeah. Let's -- you know, I'll just take a quick recess because that way I'll be able to work till our 5:50.

MR. POLSENBERG: All right. Thank you, Your Honor.

THE COURT: Be right back.

[Pause]

THE COURT: Please remain seated. So we're on page 5 of the Plaintiffs.

MS. ROBINSON: Yes, Your Honor. I believe, as -- the difference here, the modification from the standard instruction was that I had placed clear -- quotation marks around clear and convincing to be parallel to the way that the preponderance of evidence instruction is worded in the standard instruction.

And then I added the -- all of the evidence, because in our agreed instruction, the preponderance of the evidence, and I don't know if you have that up as well, but in that, we had agreed, and in this case -- excuse me, in determining whether a party has met this burden, you will consider all of the -- all the evidence, whether introduced by the Plaintiffs or Defendants. And I believe that if that sentence appears in one instruction for a preponderance and not for clear and convincing, I believe the jury will seize on that and believe that there is a significance to that difference. And that's why I had suggested that we add that to this instruction.

THE COURT: And the response, please.

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1 MR. PORTNOI: Well, so Your Honor, first thing I would note
2 is we actually have a competing instruction on clear and convincing
3 evidence that is a little bit different. There's a fraud -- there's been a
4 fraud claim in here under the punitive damages. And pattern instruction
5 10.8 is a clear and convincing evidence instruction that -- that, you know,
6 is designed for fraud claims. But in addition, the authority that's in 10.8
7 is general punitive. It is general clear and convincing evidence
8 instruction. And when you read 10.8 -- and just to be clear, this is in our
9 proposed instruction, I will note the authority underneath our clear and
10 convincing evidence instruction says 2.1 and 2.2. We filed a notice of
11 errata because that was an error. We were relying on 2.1 and 2.2 as well
12 as 10.8.
13 The latter, 10.8 is actually a little bit better. It's that it's -- to
14 be honest, is that it says 2.2 has an unfortunate aspect to it where it
15 really just says that clear and convincing evidence is not preponderance.
16 It's not reasonable doubt. It doesn't quite say what it -- what it is. When
17 we look at 10.8, it says the proof must be so strong in cogent as to satisfy
18 the mind and conscious of a common person, and so to convince
19 him/her that he/she would venture to act upon that conviction in matters
20 of the highest concern and importance to his or her own interest. It need
21 not possess such a degree of force as to be irresistible, but there must be
22 evidence of tangible facts from which a legitimate inference may be
23 drawn.
24 So we would recommend -- our instruction is derived from
25 10.8, and we would -- we would actually recommend that we work with

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1 10.8 as the basis.
2 THE COURT: Okay. My inclination is to go with the pattern
3 jury instructions. So please make your record.
4 MS. ROBINSON: And when you say the inclination is to go
5 to pattern, we both offered a pattern jury instruction, Your Honor.
6 THE COURT: Right. The 10.8.
7 MS. ROBINSON: 10 point --
8 THE COURT: With modification.
9 MS. ROBINSON: I'm sorry?
10 THE COURT: 10.8 with modification.
11 MS. ROBINSON: Well, Your Honor, the issue with that is that
12 we don't have a claim for fraud. There is a claim for a fraudulent aspect
13 of punitive damages.
14 THE COURT: Okay.
15 MS. ROBINSON: But there is a couple of different ways that
16 clear and convincing applies here. It's not only just in whether punitive
17 damages should apply at all, but it's also that it -- honestly, it also applies
18 to contract modification, which is another instruction. So I just don't
19 know that the fraud instruction belongs in a case without a claim for
20 fraud.
21 MR. PORTNOI: It -- and Your Honor, the -- in our proposed
22 instruction, we obviously took out the in order for the Plaintiff to
23 establish a fraud claim, because really what we're trying to do is use
24 10.8, which is a correct statement of the law, to -- for any issue on clear
25 and convincing evidence, so that's why in our proposed instruction, we'd

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1 modify 10.8 to take that in order for the Plaintiff to establish.
2 THE COURT: 10.8 is inappropriate. 2.2, as is, is the
3 appropriate instruction.
4 MS. ROBINSON: Your Honor, if we're going to just give 2.2
5 without modification, I would recommend that we take out the line in
6 both preponderance and our -- you know, about the considering of all
7 the evidence, because on reelection, we actually have an agreed
8 instruction that also says that. So it would be -- we have an instruction --
9 THE COURT: The agreed instruction says without regard to
10 which party introduced the evidence.
11 MS. ROBINSON: Yes. So I think the -- we have that agreed
12 instruction, but we also have, in our agreed instruction on
13 preponderance, and I'll tell you, I agree -- we agreed to this
14 preponderance instruction and we -- and I found that we wouldn't be
15 agreeing to clear and convincing, and that's when I looked back and
16 realized that there would be a line in this one that did not appear in clear
17 and convincing about considering all the evidence.
18 So I just don't think it should appear in one and not the other.
19 Particularly, since we have an additional instruction that says that you
20 should consider all evidence bearing on the question. So I just want
21 them to be parallel. I don't mind if the line is in there or out of there, I
22 just want them to be the same.
23 THE COURT: Yeah. Are you okay if they're parallel?
24 Because the language we use is put that regard to which party
25 introduced the evidence, not whether introduced by Plaintiffs or

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1 Defendants. I think it should be as neutral as possible.
2 MR. ROBERTS: Yeah, I'm okay with it being parallel, Your
3 Honor. I only stood because I thought you would offer for us to be able
4 to make a record on the exclusion of the sentence we wanted to add it to,
5 too, that comes from today. And I'll be very brief that this came from
6 me, Your Honor. I think that when it comes to jury instructions, patterns
7 are great, but the Court has a duty to give an instruction if it's requested
8 and it's a correct statement of the law. And -- but since we --
9 THE COURT: You know, I have done that so many times, and
10 it inevitably it ends up being the reason for the appeal and the remand.
11 MR. ROBERTS: But this one is so safe, Your Honor, and
12 here's why --
13 THE COURT: So --
14 MR. ROBERTS: -- because 10.8 is also a statement of clear
15 and convincing evidence. And there will be no argument that clear and
16 convincing is different in a fraud claim than it is for any other claim.
17 THE COURT: It can --
18 MR. ROBERTS: And then you take --
19 THE COURT: It's possible to modify it if you're -- it says --
20 that says fraud.
21 MR. ROBERTS: But I know. We just want to take that one
22 sentence from 10.8 and put it in 2.2. You know, the people would ask --
23 would ask upon to the matters of the highest [indiscernible] something
24 like that.
25 And here's why it's appropriate, because even though that

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1 sentence is in 10.8, not 2.2, if you look at the authority for 2.2, it has that
2 exact quote in the authority for 2.2.
3 THE COURT: 2.2 is appropriate. So you've made the record.
4 MR. ROBERTS: Thank you, Your Honor. I'll get out of your
5 hair.
6 THE COURT: Okay. So --
7 MR. ROBERTS: I got a to leave, so I'm going to leave it to
8 this good team here. Thank you so much, Your Honor.
9 THE COURT: No, I do have to say that I was impressed with
10 the way the teams have integrated some associates and younger
11 partners in the trial process.
12 MS. ROBINSON: Thank you, Your Honor.
13 THE COURT: I've meaning to say that all week. Because I
14 get so caught up, as you do.
15 MR. PORTNOI: And Your Honor, I would -- I would -- you
16 often ask for introductions, my associate Collin Stanton is in the court for
17 the first time today.
18 THE COURT: Thank you.
19 MR. PORTNOI: Probably keep me honest with jury
20 instructions.
21 THE COURT: We see you pretty regularly.
22 MR. ROBERTS: And it came up with Mr. Murphy, Your
23 Honor, William and Mary [phonetic] alone.
24 UNKNOWN SPEAKER: You didn't go to UVA, did you? All
25 right. You can stay.

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1 THE COURT: All right. So on the -- page 5 for clear and
2 convincing, we'll make the two standards parallel in a neutral way.
3 MS. ROBINSON: Thank you, Your Honor.
4 THE COURT: And we'll adopt 2.2. Does that take us to page
5 6 with regard to unjust enrichment?
6 MS. ROBINSON: Yes, Your Honor. So our modification here
7 to the standard instruction was that we had inserted direct or indirect
8 benefit, and then I also added, this is called unjust enrichment, and the
9 reason I had added this is called unjust enrichment is just because we
10 had to have a damages instruction, and I was trying to direct the jury
11 to -- I didn't know how to direct the jury -- how I was going to describe
12 the damages instruction, unless I told them what this claim was.
13 THE COURT: Okay.
14 MR. PORTNOI: Your Honor --
15 THE COURT: Your spokesperson, please.
16 MR. PORTNOI: -- so we also have a competing instruction on
17 unjust enrichment that I think has a foundational issue. One thing that
18 comes up as we talk about unjust enrichment is whether or not we are --
19 oh, and we can do this later, but whether or not we are presenting unjust
20 enrichment before breach of implied fact contract. The unjust
21 enrichment claim is plead as an alternative to an implied and fact
22 contract, and there's a lot of authority on the fact that once you have
23 found a contract, whether it is implied or express that you can't have an
24 unjust enrichment claim. So really, as efficiency for the jury, what you
25 would normally do is start with a breach of implied and fact contract if

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1 the, you know, evidence has a little bit more to do with the verdict form,
2 but --
3 THE COURT: That has more to do with the order in which
4 the instructions are read also.
5 MR. PORTNOI: That's what I'm saying is whether we should
6 be moving to unjust enrichment first or breach of implied in fact
7 contract. We can argue that at a different time on Sunday, or we can
8 argue about that now, if you wanted to.
9 THE COURT: Let's do it now.
10 MR. PORTNOI: Yes.
11 THE COURT: Well, it's --
12 MS. ROBINSON: Sorry, I didn't mean to interrupt. Go ahead.
13 THE COURT: Did you wish to comment?
14 MS. ROBINSON: Oh, I -- I'm so sorry. I didn't mean to
15 interrupt. I was -- I had a response, but I had -- I had misunderstood that
16 he was done, but I'll let him continue.
17 THE COURT: This is a fairly informal process, and --
18 MS. ROBINSON: Okay.
19 MS. LUNDVALL: Your Honor, we do have a position as far as
20 on that source. What Mr. Dimitri -- or what Mr. Portnoi, excuse me, is
21 suggesting is that if the jury finds, on the implied in fact contract, then
22 they should just stop with their analysis. Well, in fact, that that should
23 not be the case because, for example, once it -- if this goes -- case goes
24 up, and which it likely will, is that in the event that they -- Nevada
25 Supreme Court reverses and remands, if we have both of the

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1 instructions, then there can be limited amount of work on remand versus
2 a brand-new trial then with only one of the claims being instructed upon.
3 So the jury needs instruction on both claims in our opinion.
4 THE COURT: I would tend to agree with Ms. Lundvall on that
5 issue.
6 MS. ROBINSON: If I may approach, Your Honor, I just had
7 some authority on that?
8 THE COURT: Let's give Mr. Polsenberg a chance to respond.
9 MS. ROBINSON: Sure. Of course.
10 MR. POLSENBERG: Yeah. I understand Pat's point. We
11 can -- though I do know logically it makes more sense. I've been in cases
12 where we've instructed on contract, implied contract, quantum unjust
13 enrichment. It's just a logical order, but we can tell the jury that they
14 have to go through and answer all the questions.
15 THE COURT: Well, and we'll get -- that's why I want to do the
16 instructions before we do the verdict form.
17 MS. ROBINSON: I do have -- I just was going to offer the
18 Court some authority on -- but I get the sense you're already familiar.
19 THE COURT: Go ahead. I cut you off.
20 MS. ROBINSON: Just, you know, this -- the question of
21 whether we need to elect and stop the jury, that's not appropriate. The
22 jury can answer, even inconsistent theories and that we would elect
23 afterwards.
24 MR. POLSENBERG: I get --
25 MS. ROBINSON: So I don't think it makes sense to cut the

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1 jury off.
2 MR. POLSENBERG: You know, I think I just said we don't
3 have to.
4 MS. ROBINSON: Oh, okay. I'm sorry.
5 THE COURT: All right. So let's talk about this unjust
6 enrichment instruction.
7 MS. ROBINSON: So as I say, just turning to the standard
8 instruction, 13.12, the difference that we had -- I made Plaintiffs instead
9 of the Plaintiff. Same with Defendants. And then I had inserted direct or
10 indirect. That's recognized in Topaz Mutual, which we cite in our
11 authority. The other part, as I said, I had just said this is called unjust
12 enrichment because it was the only way I could think of to bridge the
13 jury to a damages instruction that I identified unjust enrichment.
14 THE COURT: Any response, please?
15 MR. PORTNOI: So Your Honor, we have a competing
16 instruction, which is on page 23 of our contested instruction.
17 THE COURT: Let me pull that up real quick because I'm -- my
18 desk up here is getting really messy. I think I have it right here. And
19 what page will that be on?
20 MR. PORTNOI: That would be at page 23 of our contested
21 instructions, Your Honor. Let me know when you're there. I don't want
22 to talk while you're trying to find something.
23 MS. LUNDVALL: Page 23 or instruction 23?
24 MS. ROBINSON: Page 23.
25 MR. PORTNOI: Look at it at the bottom, it says -- I see page

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1 23.
2 MS. ROBINSON: Oh, see, I was wrong. I had two versions of
3 their --
4 THE COURT: I have two versions of yours, too.
5 MS. ROBINSON: Here it is.
6 THE COURT: I'm going to have to pull it up on the computer.
7 MS. ROBINSON: A different page 23.
8 MS. LUNDVALL: Okay. So I have to --
9 THE COURT: I have for Sunday, I have --
10 MS. ROBINSON: It's 23 of 44.
11 THE COURT: -- everything being organized, so --
12 MR. PORTNOI: The best made plans. Well, I can certainly
13 explain the differences and what --
14 THE COURT: Go ahead.
15 MR. PORTNOI: -- went -- the first piece that is -- that we have
16 is the fact that we think that the instructions have to open by pointing out
17 that in this case throughout, what's going to be complicated is the jury
18 has to be aware that this isn't a case about the Plaintiffs potentially
19 conferring a benefit upon the Defendants. They have to find that a single
20 Plaintiff confer a benefit upon a single Defendant. Maybe they'll find
21 multiple different valiances. So the reason our instruction opens with
22 the Plaintiffs -- and we sense that this might be the first claim, or it would
23 be the transition from another claim. We had read the Plaintiffs,
24 Fremont, Ruby Crest, or Team Physicians, may recover the reasonable
25 value of a benefit conferred by -- on one or more of the Defendants.

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1 THE COURT: Okay.
2 MR. PORTNOI: You had United Healthcare, UMR, Sierra, or
3 Health Plan of Nevada ifs. That's Nevada if. So that's the first pieces
4 that we really have to make clear, or else we're going to have the notion
5 that the jury is able to undifferentiated fashion, treat the Plaintiffs as a
6 lump, and treat the Defendants as a lump, which isn't -- doesn't work for
7 how unjust enrichment has to operate.
8 THE COURT: And I'm aware that there are briefs on this
9 issue.
10 MR. PORTNOI: There are trial briefs on the -- there's some
11 trial briefs on the unjust enrichment. I don't think that there is a -- I don't
12 think there's a brief on this particular issue that I've just raised.
13 MS. ROBINSON: So just to respond to his point about
14 lumping, I think both sides have -- certainly, we have proposed verdict
15 form. We're not going to ask for Plaintiffs get this, you know, from all
16 Defendants. We have broken out every single Plaintiff and every single
17 Defendant.
18 So you know, we're not suggesting to the jury that you
19 can't -- that you don't have to match every single Plaintiff with every
20 single Defendant. And I think that's pretty clear. What -- what -- this
21 instruction is very confusing the way that it's written.
22 In addition, the entire second half of the instruction is just the
23 issue that we discussed. Instructing the jury on the law regarding, you
24 know, we affected their verdict, and also, you know, they should stop, or
25 you know, everything rests on the implied in fact contract; I just don't

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1 think that that is appropriate for an instruction to the jury.
2 MR. PORTNOI: I agree with the second half of the instruction
3 has been ruled on, so I --
4 THE COURT: Right.
5 MR. PORTNOI: So long as we agree that we preserve our
6 record, or you know, I agree with that; however, I still believe that the
7 verdict form should match the instructions. It's very confusing to the
8 jury if they get in and there's a verdict form and it doesn't actually -- and
9 it looks completely different from what they were just instructed. That's
10 a -- that is a prejudicial error, and really just a problem that's going to
11 make the jury send back a lot of questions. It's going to make it hard for
12 us to get out of here before Thanksgiving, so that's why I believe that the
13 instruction should hopefully match that.
14 And otherwise, with the, you know, one, two, and three that
15 are listed here, that also reflects the fact that, you know, once we start
16 talking about the fact that we are -- it is the Defendant on whom a
17 Plaintiff conferred the benefit, knew of the benefit conferred, is a -- as a --
18 I attempt to say as close to the pattern as possible, while rate -- while
19 fighting that what we are doing is talking about we have to have a
20 Plaintiff and a Defendant. We have to get to that match for unjust
21 enrichments purposes. So that -- otherwise, I'm trying to say -- we are
22 trying to say is faithful as possible to the pattern.
23 THE COURT: I am going to reject the Defendant's unjust
24 enrichment request for instruction. Do you have anything more for the
25 record?

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1 MR. POLSENBERG: Yes, Judge. I think instead of adding
2 lines to the pattern like this is called unjust enrichment, why don't we
3 just use traffic signals? In other words, I will now instruct you on
4 Plaintiff's claim for unjust enrichment, and that can be the instruction
5 before this.
6 THE COURT: Then I --
7 MR. POLSENBERG: And we can do that for every single one
8 of their claims.
9 THE COURT: I read the intro at the top, so I think the last
10 sentence is just not necessary.
11 MS. ROBINSON: That's fine. I just wanted to -- that's -- yeah,
12 as long as we achieve that purpose, that's fine by me.
13 MR. POLSENBERG: Right. And let me also object to the --
14 they're adding to the pattern by putting direct or indirect. If we're going
15 to stay true to the -- to the patterns, where -- at least where necessary,
16 then I think we should just be making wholesale changes. Right, the
17 direct and indirect aren't in here. And you know, I've done jury
18 instructions in maybe 75 cases, and I've -- it's pretty typical to put in the
19 proposed instruction that we're talking about, what the modifications
20 are. So that's marked right there in the text. So if you take something
21 out, you put in brackets. And if you add something, you underline it.
22 MS. ROBINSON: I don't think either party did that in this
23 case.
24 MR. PORTNOI: That's correct.
25 THE COURT: That's unusual in my opinion.

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1 MR. POLSENBERG: A pox on both their houses.
2 THE COURT: So -- all right.
3 MR. ROBERTS: If that is helpful to Your Honor, I think we
4 would -- Ms. Robinson and I could obviously prepare something that is
5 easier to look at before and have that to you if that -- if that's something
6 that is helpful to Your Honor.
7 MS. ROBINSON: Or we could just walk you through. Either
8 way is fine.
9 THE COURT: The instructions that go back to the jury will
10 not have the cites. I use the cites for reference in settling the
11 instructions. So the two of you are going to agree on a language for the
12 unjust enrichment instruction, is that what I heard?
13 MS. ROBINSON: I'm not sure that I --
14 THE COURT: Because the last sentence will be removed.
15 MS. ROBINSON: Correct.
16 THE COURT: The question now is whether or not direct or
17 indirect will be in. The Defendant says, you know, it's not in the pattern.
18 Plaintiff says this is a correct statement; you have to have the law. You
19 want one last bite of the apple?
20 MS. ROBINSON: Yes, Your Honor. I do think it's a correct
21 statement of the law, and I think it would be helpful to the jury, because
22 in this case, there's going to be argument, I assume. In fact, we've
23 already heard argument that it -- you know, the benefit is going to the
24 insured -- to the insured -- the employer or the -- sorry -- the patient. And
25 in fact, and I don't want to confuse the jury because indirect or a direct

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1 benefit can be recognized for unjust enrichment.
2 MS. LUNDVALL: And if it helps, Your Honor, when we
3 argued the motion to dismiss, we had argued Topaz as including indirect
4 benefit. And that was the Court's ruling. And so it would be consistent,
5 then, with the previous order that you issued on the motion to dismiss.
6 As you well know, that went up and there was no fuss about it, then,
7 from the Nevada Supreme Court.
8 THE COURT: Okay. So I will -- Mr. Polsenberg, you have an
9 issue now for appeal again.
10 MR. POLSENBERG: Thank you, Your Honor.
11 THE COURT: I won't strike the direct or indirect because it's
12 a correct statement of Nevada law. Let's go to page seven.
13 MS. ROBINSON: So I know this is going to be an issue of hot
14 debate. There is not a pattern instruction that I'm aware of on unjust
15 enrichment. And basically, what I did here is the -- if you look at the first
16 line of the unjust enrichment instruction, it says, "Plaintiffs may recover
17 the reasonable value of the benefit." To me, that almost in itself is
18 intended as instruction. And so I tried to, artfully or not, rephrase that
19 exact statement of the law, "Plaintiffs may recover the reasonable value
20 of the benefit conferred on the Defendants."
21 There is a lot -- I'm just going to go ahead and anticipate
22 some of the argument that we're going to hear. The problem with the
23 restatement with all the different options that are provided is that only
24 one of them is supported by the evidence. There is the cost to the
25 Claimant of conferring the benefit. There's no evidence of that because

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1 that has been excluded.

2 The market value of the benefit. I think the problem with this

3 statement is that we've just heard from Mr. Deal that a market --

4 whatever the courts are considering when they talk about a market value

5 is willing buyer and willing seller. We know that we don't have that here.

6 And so I think that's a very confusing -- in fact, really, all this testimony

7 has established, there is, you know, so much confusion over what the

8 prices should be in a market where there's a compulsory service

9 provided and then a seeking of reimbursement afterward. It's just

10 completely different.

11 And then the final one is the price the Defendant has

12 expressed a willingness to pay if the Defendant's acceptance of the

13 benefit may be treated as valid on the question of price, I just don't know

14 how that ties into the evidence that's been presented in this case. So the

15 problem is I think it's just very confusing to the jury to present a number

16 of options that haven't been supported by any evidence. And in

17 contrast, the instruction that we have offered is just a restatement of

18 what's already been said in the standard instruction, which is they may

19 recover the reasonable value of the benefit conferred on the Defendants.

20 THE COURT: And the response, please?

21 MR. PORTNOI: Your Honor, again, neither of these is a

22 pattern instruction, so we're left without a pattern instruction for

23 damages in unjust enrichment in Nevada. However, what we do know

24 from *Certified Fire* is that *Certified Fire* does say that the proper measure

25 is determined by restatement 49. And so giving restatement 49 is

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1 equivalent to giving a pattern instruction. It is equivalent to giving what
2 the -- what the Nevada Supreme Court said is the law. And for instance,
3 there's -- just to be clear, you know, we -- everything -- much of what we
4 put in here was designed to be directly quoted -- is either directly quoted
5 from the restatement 49 or it's directly quoted from *Certified Fire*. For
6 instance, "The actual value of recovery is usually the lesser of the market
7 value and the price the Defendant has expressed a willingness to pay."
8 That's a direct quote from the Nevada Supreme Court in an unjust
9 enrichment case.
10 And we do have -- we do know what the price the Defendant
11 has expressed a willingness to pay; that has been -- that -- Mr. Deal and
12 Mr. Leathers have given -- have presented claims files that show -- and
13 have described them -- that show how much the Defendants have
14 expressed a willingness to pay, how much they have paid. They
15 made -- there may be decisions that how much we've expressed a
16 willingness to pay to other providers may be relevant to that. And you
17 know, again, we've seen some evidence with respect to cost and we've
18 seen some evidence -- certainly, Plaintiffs have said frequently that they
19 believe that a substantial value of benefit was provided to advance the
20 purposes of the Defendant. That's been said many times. And the jury
21 is competent to measure that.
22 Mr. Polsenberg may be starting to stand up now.
23 MS. LUNDVALL: Well, let's be clear, Your Honor, what
24 they're doing is they're trying to set you up. They're trying to suggest
25 that if you give the jury instruction that they want, then in fact that

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1 there's some type of error.
2 THE COURT: No, no. I can tell you that the jury instruction
3 proposed by the Defendant here is way overbroad. It doesn't fit the facts
4 of this case and it basically is -- contains argument for things that should
5 be in the verdict form. But you can't recover on the implied in fact
6 contract and the unjust enrichment claims. You know, you might set
7 those out in separate jury instructions, but the way that the Defendant
8 framed the unjust enrichment instruction here is just way overbroad.
9 MR. PORTNOI: Oh, I think Your Honor may be looking at the
10 wrong instruction because we were -- we moved -- well, I thought we
11 had moved on to the measure of damages. So that would be page 25 of
12 50 -- of 44.
13 THE COURT: Oh. And this is why. I'm embarrassed that
14 we're on the record when I said that. Okay. I --
15 MR. PORTNOI: And to be clear on that point about what's in
16 that, I think I already said on the record, we believe that's been resolved.
17 So we are -- with that, that's fine.
18 THE COURT: Good enough. I have no problem with
19 the -- seven as proposed by the Plaintiff.
20 MR. PORTNOI: And again, we would say we believe that is
21 an incorrect statement of the law and is clearly too minimal and does not
22 actually correctly state the law under *Certified Fire*.
23 THE COURT: Good enough. Do you have anything more for
24 the record?
25 MR. PORTNOI: No, Your Honor.

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THE COURT: Okay. Let's go over to the contracts instruction on page eight.

MS. ROBINSON: Thank you, Your Honor. So there's -- this is a modified from the standard 13.11. 13.11 stops at ascertainable agreement. We did add the -- everything that follows from that. So, "Even if the parties did not agree on a price term, you may find the parties formed," that whole paragraph there is added from *Certified Fire.* I know that there's just been a lot of dispute about whether or not a price term is necessary, and so we just wanted to forestall any argument that without a price term, you can't find that there has been an agreement.

THE COURT: Well, I think my ruling today on the request for directed verdict should be instructive. I don't believe the price term is necessary in an implied contract. So I don't have any problem with the 13.11, but I don't think the additions are appropriate.

MR. PORTNOI: Your Honor, before we get to 13.11, I would also point out that Defendants have proposed that all of the contract instructions, the pattern contract instructions should be given. So that includes 13.0, 13.2 --

THE COURT: Right. And I just think that they are way too broad. Way over the top.

MR. PORTNOI: You think the pattern instructions are too broad?

THE COURT: No, no. The proposals from the Defendant.

MR. PORTNOI: Your Honor, again, these are the pattern instructions in any contract claim. The jury should be instructed on what

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1 an offer is, what an acceptance is, what contractual intent is, what
2 consideration is. This is --
3 THE COURT: Well, we'll get there. We're only now at the
4 basic contracts. We'll get there.
5 MR. PORTNOI: Oh, okay. I was pointing out that only
6 Defendants have proposed those pattern instructions. I -- the implied in
7 fact instruction, that is the pattern without modification. Obviously,
8 Plaintiffs have proposed adding something that says price term is not
9 necessary. Defendants have proposed something that says a price term
10 is a material term.
11 THE COURT: And I've just indicated that I think the pattern
12 instruction should be given without the additional information.
13 MR. PORTNOI: And I understand. So we believe it's helpful,
14 but we've made our record.
15 THE COURT: Good enough. Did you have something more
16 to add on that?
17 MS. ROBINSON: I'll just make a little record here, Your
18 Honor, and just say that we believe that the paragraph about the price
19 term is both legally correct and it would be helpful to the jury in case
20 there's going to be argument that if there wasn't an agreement on a
21 price term, there was not a contract. And then the second part, the, "In
22 Nevada, implied in fact contracts and expressed contracts stand on equal
23 footing," is in part a response just to the Defendants' continuing
24 characterizations that we don't have a contract with any of the Plaintiffs.
25 It's been repeated over and over again, and it's a little frustrating

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1 because I think that they don't have an express contract. But we don't
2 want to give the jury the impression that implied contracts are not
3 equally enforceable and valid under the law. So that is the reason why
4 we would propose that. We think it's both legally correct and helpful.
5 THE COURT: Thank you. Let's go to page nine.
6 MR. PORTNOI: Your Honor, just so I understand the ruling --
7 THE COURT: Yes, of course.
8 MR. PORTNOI: Is your ruling to give 13.11 unmodified?
9 THE COURT: That's correct.
10 MR. PORTNOI: Okay.
11 MS. ROBINSON: Thank you, Your Honor. So the
12 modification, I don't know if the Defense is going to argue that there was
13 a modification to our agreement or not. And I just offer this instruction
14 sort of in case that there is an argument that there's been a modification.
15 The way that this deviates from the pattern instruction is that the pattern
16 instruction creates -- has a line about an oral agreement may modify a
17 written contract. That's the second line of the first paragraph. I don't
18 think that -- I mean, that refers to an express contract. So I'd remove that
19 because I just didn't think that that was reflected in the evidence in this
20 case because everything is going to be implied.
21 What we had added was the idea that for modifications to be
22 valid, there has to be additional consideration. And the reason that we
23 did that is because what the jury has seen is evidence that, you know,
24 there was payment amounts and then those payment amounts have
25 gone down. And that, you know, if all there is is just -- if there's going to

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1 be argument that there's a course of dealing, that the payment amounts
2 went down, down, down, that that somehow indicates that there's been
3 an acceptance of a modification, we wanted to show the jury that there
4 has not been any return consideration given for that. You know, and we
5 don't think that would be a valid modification.
6 Now of course, we would also argue that we never
7 consented and there's nothing to suggest we did. We're here suing
8 because we didn't consent. But that's the reason why we offered that.
9 Everything else, I think, is in the pattern instruction.
10 THE COURT: And the response, please. Do you --
11 MR. PORTNOI: I don't think that modification is in this case.
12 We haven't proposed a modification instruction. I just don't think this is
13 a modification of contract case.
14 THE COURT: All right. Given the fact that there is a
15 statement that modification is not going to be argued, this -- page nine
16 will not need to be given.
17 MS. ROBINSON: Thank you, Your Honor.
18 THE COURT: Page ten.
19 MS. ROBINSON: This -- so -- and I realized that my footnote
20 on this is not entirely accurate about the revision, so I'm just going to
21 walk the Court through the revision of the standard.
22 THE COURT: Hold on. I'm pulling it up right now.
23 MS. ROBINSON: So you'll see the standard is much, much
24 longer. And I can explain once you've pulled it up.
25 THE COURT: It's scrolling. This is very user-friendly.

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1 MS. ROBINSON: So basically, our proposed instruction ends
2 right before -- the middle of the first paragraph or about two thirds of the
3 way through the first paragraph because I just deleted consequential
4 damages. We're not seeking consequential damages and I didn't think
5 that that was -- I just thought that would be confusing to the jury. It's not
6 supported by the evidence.
7 Everything else, I excluded because it just doesn't seem
8 relevant to this case. So the first -- the second paragraph, which is the
9 first we excluded, was that enforceable as to future performance,
10 divisible, we don't have a divisible -- that just doesn't seem like the kind
11 of contract that's being argued in here. Terminable at will, all of these,
12 basically, measure -- damage is measured as the date it was breached,
13 special circumstances, none of that is really relevant to this case. And so
14 that's why we had not included those paragraphs in the standard
15 instruction.
16 MR. PORTNOI: Just a moment to consult with Mr.
17 Polsenberg.
18 THE COURT: Of course.
19 MR. PORTNOI: Thank you.
20 THE COURT: And you know, just because I indicated I
21 thought some of the Defendants' were overbroad doesn't mean that I
22 don't have an open mind. I change my mind based upon argument
23 regularly.
24 MR. PORTNOI: Absolutely. And we'll continue to try to
25 change your mind, Your Honor. I did not take that any other way.

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THE COURT: Good enough. So take a moment. Let me know when you're ready.

[Pause]

MR. PORTNOI: Your Honor, is it possible we could reserve this particular instruction and bring it up tomorrow? It may be possible that we can, on further reflection, come to an agreement and not use the Court's time today.

THE COURT: I have no problem with that. Let me just give you my impression.

MR. PORTNOI: Yes, Your Honor.

THE COURT: The first paragraph seems to -- the first paragraph seems to apply. The following paragraphs seem to assume that it's a written contract, and that's my comment. So Ms. -- is it Williams?

MS. ROBINSON: Me?

THE COURT: Your last name, yeah.

MS. ROBINSON: Robinson.

THE COURT: Sorry. Robinson.

MS. ROBINSON: No, it's only -- they're both in the top ten most common names.

THE COURT: Sorry.

MR. POLSENBERG: Polsenberg.

THE COURT: Are you willing --

MR. PORTNOI: Portnoi.

THE COURT: Oh, yeah. How about my name, right?

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1 MS. ROBINSON: What's your name?
2 THE COURT: So what -- are you willing to defer this to talk to
3 Mr. Portnoi?
4 MS. ROBINSON: Of course. Of course.
5 THE COURT: Okay. So we'll take this up tomorrow.
6 MR. PORTNOI: Your Honor, I think that's the last of Plaintiff's
7 proposed contract instructions. And I just wonder, I mean, A, I don't
8 know if that means we're at a point where we should stop, just given
9 security's desire, or --
10 THE COURT: We have five more minutes.
11 MS. ROBINSON: Oh.
12 MR. PORTNOI: Otherwise, I would wonder if it makes sense
13 to look at the other contract pattern instruction that we have proposed.
14 MS. ROBINSON: So -- sorry. I didn't mean to -- but we do
15 actually have one more.
16 MR. PORTNOI: Oh, I'm sorry. I didn't --
17 MS. ROBINSON: It's 13.47, the following one on page 11.
18 MR. PORTNOI: I'm so sorry. I really thought we were done.
19 MS. ROBINSON: I mean, I guess that could apply to all of
20 our damages, and I'd be fine with that, but that is technically taken from
21 the contracts portion of the -- I mean, of the NJI. So this is just, I think,
22 the pattern instruction about damages, 13.47. I don't think there's any
23 modification. Certainly not an intentional modification, unless it's a typo.
24 MR. PORTNOI: I don't think we have a -- so as long as it is
25 represented to be the pattern, we don't have an objection to this

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1 instruction.
2 THE COURT: Thank you. So 13.47 will be given. Now, this
3 gets me to the Unfair Insurance Practices Act. Let's --
4 MS. ROBINSON: Okay. Oh, I'm sorry, Your Honor. I just
5 was agreeing with Mr. Portnoi that maybe we should finish their
6 contracts.
7 THE COURT: Okay. Let me pivot over to that, then. And
8 what page will that start?
9 MR. PORTNOI: So our contract instructions start on page 9
10 of 44 is what I see running down the bottom.
11 THE COURT: I'm there.
12 MR. PORTNOI: Of our November 15th filing.
13 THE COURT: I'm there.
14 MR. PORTNOI: So this is 13.0. 13.0 contemplates having
15 some description of what the contract is, which is in the pattern
16 instruction, I believe. Mr. Polsenberg will probably remember when the
17 first version of this was written in 1947.
18 MR. POLSENBERG: Excuse me.
19 MR. PORTNOI: But my understanding is that it's here
20 because really, the jury has to understand what the theory of the contract
21 is and what the theory of the defenses to the contract is to be able to
22 really have a target of what that is. So we do believe a version of 13.0
23 should be given. Certainly, you know, I believe Ms. Robinson has argued
24 that ours is, you know, lengthy and we've done our best. And obviously,
25 we would expect -- we would have expected Plaintiffs to propose a

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1 counter to this so that we could potentially integrate their view of what
2 they allege the contract to be. And we're open to that, but we do believe
3 that some introductory instruction along the lines of 13.0 is needed.
4 THE COURT: The thing is that the jury instructions are not
5 supposed to editorialize, and the Defendant's proposed here does that.
6 And we've got a pattern instruction on point. So with that being said,
7 Ms. Robinson.
8 MR. PORTNOI: Well, the issue is 13.0 is the pattern
9 instruction. And if you look at it, it has things like, "The Plaintiff claims
10 that Defendant breached the contract by," and then it says, "briefly state
11 alleged breach." So I am attempting to obviously fill in the brackets,
12 though I obviously agree that we should, you know, we would have to
13 have some discussion about, you know, some of the details in there.
14 MS. ROBINSON: So my response to that is that this is a very
15 complex case. Now, if that -- the jury has sat through -- will have sat
16 through weeks of evidence where the parties are describing exactly what
17 they believe their claims and defenses are. That being said, trying to
18 reduce all of that to a narrative description of the parties' claims and
19 defenses seems to me both an incredibly difficult -- well basically,
20 impossible to do without -- it would be a very, very time-consuming and
21 difficult task and would probably still result in error.
22 And I just don't think it's necessary. It is a pattern instruction
23 in the sense that there is an instruction that invites a narrative about the
24 parties' claims and defenses. I just think in a case of this nature, it's just
25 -- it does invite editorializing. And it's going to be very, very difficult to

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1 draft something that's totally neutral that doesn't exclude any of the
2 parties' arguments or evidence in this case.
3 MR. PORTNOI: Yeah, I --
4 MS. LUNDVALL: Nearly going to be impossible to try to
5 come up with a neutral statement on what the parties' positions are.
6 THE COURT: So what I'm going to do is tell you that the
7 pattern instruction will be given. You'll propose language to each other
8 to fill it in. To the extent you can agree, great. If you can't, I will
9 determine the language.
10 MR. PORTNOI: I think that's appropriate, Your Honor. Thank
11 you.
12 MR. POLSENBERG: Thank you, Your Honor.
13 THE COURT: Okay. And I think that pretty much uses up our
14 time for the day.
15 [Proceedings adjourned at 5:51 p.m.]
16
17
18
19
20 ATTEST: I do hereby certify that I have truly and correctly transcribed the
21 audio-visual recording of the proceeding in the above entitled case to the
best of my ability.
22
23 _____
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24 Jessica B. Cahill, Transcriber, CER/CET-708
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DISTRICT COURT

CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., a Nevada professional corporation; TEAM PHYSICIANS OF NEVADA-MANDAVIA, P.C., a Nevada professional corporation; CRUM, STEFANKO AND JONES, LTD. dba RUBY CREST EMERGENCY MEDICINE, a Nevada professional corporation, Plaintiffs, vs.	Case No.: A-19-792978-B Dept. No.: 27 **DEFENDANTS' SUPPLEMENTAL PROPOSED JURY INSTRUCTIONS (CONTESTED)**

WEINBERG WHEELER HUDGINS GUNN & DIAL
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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,

Defendants.

Defendants UnitedHealthcare Insurance Company ("UHIC"), United HealthCare Services, Inc. ("UHS"), UMR, Inc. ("UMR"), Sierra Health and Life Insurance Co., Inc. ("SHL"), and Health Plan of Nevada, Inc. ("HPN") (collectively "Defendants"), by and through their attorneys, submit the following Supplemental Proposed Jury Instructions (Contested). Defendants reserve the right to amend their proposed jury instructions based on, among other things, the evidence admitted at the trial.

Dated this 19th day of November, 2021.

/s/ Colby L. Balkenbush

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JURY INSTRUCTION NO. D___

NEVADA LAW REGARDING HEALTH MAINTENANCE ORGANIZATIONS

Members of the Jury:

There was in force at the time of the dispute in question a law which read as follows:

The Legislature hereby declares that the rising cost of health services in recent years has led government agencies, private organizations, and legislative bodies to seek alternatives to the traditional medical delivery system which would provide improved health care and would provide such health care at a lower cost. The health maintenance organization is a concept which has received much attention as one means through which an improvement in delivery might be achieved. The Legislature therefore enacts this chapter to carry out this objective.

SOURCE/AUTHORITY:
NRS 695C.020 (unmodified)

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JURY INSTRUCTION NO. D___

NEVADA LAW REGARDING RESTRAINING COSTS OF HEALTHCARE

There was in force at the time of the dispute in question a series of laws to restrain costs of healthcare. The purposes of these law were to:

1. Promote equal access to quality medical care at an affordable cost for all residents of this State.

2. Reduce excessive billed charges and revenues generated by some hospitals in this State in order to provide relief from excessively high costs of medical care.

3. Provide the regulatory mechanisms necessary to ensure that the forces of a competitive market will be able to function effectively in the business of providing medical care in this State.

SOURCE/AUTHORITY:
NRS 439B.160 (unmodified).

WEINBERG WHEELER HUDGINS GUNN & DIAL

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of November, 2021, a true and correct copy of the foregoing **DEFENDANTS' SUPPLEMENTAL PROPOSED JURY INSTRUCTIONS (CONTESTED)** was electronically filed/served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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DISTRICT COURT

CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA) LTD.,	)	CASE#: A-19-792978-B
Plaintiff,	)	DEPT. XXVII
vs.	)	
UNITED HEALTHCARE INSURANCE COMPANY,	)	
Defendant.	)	

ERRATA

A clerical error was discovered on page 73, line 17 in said case of the transcript for November 9, 2021, filed November 10, 2021. Said transcript indicates exhibit 95 was admitted into evidence, when it should read exhibit 96.

The corrected transcript has been e-filed as amended.

Dated this 19th day of November, 2021

Brynn White

Brynn White
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DISTRICT COURT

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PLEASE TAKE NOTICE that an Order Granting Plaintiffs' Motion for Leave to File Supplemental Record in Opposition to Arguments Raised for the First Time in Defendants' Reply in Support of Motion for Partial Summary Judgment was entered on November 18, 2021, a copy of which is attached hereto.

DATED this 19th day of November, 2021.

McDONALD CARANO LLP

By: */s/ Kristen T. Gallagher*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on this 19th day of November, 2021, I caused a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING PLAINTIFFS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL RECORD IN OPPOSITION TO ARGUMENTS RAISED FOR THE FIRST TIME IN DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

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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.

Defendants.

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

ORDER GRANTING PLAINTIFFS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL RECORD IN OPPOSITION TO ARGUMENTS RAISED FOR THE FIRST TIME IN DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Hearing Date: November 9, 2021
Hearing Time: Chambers

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Plaintiffs Fremont Emergency Services (Mandavia), Ltd. ("Fremont"); Team Physicians of Nevada-Mandavia, P.C. ("Team Physicians"); Crum, Stefanko and Jones, Ltd. dba Ruby Crest Emergency Medicine ("Ruby Crest" and collectively the "Health Care Providers") filed their Motion for Leave to File Supplemental Record in Opposition to Arguments Raised for the First Time in Defendants' Reply in Support of Motion for Partial Summary Judgment ("Motion for Leave") on October 17, 2021. The Motion for Leave was served on all appearing parties, Defendants filed their opposition on October 18, 2021. Good cause appearing,

IT IS HEREBY ORDERED that Health Care Provider's Motion for Leave is GRANTED.

IT IS HEREBY FURTHER ORDERED that the hearing set on the Motion for November 9, 2021 on Chambers Calendar is VACATED.

November 18, 2021

Dated this 18th day of November, 2021

Nancy L Allf

TW

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Nancy Allf
District Court Judge

Respectfully submitted by:

McDONALD CARANO LLP

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

AUTOMATED CERTIFICATE OF SERVICE

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DISTRICT COURT

CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., a Nevada professional corporation; TEAM PHYSICIANS OF NEVADA-MANDAVIA, P.C., a Nevada professional corporation; CRUM, STEFANKO AND JONES, LTD. dba RUBY CREST EMERGENCY MEDICINE, a Nevada professional corporation, Plaintiffs, vs. 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' PROPOSED SPECIAL VERDICT FORM**

Plaintiffs submit the attached proposed special verdict form. Plaintiffs propose this form as an alternative to the general verdict form plaintiffs have already filed.

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DATED this 19th day of November, 2021.

AHMAD ZAVITSANOS ANAIPAKOS ALAVI & MENSING

By: /s/ *Jane Langdell Robinson*

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

Special Verdict Form

We, the jury in the above-entitled action, answer the questions submitted to us as follows:

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1. Were any of the defendants (shown in the left column) unjustly enriched as a result of services provided by any of the plaintiffs (shown in the top row)?

Answer "Yes" or "No" in each box.

	Fremont Emergency Services	Team Physicians	Ruby Crest Emergency Medicine
United Healthcare Insurance Company			
United Health Care Services, Inc.			
UMR, Inc.			
Sierra Health and Life Insurance Company, Inc.			
Health Plan of Nevada, Inc.			

2. Did any of the defendants (shown in the left column) fail to comply with an implied contract with any of the plaintiffs (shown in the top row)?

Answer "Yes" or "No" in each box.

	Fremont Emergency Services	Team Physicians	Ruby Crest Emergency Medicine
United Healthcare Insurance Company			
United Health Care Services, Inc.			
UMR, Inc.			
Sierra Health and Life Insurance Company, Inc.			
Health Plan of Nevada, Inc.			

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3. Did any of the defendants (shown in the left column) engage in any unfair insurance practices in connection with the payment of any of the plaintiffs' (shown in the top row) claims?

Answer "Yes" or "No" in each box.

	Fremont Emergency Services	Team Physicians	Ruby Crest Emergency Medicine
United Healthcare Insurance Company			
United Health Care Services, Inc.			
UMR, Inc.			
Sierra Health and Life Insurance Company, Inc.			
Health Plan of Nevada, Inc.			

4. Did any of the defendants (shown in the left column) fail to fully pay to any of the plaintiffs (shown in the top row), within 30 days of submission of the claim, claims that were approved and fully payable?

Answer "Yes" or "No" in each box.

	Fremont Emergency Services	Team Physicians	Ruby Crest Emergency Medicine
United Healthcare Insurance Company			
United Health Care Services, Inc.			
UMR, Inc.			
Sierra Health and Life Insurance Company, Inc.			
Health Plan of Nevada, Inc.			

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5. If you answered "Yes" to any part of Questions 1, 2, or 3 with respect to Fremont Emergency Services, what amount of money do you find from a preponderance of the evidence should be awarded to Fremont Emergency Services and against the following?

United Healthcare Insurance Company	Answer:	$_____
United Health Care Services, Inc.	Answer:	$_____
UMR, Inc.	Answer:	$_____
Sierra Health and Life Insurance Company, Inc.	Answer:	$_____
Health Plan of Nevada, Inc.	Answer:	$_____

6. If you answered "Yes" to any part of Questions 1, 2, or 3 with respect to Team Physicians, what amount of money do you find from a preponderance of the evidence should be awarded to Team Physicians and against the following?

United Healthcare Insurance Company	Answer:	$_____
United Health Care Services, Inc.	Answer:	$_____
UMR, Inc.	Answer:	$_____
Oxford Health Plans, Inc.	Answer:	$_____
Sierra Health and Life Insurance Company, Inc.	Answer:	$_____
Health Plan of Nevada, Inc.	Answer:	$_____

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7. If you answered "Yes" to any part of Questions 1, 2, or 3 with respect to Ruby Crest Emergency Medicine, what amount of money do you find from a preponderance of the evidence should be awarded to Ruby Crest Emergency Medicine and against the following?

United Healthcare Insurance Company	Answer:	$_____
United Health Care Services, Inc.	Answer:	$_____
UMR, Inc.	Answer:	$_____
Oxford Health Plans, Inc.	Answer:	$_____
Sierra Health and Life Insurance Company, Inc.	Answer:	$_____
Health Plan of Nevada, Inc.	Answer:	$_____

8. If you answered "Yes" to any part of Question 1 or 3, answer the following question. Do you find by clear and convincing evidence that any of the defendants (shown in the left column) are guilty of oppression, fraud, or malice in any conduct that you found to constitute unjust enrichment or unfair insurance practices and that caused damage to any plaintiff (shown in the top row)?

Answer "Yes" or "No" in each box.

	Fremont Emergency Services	Team Physicians	Ruby Crest Emergency Medicine
United Healthcare Insurance Company			
United Health Care Services, Inc.			
UMR, Inc.			
Sierra Health and Life Insurance Company, Inc.			
Health Plan of Nevada, Inc.			

Dated November __, 2021

_____
Jury Foreperson

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

Special Verdict Form

We, the jury in the above-entitled action, answer the questions submitted to us as follows:

1. The amount of money that should be awarded to Fremont Emergency Services against the following defendants for punitive damages in order to punish those defendants is:

United Healthcare Insurance Company	Answer:	$_____
United Health Care Services, Inc.	Answer:	$_____
UMR, Inc.	Answer:	$_____

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Sierra Health and Life Insurance Company, Inc. Answer: $_____

Health Plan of Nevada, Inc. Answer: $_____

2. The amount of money that should be awarded to Team Physicians against the following defendants for punitive damages in order to punish those defendants is:

United Healthcare Insurance Company Answer: $_____

United Health Care Services, Inc. Answer: $_____

UMR, Inc. Answer: $_____

Sierra Health and Life Insurance Company, Inc. Answer: $_____

Health Plan of Nevada, Inc. Answer: $_____

3. The amount of money that should be awarded to Ruby Crest Emergency Medicine against the following defendants for punitive damages in order to punish those defendants is:

United Healthcare Insurance Company Answer: $_____

United Health Care Services, Inc. Answer: $_____

UMR, Inc. Answer: $_____

Sierra Health and Life Insurance Company, Inc. Answer: $_____

Health Plan of Nevada, Inc. Answer: $_____

Dated: November ____, 2021

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Jury Foreperson

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Ahmad, Zavitsanos, Anaipakos, Alavi and Mensing, P.C. and on this 16th day of November, 2021, I caused a true and correct copy of the foregoing **PLAINTIFFS' PROPOSED VERDICT FORM** through the filing system in the above-captioned case, upon the following:

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DISTRICT COURT

CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIS) LTD., ET AL.,	CASE#: A-19-792978-B
Plaintiffs,	DEPT. XXVII
vs.	
UNITED HEALTHCARE INSURANCE COMPANY, ET AL.,	
Defendants.	

BEFORE THE HONORABLE NANCY ALLF
DISTRICT COURT JUDGE
FRIDAY, NOVEMBER 19, 2021

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 16

APPEARANCES:

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JOSEPH Y. AHMAD, ESQ.
KEVIN LEYENDECKER, ESQ.
MICHAEL A. KILLINGSWORTH, ESQ.

For the Defendants: D. LEE ROBERTS, JR., ESQ.
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JEFFREY E. GORDON, ESQ.
DANIEL F. POLSENBERG, ESQ.
JASON YAN, ESQ.

RECORDED BY: BRYNN WHITE, COURT RECORDER

1 INDEX

2

3 Testimony 6

4

5

6 WITNESSES FOR THE DEFENDANTS

7 BRUCE DEAL

8 Continued Cross-Examination by Mr. Leyendecker 6

9 Redirect Examination by Mr. Blalack 102

10 Recross Examination Mr. Leyendecker..... 137

11 Further Redirect Examination by Mr. Blalack..... 147

12 Further Recross Examination by Mr. Leyendecker 147

13

14 ALEXANDER MIZENKO

15 Direct Examination by Mr. Blalack 149

16 Cross-Examination by Mr. McManis 191

17 Redirect Examination by Mr. Blalack 233

18 Recross Examination by Mr. McManis 249

19

20 KAREN KING

21 Direct Examination by Mr. Roberts 253

22

23

24

25

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INDEX OF EXHIBITS

FOR THE PLAINTIFFS	MARKED	RECEIVED
1000	20	23
299		63
506		69
297, 297-A		132

FOR THE DEFENDANTS	MARKED	RECEIVED
5322-A		53
5529		111

010976

1 Las Vegas, Nevada, Friday, November 19, 2021
2
3 [Case called at 8:32 a.m.]
4 [Outside the presence of the jury]
5 THE MARSHAL: All rise. Court 27 is now in session.
6 Honorable Judge Allf presiding.
7 THE COURT: Good morning, everyone. Please be seated.
8 Okay. Once again I can't really see the Defendants. All right, so Fremont
9 v. United. Appearances quickly please.
10 MS. LUNDVALL: Good morning, Your Honor. Pat Lundvall
11 with McDonald Carano on behalf of the healthcare providers.
12 THE COURT: Thank you.
13 MR. ZAVITSANOS: John Zavitsanos on behalf of the
14 healthcare providers.
15 MR. AHMAD: Your Honor, Joe Ahmad, also on behalf of the
16 healthcare providers.
17 MR. KILLINGSWORTH: And Michael Killingsworth on behalf
18 of the healthcare providers.
19 MR. LEYENDECKER: Moring, Your Honor. Kevin
20 Leyendecker.
21 MR. MCMANIS: Good morning, Your Honor. Jason
22 McManis.
23 THE COURT: Thank you. And for the Defense please.
24 MR. ROBERTS: Good morning, Your Honor. Lee Roberts for
25 the Defense. Good to see you.

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MR. BLALACK: We're starting off with a chipper mood this morning, Your Honor. Good morning, Your Honor. Lee Blalack on behalf of the Defendants.

MR. YAN: Good morning, Your Honor. Jason Yan (phonetic) on behalf of the Defendants.

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

MR. POLSENBERG: And Dan Polsenberg, Your Honor. Good morning.

THE COURT: Good morning everyone. Anything to take up before we bring in the jury?

MR. ZAVITSANOS : Not from the Plaintiffs, Your Honor.

MR. BLALACK: Not from the Defense. You want us to get the witness, Your Honor?

THE COURT: Yes, please. So I'm having a bout of allergies this morning, so apologies in advance. I don't know what it is.

[Pause]

THE COURT: Okay. Bring in the jury now.

THE MARSHAL: All rise for the jury.

[Jury in at 8:34 a.m.]

THE COURT: Thank you. Please be seated. Mr. Blalack.

MR. BLALACK: I think Mr. Leyendecker has the witness, Your Honor.

THE COURT: Oh, Mr. Leyendecker. Sorry my notes go back to jury selection last time.

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1 BRICE DEAL, DEFENDANTS' WITNESS, PREVIOUSLY SWORN
2 CROSS-EXAMINATION CONTINUED
3 BY MR. LEYENDECKER:
4 Q Good morning Mr. Deal.
5 A Good morning.
6 Q First thing I want to do is to apologize to you and the jury ad
7 Judge Allf. Yesterday I was really not the professional to you. And I'm
8 sorry for that. That's not how my mom raised me. All I can tell you is
9 I've been away from my family for a month. And so, I'm going to do my
10 best today to treat you with the respect you deserve, sir.
11 A Apology accepted.
12 Q Thank you. Okay, let's get right to it.
13 MR. LEYENDECKER: Michelle, can I get yesterday's
14 transcript at page 62 up on the screen? Page 62 lines three through six,
15 I'd light to highlight for Mr. Deal and the jury.
16 BY MR. LEYENDECKER:
17 Q Yesterday I had asked you if you had made comments about
18 whether you were going to pick a side in the case; do you recall that?
19 A Yes.
20 Q And when you were asked by Mr. Blalack, so, you know,
21 there's a disagreement and he was talking about this case, fair?
22 A He was. Do you mind showing me the earlier part of it? I
23 just want to make sure I understand what the context of that was.
24 Q Sure.
25 MR. LEYENDECKER: Michell, would you bring the whole

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1 thing up there?
2 THE WITNESS: If you can scroll up a little bit there? Yes,
3 okay. I do recall this. This was in the context of the discussing of
4 particular programs.
5 BY MR. LEYENDECKER:
6 Q Okay. And so, whether it's a discussion of the particular
7 programs or not, is it fair to say that you're not here picking a side
8 simply because you've been engaged by the Defendants?
9 A I certainly agree that I'm not picking a side because I've been
10 engaged by the Defendants. I do have an opinion, and it's consistent
11 with the reasonable value of the services, but I'm not here to pick sides.
12 Particularly not on the issue of particular programs.
13 Q Do good experts pick a side and advocate on behalf of the
14 side that's paying them?
15 A Not -- an expert is not an advocate. An expert is here to
16 assist the trier of the fact or the finder of fact, in this case, the jury, with
17 some particular expertise. We do have opinions, so it doesn't mean you
18 don't have an opinion. And that opinion maybe consistent with one side
19 or the other, but you're not picking a side because of the side.
20 Q Would a good expert mislead a jury about how often they
21 work for insurance companies?
22 A They wouldn't mislead a jury on anything.
23 Q Yesterday --
24 MR. LEYENDECKER: Let's go ahead and look at page 57 of
25 the transcript yesterday, Michelle.

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1 BY MR. LEYENDECKER:
2 Q And I want to focus in on pages -- excuse me, lines 5 through
3 12.
4 See the question there? It says,
5 "Q In your engagement, sir, on these types of matters."
6 And again, you're talking about matters like this dispute.
7 "Q "Have you been typically engaged by the payors side of the
8 dispute, the provider's side of the dispute, or some combination?"
9 You go on to say,
10 "A The pair side of these cases, I've certainly worked with
11 providers, and I mentioned the case with a project up in Washington
12 State for hospitals and I worked for hospitals in the past. But on these
13 reasonable value cases, it's generally working for the payer."
14 That's what you told the jury yesterday, right, sir?
15 A Yeah, that's right.
16 Q Now when I took your deposition, didn't you tell me that we
17 know you do some consulting work and much of what you do is the
18 lawsuit business work, right, sir?
19 A That's right.
20 Q And when I took your deposition, didn't you tell me that
21 you'd been retained more than 200 times by 25 to 30 different insurance
22 company's but only twice have been working on behalf of the healthcare
23 provider?
24 A It doesn't sound wrong, yeah. That's probably about right.
25 Q Well isn't that exactly what you said, sir?

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1 A You can show me the transcript, but I'm not disagreeing with
2 it. It sounds about right.
3 Q Well let me ask you. From the point of view of a Ph.D. public
4 healthcare expert economist Harvard trained, does 198 out of two times,
5 is that consistent with generally? If of your 200 disputes with 25 to 30
6 different insurance companies and only two times for the payer, is that
7 consistent with the concept of only working for payors generally?
8 A I'm not sure I quite understand the question, but it's -- I think
9 I was very clear. On these reasonable value cases, it's almost always the
10 payor that I'm working with. It's largely because that's my -- I have a
11 point of view of how to approach these cases and it's generally not
12 consistent with how providers think about them.
13 Q Okay. Is -- fair enough. Now am I right that this is the first
14 time you've ever given testimony to a jury on what the reasonable value
15 of an out-of-network emergency service is as it relates to emergency
16 room doctors?
17 A Yeah. I think the last -- I agree with that. The last clause is
18 the important one. I've done -- and I mentioned a few others where I
19 have given testimony for -- in cases involving emergency room physician
20 services, but those have involved a cardiologist and a neurosurgeon.
21 And your question as I understood it was specific to ER physicians as a
22 specialty, and this is the first jury trial on that.
23 Q Right. I mean, the case is not about neurosurgeons or
24 cardiologists. Right, sir?
25 A Certainly not in terms of the specialty. It's a general case

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1 about reasonable value, so the principles are exactly the same. But it's a
2 -- the specific specialty is emergency room physicians.
3 Q And this is the first time in your 25 years and your 200 plus
4 assignments that you will have ever testified to a jury about what the
5 reasonable value of emergency room doctor services are, right?
6 A To a jury. I've certainly had other cases involving emergency
7 room physicians, but most cases don't go to juries. But this is the first
8 one of that particular specialty that's gone to a jury.
9 Q Okay. Remember yesterday -- Michelle, can I get Defendant's
10 5518 at number 17 up on the screen? Do you recognize this slide, Mr.
11 Deal?
12 A I do, yes.
13 Q Okay. This is one of the slides that you discussed with Mr.
14 Blalack about academic studies of surprise billing et cetera, et cetera.
15 Right, sir?
16 A Yeah. There's a number of studies that we discussed. This is
17 one of them, yes.
18 Q One was a Yale study?
19 A Yes.
20 Q By the way, remind the jury who the authors were of that
21 Yale Study?
22 A So Zack Cooper was one of the authors. Fiona Scott Morton
23 was another one. The third one I'd have to remember the name,
24 specifically. I don't recall off the top of my head.
25 Q You don't remember the third one?

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A I remember there is a third one. I don't have the name memorized.

Q Well didn't -- let me see if I can get that for you. Okay, there's the Yale study. Kind of like right here. From Zack Cooper, Fiona Scott Morton, those are the two you just told the jury about. Right, sir?

A Yeah, that's correct.

Q Now how about this person right here, Nathan Shekita? That's the name you couldn't remember, right, Mr. Deal?

A Yeah, that's right.

Q Didn't you hire, or your firm hire, Mr. Shekita after he participated in this study?

A I don't know. It's possible. I don't know.

Q Didn't you tell the jury you're a managing director? Tell us the name again of your outfit.

A Analysis Group.

Q How many managing directors are there of the Analysis Group?

A Managing principle. There's about 60 of us. I run the Menlo Park office. He's certainly not in the Menlo Park office.

Q Well this is -- this whole study is right up your ally; isn't it, sir? Healthcare, economics, reasonable value, surprise billing, fair?

A Sure. I mean, I didn't do this study, but the type of analysis that's done in this study is certainly the kind of analysis that we do.

Q And you don't know that your firm hired Mr. Shekita after this article was published?

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A I don't know one way or the other. It's possible. There's more than 1,000 people in the firm. So I don't know everyone that works in the firm.

Q So even though you're -- you were very familiar and very interested in this article as you told the jury and you could recall two of the names, you're here to tell us under oath you had no idea the third name that you couldn't recall is not the guy that you all hired after the study was published?

A I told you, I don't know one way or the other whether he works with Analysis Group. He's not somebody that works with me, and I haven't worked with him previously, so.

Q Well let me ask you this. Before you came down here to give your opinions to these jurors, and you knew you were going to talk about the Yale study, did you make any effort to find out whether you all had any kind of financial relationships with any of these three folks right here?

A No. That wasn't relevant from any of the analysis that I did.

Q Well, do you think a good expert does a little homework before they promote academic studies to find out whether their own company hired one of the authors right after the study?

A I believe this study was being discussed well before my testimony, so I didn't raise it. But that's not something I would typically do in analysis. The study stands on its own.

Q Okay. Let me show you what I found on the Google machine. Nathan Shekita, that's the gentleman, right, sir?

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A That appears to be the same person, yes.

Q And where's he -- let me zoom in on that so we can all see it. Well, that's not very good. There we go. Where does he work?

A Appears to be an associate at Analysis Group.

Q Where do you work?

A Analysis Group.

Q How many times has he been on your team providing the same kind of expertise, independent expertise, that he's alleged to have provided when he was doing that Yale study?

A How many times has he worked with me? I'm not aware that I've worked with him at all.

Q Do you know one way or the other?

A I'm not aware of any. I would say zero is my best recollection.

Q Sitting here today under oath with this jury, can you tell them affirmatively, you have never worked with this gentleman since you hired him after he left Yale?

A Again, it's not somebody I've interacted with directly. So my teams -- I have a lot of teams doing a lot of projects, so I suppose it's not impossible, but it's not somebody I've interacted with directly.

Q Directly, okay. So you have big teams; don't you, sir?

A It depends on the size of the project. But sometimes, yes.

Q Is this a pretty big project?

A It's pretty big. It's sort of in the middle I'd say.

Q Right. A little over $500,000 invoiced to date?

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A That's right.

Q We'll talk about that in more detail later. So what I hear you saying is, Mr. Shekita may not report directly to you, but very well since you work at the same group, he might be on one of your teams. You just don't know?

A I think that's fair. Again, we do a lot of work across offices. He's certainly not in my office. He's not somebody I've interacted with directly. But there's lots of people on my teams in various offices around Analysis Group and I don't always directly interact with each of them.

Q All right. Let's get back to Brookings. Slide 5518 at 17.

MR. LEYENDECKER: Brynn, may I please switch back to the regular feed?

BY MR. LEYENDECKER:

Q 5518 at -- there we go right there. Okay. Again, we've got the Yale study we talked about, and we've got the Brooking study, right, sir?

A Yes.

Q Both academic papers supposedly independent, right?

A I'm not sure what you mean supposedly independent. They're done by their authors.

Q Well would they be independent if they were getting confidential input from United senior executives?

A My best understanding of any of these types of research projects is they're independent, and they're the views of the researchers. It is very common to get input from lots of sources, but it would be their

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1 views independently is the standard in the industry.
2 Q Respectfully, sir, my question was would these studies be
3 independent if they were getting confidential input from senior
4 executives at United that wasn't disclosed to the public?
5 A Not sure I quite understand your question. But just the fact
6 that they got some confidential feedback let's say just hypothetically,
7 that in and of itself wouldn't necessarily mean that it wasn't
8 independent. It would totally depend on what the input was and if it was
9 incorporated and if it introduced any bias, which it seems to be what
10 you're implying. If it's just other types of information, it could be
11 completely fine. So it really would be situation specific.
12 Q Tell the jury all the homework you did before citing the
13 Brookings Institute paper, all the homework you did to figure out
14 whether United executives gave confidential input that was never
15 disclosed to this study.
16 A That certainly was not a topic of my study. I'm citing these
17 for particular propositions in terms of how billed charges are set. That
18 they're set unilaterally, which has certainly been my longstanding view.
19 This is consistent with it. So I didn't do any specific investigation as to
20 input or other things related to that. I've seen some back and forth about
21 those issues in this trial, but it's not something I've done any
22 independent research on.
23 Q Do you think as a Ph.D. healthcare economist public policy
24 expert from Harvard, do you think the public is better off if we know that
25 these so-called academic papers are actually receiving confidential input

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1 from senior executives at insurance companies?
2 A You're saying -- I'm not sure there's a question -- that the
3 public would be better off if -- would you mind restating it? I'm just not
4 sure I followed the question.
5 Q Okay. I'll try one more time. You do hold yourself out as a
6 public policy expert, right, sir?
7 A Yes.
8 Q A healthcare public policy expert?
9 A Yes.
10 Q You've told the jury you taught classes at Harvard?
11 A That's right.
12 Q Did you take any ethics classes at Harvard?
13 A Not a -- not a specific ethics class. That was certainly part of
14 various courses.
15 Q Well, did you teach any ethics classes at Harvard?
16 A Not a specific ethics class, no. I was teaching economics.
17 Q Okay. Did you teach any public policy classes at Harvard?
18 A I did. I was a teaching fellow for some public policy classes
19 in addition to teaching economics.
20 Q Now, when you teach, my understanding, was that while you
21 were a Ph.D. student?
22 A Yes, that's correct.
23 Q And I'm not a Ph.D. Although sometimes I refer to myself as
24 doctor.
25 A Play one on TV.

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Q Well, I've stayed at Holiday Express on occasion.

A Yeah. Exactly.

Q Now, do the Ph.D. students, are they actual professors of these classes?

A Typically not. There's typically a processor who teaches the main course and then there's teaching fellows who are running separate sessions, and sometimes teach some independent content, but typically following up on what the main professor has taught.

Q So what I remember -- I went to the University of Texas. That's where I'm from. And I have a finance degree. And I remember teaching assistants -- that's what I think we called them, and I think we called them that in law school too, teaching assistants. Is that the same as a teaching fellow?

A There's two different things at Harvard. There's a teaching assistant that's really doing more direct assistance. And I was one of those too. I taught -- I was a teaching assistant for statistics. But then a teaching fellow has more responsibility and is doing more independent teaching; leading of sessions, providing additional material, things like that. So it's not the full professor of the class but it's sort of between the two.

Q Well, were you ever the lead teacher in any class you say you taught at Harvard?

A Yes.

Q Okay. What class was that?

A That was economics.

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1 Q Economics. And tell the jury again where you actually got
2 your economics degree.
3 A Well, I have an undergraduate degree in economics from
4 Pacific Lutheran. And my master's degree is from Harvard, from the
5 Kennedy School of Government at Harvard, public policy.
6 Q Wait a minute. Are you telling the jury you got an economics
7 degree from Harvard?
8 A No. I have a degree in public policy from Harvard.
9 Q Okay. So I was confused by your answer because I thought I
10 asked you, tell the jury where you got your economics degree.
11 A And I gave you the answer of I have an undergraduate
12 degree in economics from Pacific Lutheran University, and I have a
13 graduate degree in public policy which includes applied economics, a
14 heavy dose of economics. It's not a strict economics degree, but it
15 certainly includes lots of economics. And that's where I taught
16 economics, was at the Kennedy School of Government at Harvard.
17 Q Did you teach -- in this public policy teaching you did at
18 Harvard, did you ever tell your students it would be good for the public,
19 all of us in here, to know when insurance companies are providing
20 confidential input to these so-called independent academic reports? Did
21 you ever teach that concept?
22 A That was never a concept that would have been relevant for
23 any of the classes I was teaching. No is the answer to your question.
24 Q Do you think that would be a good idea, that if all of knew
25 when we're reading the paper from Yale, we're reading the paper from

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1 Brookings that says this academic, you know, ta-da, ta-da, ta-da, do you
2 think we would all be better as a consuming public if we knew up front
3 that high-ranking insurance executives were getting confidential input to
4 those papers?
5 A I'm not sure. That's a very hard question to answer yes or
6 no. I -- the standard, which I do certainly support, is if there's financial
7 support for a study, that should definitely be disclosed. And that is the
8 standard. The question about getting input I think is trickier in the sense
9 that there's oftentimes lots of input in any study. You get -- you get
10 input from fellow researchers; you get input from industry people. So I
11 don't know even how you would exactly disclose that. So it's not an
12 easy answer -- or an easy question to answer. And I don't think you can
13 just say you would always be better off if you listed everybody you ever
14 talked to on a study. That would be really pretty unworkable. So it just
15 depends.
16 Q Well, did you tell the jury yesterday there would be nothing
17 unusual about getting this kind of input from insurance companies?
18 A I'm not even sure what you mean; "this kind of input." That
19 wasn't a topic I really -- I testified about.
20 Q Okay. Let's look at this. The Brookings Institute paper was
21 published in February 2019. Do you see that, sir?
22 A I think it's --
23 Q Right here.
24 A Yes.
25 Q February 2019. This is the paper you were talking about

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1 yesterday, right?
2 A Yeah, that's correct.
3 Q Okay. Let me show you -- you said you -- in this case, in your
4 work, you looked at some of the back and forth about what was United
5 really doing behind the scenes. Did I hear you say that a minute ago?
6 A I'm sorry. I -- would you mind repeating that? I was just -- I
7 was reading the slide for a moment.
8 Q Yeah. I thought I heard you say a minute ago that in your
9 work in this case, you were aware, you had seen some emails or some of
10 the documents talking about the, you know, input from the United side
11 over to these academic type side, right?
12 A Are you talking about the Yale study now?
13 Q Well, I don't know what you were referring to, but I just --
14 A Back then, I've seen the trial testimony related to the Yale
15 study, and I believe that was discussion -- I think it might have been
16 about a proposal as opposed to the final study. But that's as much as I
17 know, is what was discussed in the trial.
18 MR. LEYENDECKER: What is your next available exhibit
19 number? I'll tell you what, let me just make this one 1000. Okay?
20 UNIDENTIFIED SPEAKER: Hold on.
21 MR. LEYENDECKER: That's okay. I'll make it 1000 for ease.
22 Brendan, may I have the Elmo, please?
23 [Plaintiffs' Exhibit 1000 marked for identification]
24 MR. BLALACK: Well, Your Honor, is this an admitted exhibit?
25 MR. ZAVITSANOS: Hey, Kevin, it's 5 --

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1 MR. BLALACK: Because if so --
2 MR. ZAVITSANOS: -- 6 --
3 MR. BLALACK: -- I'd --
4 MR. ZAVITSANOS: -- 516.
5 MR. BLALACK: -- it should not be on the screen.
6 THE COURT: It's not admitted.
7 MR. LEYENDECKER: I haven't offered it yet.
8 MR. BLALACK: Well, then --
9 MR. ZAVITSANOS: You can't be --
10 MR. BLALACK: -- it shouldn't be published.
11 MR. ZAVITSANOS: You can't show it, Kevin.
12 THE COURT: You can't publish it unless you lay a foundation
13 and admit it.
14 MR. LEYENDECKER: Okay.
15 BY MR. LEYENDECKER:
16 Q Mr. -- let me hand you what I've marked as Exhibit number
17 1000, Mr. Deal.
18 A Okay.
19 Q Do you see this is a March 15th at the top. The email -- this
20 two-pager is a March 15th, 2019 email, right?
21 A Yes, that sounds -- that looks right.
22 Q And from a Mr. Steven Wilson to Katherine Miller regarding
23 balance billing. Do you see that?
24 A Balance billing hearing it says, yes.
25 Q Okay. Now, if you go to the very bottom, you see it has a

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1 Bates number. Tell the jury what you understand that Bates number
2 means as to who produced this document.
3 A You don't want to know the actual number, just -- it looks like
4 it came from the Defendants.
5 Q Okay. Because it's got a Bates number DEF408940, right?
6 A Yes.
7 Q And based on your experience, you understand that to mean
8 that the Defendants in this case produced an email?
9 A That would be my understanding, yes.
10 Q Okay. And if you see at the top of the email under the
11 attachments, there's a reference to the Brookings, State approaches to
12 mitigate surprise billing, February 2019, article.
13 A Okay.
14 Q Do you see that?
15 A Yes.
16 Q That's the study you were just talking about up on that slide,
17 right, sir?
18 MR. BLALACK: Objection. Foundation.
19 THE COURT: Overruled.
20 THE WITNESS: Yes, it looks like it. Yes.
21 BY MR. LEYENDECKER:
22 Q Okay. And you see here in the actual email down there from
23 Mr. Schifsky [phonetic], he is a Vice President from UnitedHealthcare,
24 right?
25 A It looks that way, yes.

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1 Q All right. And the -- one, two, three -- third bullet down in
2 this email from United's Vice President of Corporate Communications,
3 there's reference to the Brookings White Paper published last month?
4 That's the one we were just looking at, right?
5 A Yeah, that would make sense that that would be the same
6 one. Yes.
7 MR. LEYENDECKER: Your Honor, the Plaintiffs would offer
8 Exhibit 1000.
9 MR. BLALACK: No objection.
10 THE COURT: Exhibit 1000 will be admitted.
11 [Plaintiffs' Exhibit 1000 admitted into evidence]
12 UNIDENTIFIED SPEAKER: You can switch over.
13 MR. LEYENDECKER: Thank you. May I get, Michelle -- oh,
14 I'm sorry. It's just a habit.
15 UNIDENTIFIED SPEAKER: No, no. We got it. Yeah.
16 MR. LEYENDECKER: Right. Since we have it, Brendan, can
17 you switch me -- switch it back to the regular?
18 BY MR. LEYENDECKER:
19 Q Okay. We know the Brookings' paper was in February of
20 2019, right, sir?
21 A Yes.
22 Q This email from the VP that Corporate Communications at
23 United here in the middle says, "The Brookings White Paper published
24 last month on surprised billing" -- comma -- "Vicki and John Haben
25 provided confidential input to the report." Do you see that?

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1 A Yes.
2 Q That's not a reference to claims data, is it?
3 A I'm not sure what it's a reference to.
4 Q You know who the reference to Vicki is, don't you, sir?
5 A I'm -- I can't say I do.
6 Q Well, did you watch any of Ms. Vicky Paradise's testimony in
7 the case?
8 MR. BLALACK: Wait a minute. Did you say Vicky Paradise?
9 THE COURT: Vicky or Becky?
10 MR. LEYENDECKER: Excuse me. Fair enough. I think it is
11 Becky Paradise.
12 BY MR. LEYENDECKER:
13 Q Okay. You know who John Haben is though, right?
14 A I don't recall the title, but I do recognize the name.
15 Q Did you see the testimony where he told the jury he was
16 head of all the out-of-network, quote/unquote, shared savings programs
17 in the case?
18 A I'll take your representation for the specifics of it. I
19 remember he did testify, and I recall he had involvement in out-of-
20 network programs.
21 Q Did you do anything before you were touting the Brookings
22 White Paper to this jury to investigate whether Mr. Haben or other senior
23 executives at United had given confidential input that might compromise
24 its independence?
25 A Again, I -- it's not -- it's not something that I have studied. It's

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1 not something that I -- was relevant for the use that I was making of the
2 study.
3 Q Do you think a good expert before they tout a so-called
4 independent study to a jury ought to make an effort to do a little
5 homework to find out whether the paper may have been tainted by
6 insurance companies' input on a confidential basis?
7 A I'm not sure what you mean; tainted. I mean it totally
8 depends on what the input is. I don't -- you certainly can't say just
9 because there was input that it's tainted. So it would totally depend. But
10 for the purpose that I'm -- I was using the paper for, which is really a very
11 simple purpose, to just say they're unilaterally set, I don't think that's
12 really until dispute. It's certainly been my long-held view. Very
13 consistent with that. So I wasn't using it for purposes other than that.
14 Q Okay. Let's move on. I want to look at another one of the
15 slides that you discussed with the jury. It's 5518 at 6. Do you remember
16 this slide?
17 A I do, yes.
18 Q Now, does a good expert cherry pick examples that might
19 have the potential to mislead a jury about some issue?
20 A I certainly wouldn't endorse cherry picking, as you're
21 describing it, depending on what the purpose is, if you're trying to
22 represent the totality of something with one example and it's not
23 particularly representative. But if you're just trying to illustrate a point,
24 then it doesn't really matter which example you use.
25 Q Well, let's say what you chose to show the jury is

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1 representative. Okay, sir?
2 A Sure.
3 Q Over here on the right side you said, "Illustrative examples
4 of billed procedures." Here's one less severe; ingrown toenail.
5 MR. LEYENDECKER: Can I get this highlighted right here,
6 Michelle?
7 BY MR. LEYENDECKER:
8 Q Now, this one got I attention for a couple of reasons, sir.
9 Well, go ahead and tell the jury why you used it.
10 A I was just trying to give examples of what these kind of look
11 like in real life in terms of the different types of services that are being
12 provided and examples of where you might have the main evaluation
13 and management code and a different procedure code, and to illustrate a
14 couple of examples where the primary CPT code was, in this case, a
15 99283, kind of in the middle, and another one where it's a 99285, a little
16 more severe.
17 Q Did you just say examples, as in plural?
18 A Well, there's this one and then the one on the left.
19 Q Okay. Are you -- are you telling the jury -- by the way, you
20 know that the average charge for my clients on the disputed claims is
21 $1,145, right?
22 A That sounds right, yes.
23 Q Are you telling us that when you picked this toenail example
24 you weren't trying to subliminate -- subliminally communicate with the
25 jury that we're charging for services that don't amount to much?

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MR. BLALACK: Wait a minute, Your Honor. Just so I'm clear, did he say subliminally?

MR. LEYENDECKER: Yeah.

THE COURT: He did.

MR. BLALACK: All right. No objection.

THE WITNESS: I was not trying to send a subliminal message to the -- to the jury, no.

MR. LEYENDECKER: That's right.

BY MR. LEYENDECKER:

Q There's nothing subliminal about what you were doing, is there, Mr. Deal?

A I'm not sure what you mean. I was -- it's an -- it's an illustrative example. I think it's very clear.

Q Do you see here -- that's your 99283, right, sir?

A Yes.

Q And then you got the CPT code 11765, right?

A Yes.

Q The jury's going to get Exhibit 473. That's my client's claim file, right?

A Yes.

Q They're going to have a computer. They're going to be able to search that Excel file. Go ahead and tell them, if they search that Excel file, how many of the 11,563 claims involve CPT codes 11765.

A I don't know off the top of my head. I'm presuming at least one.

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