Case Nos. 85525 & 85656

# In the Supreme Court of Nevada

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



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K. LEE BLALACK II
(*pro hac vice*)
JONATHAN D. HACKER (*pro hac vice forthcoming*)
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
KORY J. KOERPERICH (SBN 14,559)
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Pkwy., Ste. 600
Las Vegas, Nevada 89169

D. LEE ROBERTS (SBN 8877)
COLBY L. BALKENBUSH (SBN 13,066)
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd., Ste. 400
Las Vegas, Nevada 89118

*Attorneys for Appellants/Petitioners*

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## CERTIFICATE OF SERVICE

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

Electronic notification will be sent to the following:

Pat Lundvall
Kristen T. Gallagher
Amanda M. Perach
McDONALD CARANO LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102

*Attorneys for Respondents (case no. 85525)/Real Parties in Interest (case no. 85656)*

Richard I. Dreitzer
FENNEMORE CRAIG, PC
9275 W. Russell Road, Suite 240
Las Vegas, Nevada 89148

*Attorneys for Real Parties in Interest (case no. 85656)*

Dennis L. Kennedy
Sarah E. Harmon
BAILEY KENNEDY
8984 Spanish Ridge Avenue
Las Vegas, Nevada 89148

*Attorneys for Respondents (case no. 85525)*

Constance. L. Akridge
Sydney R. Gambee
HOLLAND & HART LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134

*Attorneys for Amicus Curiae (case no. 85656)*

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, at Las Vegas, Nevada, addressed as follows:

The Honorable Nancy L. Allf
DISTRICT COURT JUDGE – DEPT. 27
200 Lewis Avenue
Las Vegas, Nevada 89155

*Respondent (case no. 85656)*

Joseph Y. Ahmad
John Zavitsanos
Jason S. McManis
Michael Killingsworth
Louis Liao
Jane L. Robinson
Patrick K. Leyendecker
AHMAD, ZAVITSANOS, & MENSING, PLLC
1221 McKinney Street, Suite 2500
Houston, Texas 77010

Justin C. Fineberg
Martin B. Goldberg
Rachel H. LeBlanc
Jonathan E. Feuer
Jonathan E. Siegelaub
David R. Ruffner
Emily L. Pincow
Ashley Singrossi
LASH & GOLDBERG LLP
Weston Corporate Centre I
2500 Weston Road Suite 220
Fort Lauderdale, Florida 33331

*Attorneys for Respondents (case no. 85525)/Real Parties in Interest (case no. 85656)*

*/s/ Jessie M. Helm*
An Employee of Lewis Roca Rothgerber Christie LLP

encounters continue to accrue.[2] By filing this lawsuit, GTB seeks the recovery of the amount underpaid for each instance of care, plus interest thereon at a rate of 12% per annum under Florida's prompt pay statutes, Fla. Stat. §§ 627.6131(7), 641.3155(6). GTB also requests an order from the Court declaring the rate at which Florida law requires United to pay GTB for its anesthesia services, and a mandatory injunction compelling United to pay GTB at such rates for the out-of-network anesthesiology services Plaintiff renders to United's Members in the future.

**PARTIES**

2. Plaintiff Gulf-to-Bay Anesthesiology Associates, LLC is a limited liability company formed under the laws of Delaware. GTB's principal place of business is located in Hillsborough County, Florida. At all relevant times to the allegations stated herein, GTB has provided professional anesthesia services in Hillsborough County, Florida and the surrounding area.

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3. Upon information and belief, Defendant UnitedHealthcare of Florida, Inc. ("United HMO") is a Florida for-profit corporation with its principal place of business in Hillsborough County, Florida. United HMO operates under a certificate of authority issued by the Florida Office of Insurance Regulation as a health maintenance organization ("HMO") in Florida under Fla. Stat. § 641.17, *et seq.*

4. Upon information and belief, Defendant UnitedHealthcare Insurance Company ("United PPO") is a foreign for-profit corporation with its principal place of business in Hartford, Connecticut. As a preferred provider organization, United PPO operates under a certificate of

[2] This lawsuit and the claims asserted herein do not relate to or involve GTB's right to payment, but rather the applicable rate of payment GTB is entitled to receive for its services. This action does not include any claims in which benefits were denied nor does it challenge any coverage determinations under any health plan that may be subject to the Employee Retirement Income Security Act of 1974.



Lash&Goldberg LLP
LASHGOLDBERG.COM
MIAMI 100 Southeast 2nd Street, Suite 1200 • Miami, Florida 33131-2158 • 305 347 4040 tel 305 347 4050 fax
FT. LAUDERDALE 2500 Weston Road, Suite 220 • Weston, Florida 33331-3615 • 954 384 2500 tel 954 384 2510 fax
TAMPA 142 West Platt Street, Suite 118 • Tampa, FL 33606-2315 • 813-284-4002 tel

authority issued by the Florida Office of Insurance Regulation as a life and health insurer in Florida under Fla. Stat. § 624.01, *et seq.*

5. Upon information and belief, Defendants United PPO and United HMO are affiliated corporate entities and have made centralized decisions regarding the payment of the claims at issue herein. Thus, this action involves common issues of law and fact such that joinder of the claims against United PPO and United HMO in this action will further judicial efficiency and economy and will tend to avoid unnecessary costs or delay.

**JURISDICTION AND VENUE**

6. This Court has jurisdiction pursuant to Fla. Stat. § 26.012(2) because this dispute involves an amount in controversy in excess of $15,000. Plaintiff has claims against United PPO for more than $15,000. Plaintiff has claims against United HMO for more than $15,000.

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7. Defendants are engaged in substantial activity within Florida and maintain offices in Florida.

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8. Pursuant to Fla. Stat. § 47.051, venue is proper in Hillsborough County because United HMO, a Florida corporation, has, and usually keeps, an office for transaction of its customary business in Hillsborough County. Pursuant to Fla. Stat. § 47.051, venue is proper in Hillsborough County because United PPO, a foreign corporation doing business in Florida, has agents and other representatives located in Hillsborough County. In addition, Plaintiff resides in Hillsborough County and its causes of action against United HMO and United PPO have accrued, in whole or in part, in Hillsborough County.





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## FACTS

***Relationship Between Plaintiff and United***

9. GTB began in 1994 as a private practice group of anesthesiologists dedicated to providing high-quality patient-focused anesthesia health care services. Today, GTB employs more than 50 board certified anesthesiologists and more than 100 certified registered nurse anesthetists who provide anesthesia care for all surgical and pain management services at Tampa General Hospital and thirteen other locations in the area. GTB's anesthesiology professionals render anesthesia services to patients, including United Members, in the medical facilities in which they are staffed.

10. United is one of the country's largest health benefit insurers and claims administrators. In exchange for premiums, United pays for health care services rendered to Members of United's commercial health care products and platforms, including prepaid health care plans such as HMOs and traditional insurance products such as indemnity plans and PPO products.[3] United also provides claims processing services, including making the determination of whether a claim should be paid and paying the claim, for employer self-funded plans.

11. Beginning on or around May 20, 2003 and continuing until May 20, 2017, GTB and United were parties to a participation agreement ("Participation Agreement"). Pursuant to the Participation Agreement, GTB agreed to provide anesthesia services to United's Members, and United agreed to pay GTB for such services at a discounted rate from GTB's charges.[4] For the

[3] United also sells products related to government-sponsored programs, such as Medicare Advantage and managed Medicaid. Those products are not at issue in this litigation, which arises only from claims involving Defendants' commercial plans and products.

[4] Pursuant to Section 10.9 of the Participation Agreement, the reimbursement rates are confidential and therefore not specifically identified herein.



Lash&Goldberg LLP
LASHGOLDBERG.COM
MIAMI 100 Southeast 2nd Street, Suite 1200 • Miami, Florida 33131-2158 • 305 347 4040 tel 305 347 4050 fax
FT. LAUDERDALE 2500 Weston Road, Suite 220 • Weston, Florida 33331-3615 • 954 384 2500 tel 954 384 2510 fax
TAMPA 142 West Platt Street, Suite 118 • Tampa, FL 33606-2315 • 813-284-4002 tel

duration of the period during which the Participation Agreement remained in effect, GTB was a participating provider in United's provider network.

12. Under the Participation Agreement, GTB agreed to accept payment from United at a rate that was less than its charges in exchange for the benefits associated with being a participating provider in United's provider network.

***Plaintiff Becomes an Out-of-Network Provider***

13. On May 21, 2017, the Participation Agreement terminated, and Plaintiff thereupon became an out-of-network provider.

14. GTB and United have not renewed, reinstated, or otherwise replaced the Participation Agreement between them. Since May 21, 2017, GTB has not been a party to a contract with United that governs the reimbursement, or any other aspect, of the services provided by GTB to United's Members. Plaintiff has thus been an "out-of-network" provider with respect to United since May 21, 2017.

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15. Despite its out-of-network status, GTB has continued to provide medically necessary, covered anesthesia health care services to United's Members following the termination of the Participation Agreement in May 2017.

16. Since the termination of the Participation Agreement, GTB has not agreed to accept any form of discounted rate from United or to be bound by United's payment policies or rate schedules with respect to any of the health care services provided by GTB to United's Members. Notwithstanding the absence of any such agreement, United has consistently and unilaterally applied an unlawful discount to its payments to GTB for GTB's anesthesia services.

17. United has consistently paid for GTB's anesthesia services rendered to United's Members from May 21, 2017 through the present, but at rates less than GTB is entitled to receive





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by law. United has made unlawful discounted payments to GTB for the services GTB has rendered to United's Members since May 21, 2017. As of October 2017, GTB has been underpaid by more than $1.5 million on more than 1700 patient encounters, which amounts and encounters continue to accrue.

18. Indeed, even though GTB is an out-of-network provider, and therefore has not agreed to accept discounted reimbursement rates from United, United has reimbursed GTB for the services GTB rendered to United's Members on or after May 21, 2017, at rates that are substantially *less* than the discounted rate Plaintiff had previously agreed to accept from United under the Participation Agreement. As an out-of-network provider, GTB has not received the benefits associated with being a participating provider in United's provider network in exchange for which GTB had previously agreed to accept discounted reimbursement rates.



***United's Failure to Reimburse Plaintiff in Accordance with Florida Law***



19. Fla. Stat. § 641.513(5), which is part of Florida's HMO Act, provides that reimbursement for emergency services by providers such as GTB "who do[] not have a contract with the [HMO] shall be the lesser of: (a) The provider's charges; (b) The usual and customary provider charges for similar services in the community where the services were provided; or (c) The charge mutually agreed to by the health maintenance organization and the provider within 60 days of the submittal of the claim."

20. Florida law requires that insurers reimburse out-of-network health care providers, such as GTB, for both the non-emergency and emergency services that such providers render to the insurer's members in accordance with the provisions of Fla. Stat. § 641.513(5). *See* Fla. Stat. § 627.64194(4) ("An insurer must reimburse a nonparticipating provider of services under subsections (2) and (3) as specified in s. 641.513(5), reduced only by insured cost share

responsibilities as specified in the health insurance policy, within the applicable timeframe provided in s. 627.6131.").[5]

21. GTB has not reached agreement with United regarding any charges within sixty days of the submittal of the claims at issue in this action.

22. For the claims at issue in this action, United has underpaid GTB by reimbursing GTB substantially less than GTB's charges and the "usual and customary provider charges for similar services in the community where the services were provided."

23. On average, United has reimbursed GTB for the claims at issue in this action at approximately half of GTB's charges for the services rendered.

24. With full knowledge of its obligations to appropriately reimburse GTB, United authorized or approved GTB's rendering of anesthesiology services to United's Members.

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25. United is aware that GTB provided anesthesiology services to United's Members with the reasonable expectation and understanding that GTB's services had been approved by United and that GTB would be appropriately reimbursed by United.

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26. With full knowledge of its obligations under Florida law described above, United has continued to authorize its Members to receive anesthesiology services from GTB at hospitals and other medical facilities in Hillsborough County and elsewhere throughout central Florida.

27. United's authorization of such services and its acknowledgement of its responsibility for payment is further confirmed by the fact that it has regularly and consistently

[5] *See also* Fla. Stat. § 627.64194(2) (providing that "[a]n insurer is solely liable for payment of fees to a nonparticipating provider of covered emergency services provided to an insured in accordance with the coverage terms of the health insurance policy"); Fla. Stat. § 627.64194(3) (providing that "[a]n insurer is solely liable for payment of fees to a nonparticipating provider of covered nonemergency services provided to an insured in accordance with the coverage terms of the health insurance policy").



Lash&Goldberg LLP
LASHGOLDBERG.COM
MIAMI 100 Southeast 2nd Street, Suite 1200 • Miami, Florida 33131-2158 • 305 347 4040 tel 305 347 4050 fax
FT. LAUDERDALE 2500 Weston Road, Suite 220 • Weston, Florida 33331-3615 • 954 384 2500 tel 954 384 2510 fax
TAMPA 142 West Platt Street, Suite 118 • Tampa, FL 33606-2315 • 813-284-4002 tel

005006

issued payment on GTB's claims for those services at all material times, albeit at rates less than what GTB is owed.

28. United's refusal to appropriately pay GTB for the anesthesiology services GTB has provided to United's Members has caused, and continues to cause, GTB to suffer damages, which are ongoing in nature.

29. GTB is entitled to interest at a rate of 12% per annum on the amounts overdue on the underpaid claims. *See* Fla. Stat. §§ 627.6131(7), 641.3155(6).

30. All conditions precedent to the institution and maintenance of this action have been performed, waived, or otherwise satisfied.

**COUNT I – Violation of Florida Statute § 627.64194 (United PPO)**

31. GTB incorporates herein the allegations of paragraphs 1-30 above.

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32. From May 21, 2017 to present, GTB and United PPO have not had a written contract between them governing the rates at which United PPO must reimburse GTB for its anesthesiology services.

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33. From May 21, 2017 to present, GTB has not been a participating provider in United PPO's network; GTB has been an out-of-network provider since May 21, 2017.

34. From May 21, 2017 to present, GTB has rendered both emergent and non-emergent anesthesiology services to United PPO's Members who were covered under an individual or group health insurance policy issued by United PPO and delivered or issued for delivery in the state of Florida. All such services have been medically necessary, covered services.

35. Fla. Stat. § 627.64194(4) requires that all insurers, such as United PPO, reimburse nonparticipating providers, such as GTB, for both non-emergency services and emergency services



Lash&Goldberg LLP
LASHGOLDBERG.COM
MIAMI 100 Southeast 2nd Street, Suite 1200 • Miami, Florida 33131-2158 • 305 347 4040 tel 305 347 4050 fax
FT. LAUDERDALE 2500 Weston Road, Suite 220 • Weston, Florida 33331-3615 • 954 384 2500 tel 954 384 2510 fax
TAMPA 142 West Platt Street, Suite 118 • Tampa, FL 33606-2315 • 813-284-4002 tel

005007

rendered to the insurer's members according to the methodology set forth in Fla. Stat. § 641.513(5).

36. Pursuant to Fla. Stat. § 641.513(5), nonparticipating providers are entitled to reimbursement for services rendered in an amount equal to the lesser of the provider's charges, the "usual and customary provider charges for similar services in the community where the services were provided," or "[t]he charge mutually agreed to by the health maintenance organization and the provider within 60 days of the submittal of the claim."

37. GTB has not reached agreement with United PPO regarding any charges within sixty days of the submittal of the claims at issue in this action. Therefore, GTB is entitled to reimbursement from United PPO at the lesser of its charges or (if hypothetically different) the "usual and customary provider charges for similar services in the community where the services were provided."



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38. United PPO has reimbursed GTB for the anesthesiology services it has rendered from May 21, 2017 to present at substantially less than GTB's charges.

39. United PPO has reimbursed GTB for the anesthesiology services it has rendered from May 21, 2017 to present at substantially less than the usual and customary provider charges for similar services in the community where GTB rendered such services to United PPO's Members.

40. Accordingly, United PPO has failed to reimburse GTB in accordance with Fla. Stat. § 641.513(5) for both the non-emergent and emergent anesthesiology services GTB rendered to United PPO's Members who were covered under an individual or group health insurance policy issued by United PPO and delivered or issued for delivery in the state of Florida, and United PPO has therefore violated Fla. Stat. § 627.64194(4).

**COUNT II – Violation of Florida Statute § 641.513 (United HMO)**

41. GTB incorporates herein the allegations of paragraphs 1-30 above.

42. From May 21, 2017 to present, GTB and United HMO have not had a written contract between them governing the rates at which United HMO must reimburse GTB for its anesthesiology services.

43. From May 21, 2017 to present, GTB has not been a participating provider in United HMO's network; GTB has been an out-of-network provider since May 21, 2017.

44. From May 21, 2017 to present, GTB has rendered emergency anesthesiology services to United HMO's Members. All such services have been covered services.

45. Fla. Stat. § 641.513(5) provides that all HMOs, such as United HMO, must reimburse non-participating providers for emergent health care services in an amount equal to the lesser of the provider's charges, the "usual and customary provider charges for similar services in the community where the services were provided," or "[t]he charge mutually agreed to by the health maintenance organization and the provider within 60 days of the submittal of the claim."

46. GTB has not reached agreement with United HMO regarding any charges within sixty days of the submittal of the claims at issue in this action. Therefore, GTB is entitled to reimbursement at the lesser of its charges or (if hypothetically different) the "usual and customary provider charges for similar services in the community where the services were provided."

47. United HMO has reimbursed GTB for the emergent anesthesiology services it has rendered to United HMO's Members from May 21, 2017 to present at substantially less than GTB's charges.

48. United HMO has reimbursed GTB for the emergent anesthesiology services it has rendered to United HMO's Members from May 21, 2017 to present at substantially less than the



Lash&Goldberg LLP
LASHGOLDBERG.COM
MIAMI 100 Southeast 2nd Street, Suite 1200 • Miami, Florida 33131-2158 • 305 347 4040 tel 305 347 4050 fax
FT. LAUDERDALE 2500 Weston Road, Suite 220 • Weston, Florida 33331-3615 • 954 384 2500 tel 954 384 2510 fax
TAMPA 142 West Platt Street, Suite 118 • Tampa, FL 33606-2315 • 813-284-4002 tel

usual and customary provider charges for similar services in the community where GTB rendered such services to United HMO's Members.

49. Accordingly, United HMO has failed to reimburse GTB for the emergency anesthesiology services GTB rendered to United HMO's Members in accordance with Fla. Stat. § 641.513(5). United HMO has therefore violated Fla. Stat. § 641.513(5).

**COUNT III – Breach of Contract Implied-in-Fact (United PPO and United HMO)**

50. GTB incorporates herein the allegations of Paragraphs 1-30 above.

51. In addition, and/or in the alternative, from May 21, 2017 to present, GTB and United have not had a written contract between them governing the rates at which United must reimburse GTB for its anesthesiology services.

52. From May 21, 2017 to present, GTB has not been a participating provider in United's network; GTB has been an out-of-network provider since May 21, 2017.

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53. From May 21, 2017 to present, United knew that GTB would provide anesthesiology services to United's Members at all medical facilities at which GTB's anesthesiology professionals are staffed in connection with any surgeries and procedures for which anesthesiology services would be required.

54. From May 21, 2017 to present, United pre-authorized United's Members to have nonemergency surgeries and procedures for which they knew that anesthesiology services would be required and that GTB would provide such anesthesiology services.

55. From May 21, 2017 to present, GTB has rendered both emergent and non-emergent anesthesiology services to United's Members.

56. From May 21, 2017 to present, United has been aware that GTB was entitled to and expected to be paid the fair value of the anesthesiology services it rendered to United's Members.



Lash&Goldberg LLP
LASHGOLDBERG.COM
MIAMI 100 Southeast 2nd Street, Suite 1200 • Miami, Florida 33131-2158 • 305 347 4040 tel 305 347 4050 fax
FT. LAUDERDALE 2500 Weston Road, Suite 220 • Weston, Florida 33331-3615 • 954 384 2500 tel 954 384 2510 fax
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005010

57. From May 21, 2017 to present, GTB understood that United intended to reimburse GTB the fair value of the anesthesiology services GTB rendered to United's Members.

58. From May 21, 2017 to present, United has consistently and regularly approved GTB to provide anesthesiology services in the treatment of United's Members and impliedly agreed to pay GTB the fair value of its services by pre-authorizing various medical facilities and/or surgeons to perform surgeries or procedures, knowing that GTB would be performing anesthesiology services in connection therewith.

59. From May 21, 2017 to present, United has further acknowledged its responsibility for payment and approval of GTB's rendering of anesthesiology services in the treatment of United's Members by regularly and consistently paying GTB for such services, although at rates lower than what GTB is owed.

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60. From May 21, 2017 to present, United has further acknowledged its responsibility for payment and approval of the claims at issue in this action, as all such claims have been processed and adjudicated by United and determined by United to be covered services.

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61. From May 21, 2017 to present, United has breached its implied-in-fact contract with GTB by reimbursing GTB for the claims at issue at less than the fair value of the services provided.

62. At all material times, all necessary conditions precedent for United to perform its obligation to reimburse GTB for the services GTB rendered pursuant to United's implied-in-fact contract with GTB were met, satisfied, and/or waived.

63. United's breach of its implied-in-fact contract with GTB has caused GTB damage in an amount to be determined at trial equal to the difference between the fair value of the services



Lash&Goldberg LLP
LASHGOLDBERG.COM
MIAMI 100 Southeast 2nd Street, Suite 1200 • Miami, Florida 33131-2158 • 305 347 4040 tel 305 347 4050 fax
FT. LAUDERDALE 2500 Weston Road, Suite 220 • Weston, Florida 33331-3615 • 954 384 2500 tel 954 384 2510 fax
TAMPA 142 West Platt Street, Suite 118 • Tampa, FL 33606-2315 • 813-284-4002 tel

005011

provided by GTB and the amounts paid by Defendants to GTB for the anesthesiology services GTB's professionals have rendered to United's Members on and after May 21, 2017.

**COUNT IV – Quantum Meruit (United PPO and United HMO)**

64. GTB incorporates herein the allegations of Paragraphs 1-30 above.

65. In addition, and/or in the alternative, from May 21, 2017, GTB has conferred a direct benefit upon United by, among other things, authorizing and/or approving GTB to provide valuable professional anesthesiology services to United's Members, but then failing to properly reimburse GTB for those authorized or approved services. The direct benefit GTB provided to United is further evidenced by United's prior contractual relationship with GTB.

66. Between May 20, 2003 and May 20, 2017, United and GTB were parties to a Participation Agreement in which GTB agreed to provide anesthesia services to United's Members. In exchange, United agreed to pay GTB for anesthesia services at a discounted rate from GTB's usual and customary charges. During the time in which the Participation Agreement was in full force and effect, United routinely acknowledged that it would be paying GTB for these services by providing GTB with authorization and/or approval for these services.

67. Subsequent to the termination of the Participation Agreement on May 20, 2017, United continued to authorize and/or approve GTB to provide medically necessary services to United's Members. In doing so, United continued to obtain this direct previously contracted-for benefit of the Participation Agreement (i.e., anesthesiology services provided to United's Members), but failed to pay GTB the appropriate rate of payment for those same services.

68. In exchange for premiums, United owes United's Members an obligation to pay for the covered medical services they receive. United derives a direct benefit from GTB's provision of professional anesthesiology services to United's Members because it is through GTB's



Lash&Goldberg LLP
LASHGOLDBERG.COM
MIAMI 100 Southeast 2nd Street, Suite 1200 • Miami, Florida 33131-2158 • 305 347 4040 tel 305 347 4050 fax
FT. LAUDERDALE 2500 Weston Road, Suite 220 • Weston, Florida 33331-3615 • 954 384 2500 tel 954 384 2510 fax
TAMPA 142 West Platt Street, Suite 118 • Tampa, FL 33606-2315 • 813-284-4002 tel

provision of those services that United fulfills its obligations to its Members. Thus, GTB's services allow United to discharge its contractual obligation to its Members.

69. There is no dispute that the anesthesiology services at issue that GTB provided to United's Members were covered services, because United adjudicated them, determined they were covered services, and paid GTB for them, except at an amount less than the fair value of the services. When GTB provides covered anesthesiology services to United's Members, United receives the benefit of having its contractual obligations to its Members discharged.

70. United has knowledge of the benefits GTB conferred on United by providing anesthesiology services to United's Members because, *inter alia*, United received, processed, and adjudicated GTB's claims for such services and determined that they were covered services under United's contracts with its Members.

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71. United has voluntarily accepted and retained the benefits GTB conferred on United by providing anesthesiology services to United's Members because, *inter alia*, United adjudicated GTB's claims for such services and determined that they were covered services under United's contracts with its Members.

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72. Moreover, for the non-emergent anesthesiology services GTB rendered to United's Members, United pre-authorized its Members' surgeries or other procedures with the knowledge that GTB would be providing anesthesiology services to United's Members in connection with the approved procedure and that GTB expected to be reimbursed at the fair value for its services.

73. United voluntarily accepted, retained and enjoyed, and continues to accept, retain, and enjoy, the benefits conferred upon it by GTB, knowing that GTB expected and expects to be paid the fair value for its services. However, United has failed to reimburse GTB the fair value of the services GTB has rendered to United's Members since May 21, 2017.



Lash&Goldberg LLP
LASHGOLDBERG.COM
MIAMI 100 Southeast 2nd Street, Suite 1200 • Miami, Florida 33131-2158 • 305 347 4040 tel 305 347 4050 fax
FT. LAUDERDALE 2500 Weston Road, Suite 220 • Weston, Florida 33331-3615 • 954 384 2500 tel 954 384 2510 fax
TAMPA 142 West Platt Street, Suite 118 • Tampa, FL 33606-2315 • 813-284-4002 tel

005013

74. Under the present circumstances, it would be extraordinarily inequitable for United to fail to reimburse GTB the fair value of the anesthesiology services it rendered to United's Members, while retaining the benefits GTB conferred upon United.

75. Florida law affords non-contracted providers, like GTB, with a cause of action for quantum meruit against payers, like United, in circumstances such as these, when the non-contracted provider discharges the payer's obligations to its Members to pay for covered services, but fails to adequately compensate the non-contracted providers. *See Merkle v. Health Options, Inc.*, 940 So. 2d 1190, 1199 (Fla. 4th DCA 2006) (holding that the trial court erred in dismissing a claim for unjust enrichment where a provider alleged that an insurer benefitted from medical services provided to patient insureds); *Shands Teaching Hosp. and Clinics, Inc. v. Beech Street Corp.*, 899 So. 2d 1222, 1227-28 (Fla. 1st DCA 2005).

005014

76. Accordingly, United is liable in *quantum meruit* to GTB for failing to reimburse GTB the fair value of the services GTB rendered to United's Members and owes as damages the difference between the fair value of the services GTB rendered to United's Members and the amounts United has paid for those services.

005014

**COUNT V – Unjust Enrichment (United PPO and United HMO)**

77. GTB incorporates herein the allegations of Paragraphs 1-30 above.

78. In addition, and/or in the alternative, from May 21, 2017, GTB has conferred a direct benefit upon United by, among other things, authorizing and/or approving GTB to provide valuable professional anesthesiology services to United's Members, but then failing to properly reimburse GTB for those authorized or approved services. The direct benefit GTB provided to United is further evidenced by United's prior contractual relationship with GTB.



Lash&Goldberg LLP
LASHGOLDBERG.COM
MIAMI 100 Southeast 2nd Street, Suite 1200 • Miami, Florida 33131-2158 • 305 347 4040 tel 305 347 4050 fax
FT. LAUDERDALE 2500 Weston Road, Suite 220 • Weston, Florida 33331-3615 • 954 384 2500 tel 954 384 2510 fax
TAMPA 142 West Platt Street, Suite 118 • Tampa, FL 33606-2315 • 813-284-4002 tel

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79. Between May 20, 2003 and May 20, 2017, United and GTB were parties to a Participation Agreement in which GTB agreed to provide anesthesia services to United's Members. In exchange, United agreed to pay GTB for anesthesia services at a discounted rate from GTB's usual and customary charges. During the time in which the Participation Agreement was in full force and effect, United routinely acknowledged that it would be paying GTB for these services by providing GTB with authorization and/or approval for these services.

80. Subsequent to the termination of the Participation Agreement on May 20, 2017, United continued to authorize and/or approve GTB to provide medically necessary services to United's Members. In doing so, United continued to obtain this direct previously-contracted-for benefit of the Participation Agreement (i.e., anesthesiology services provided to United's Members), but failed to pay GTB the appropriate rate of payment for those same services.

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81. In exchange for premiums, United owes United's Members an obligation to pay for the covered medical services they receive. United derives a direct benefit from GTB's provision of anesthesiology services to United's Members because it is through GTB's provision of those services that United fulfills its obligations to its Members. Thus, GTB's services allowed United to discharge its contractual obligation to its Members.

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82. There is no dispute that the anesthesiology services at issue that GTB provided to United's Members were covered services, because United adjudicated them, determined they were covered services, and paid GTB for them, except at an amount less than the fair value of the services. When GTB provides covered anesthesiology services to United's Members, United receives the benefit of having its contractual obligations to its Members discharged.

83. United has knowledge of the benefits GTB conferred on United by providing anesthesiology services to United's Members because, *inter alia*, United received, processed, and



Lash&Goldberg LLP
LASHGOLDBERG.COM
MIAMI 100 Southeast 2nd Street, Suite 1200 • Miami, Florida 33131-2158 • 305 347 4040 tel 305 347 4050 fax
FT. LAUDERDALE 2500 Weston Road, Suite 220 • Weston, Florida 33331-3615 • 954 384 2500 tel 954 384 2510 fax
TAMPA 142 West Platt Street, Suite 118 • Tampa, FL 33606-2315 • 813-284-4002 tel

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adjudicated GTB's claims for such services and determined that they were covered services under United's contracts with its Members.

84. United has voluntarily accepted and retained the benefits GTB conferred on United by providing anesthesiology services to United's Members because, *inter alia*, United adjudicated GTB's claims for such services and determined that they were covered services under United's contracts with its Members.

85. Moreover, for the non-emergent anesthesiology services GTB rendered to United's Members, United pre-authorized its Members' surgeries or other procedures with the knowledge that GTB would be providing anesthesiology services to United's Members in connection with the approved procedure and that GTB expected to be reimbursed at the fair value for its services.

86. United voluntarily accepted, retained and enjoyed, and continues to accept, retain, and enjoy, the benefits conferred upon it by GTB, knowing that GTB expected and expects to be paid the fair value for its services. However, United has failed to reimburse GTB the fair value of the services GTB has rendered to United's Members since May 21, 2017.

005016

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87. Under the present circumstances, it would be extraordinarily inequitable for United to fail to reimburse GTB the fair value of the anesthesiology services it rendered to United's Members, while retaining the benefits GTB conferred upon United.

88. Florida law affords non-contracted providers, like GTB, with a cause of action for unjust enrichment against payers, like United, in circumstances such as these, when the non-contracted provider discharges the payer's obligations to its Members to pay for covered services, but fails to adequately compensate the non-contracted providers. *See Merkle v. Health Options, Inc.*, 940 So. 2d 1190, 1199 (Fla. 4th DCA 2006) (holding that the trial court erred in dismissing a claim for unjust enrichment where a provider alleged that an insurer benefitted from medical



Lash&Goldberg LLP
LASHGOLDBERG.COM
MIAMI 100 Southeast 2nd Street, Suite 1200 • Miami, Florida 33131-2158 • 305 347 4040 tel 305 347 4050 fax
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TAMPA 142 West Platt Street, Suite 118 • Tampa, FL 33606-2315 • 813-284-4002 tel

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services provided to patient insureds); *Shands Teaching Hosp. and Clinics, Inc. v. Beech Street Corp.*, 899 So. 2d 1222, 1227-28 (Fla. 1st DCA 2005).

89. Accordingly, United has been unjustly enriched by failing to reimburse GTB at the fair value of the services GTB rendered to United's Members and owes as damages the difference between the fair value of the services GTB rendered to United's Members and the amounts United has paid for those services.

**COUNT VI – Declaratory Judgment (United PPO and United HMO)**

90. GTB incorporates herein the allegations of Paragraphs 1-30 above.

91. United PPO has reimbursed GTB for the anesthesiology services it has rendered on and after May 21, 2017 at substantially less than GTB's charges and the usual and customary provider charges for similar services in the community where GTB rendered such services to United PPO's Members. Accordingly, United PPO has failed to reimburse GTB in accordance with Fla. Stat. § 641.513(5) for both the non-emergent and emergent anesthesiology services GTB rendered to United PPO's Members, and United PPO has therefore violated Fla. Stat. § 627.64194(4). United PPO continues to reimburse GTB for both emergency and non-emergency anesthesiology services rendered to United PPO's Members at substantially less than GTB's charges and the usual and customary provider charges for similar services in the community where GTB rendered such services to United PPO's Members. United PPO has indicated that it intends to continue to reimburse GTB for anesthesiology services in such an unlawful manner.

92. United HMO has reimbursed GTB for the emergent anesthesiology services it has rendered to United HMO's Members on and after May 21, 2017 at substantially less than GTB's charges and the usual and customary provider charges for similar services in the community where GTB rendered such services to United HMO's Members. Accordingly, United HMO has failed to

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reimburse GTB for the emergency anesthesiology services GTB rendered to United HMO's Members in accordance with Fla. Stat. § 641.513(5). United HMO has therefore violated Fla. Stat. § 641.513(5). United HMO continues to reimburse GTB for emergency anesthesiology services rendered to United HMO's Members at substantially less than GTB's charges and the usual and customary provider charges for similar services in the community where GTB rendered such services to United HMO's Members. United HMO has indicated that it intends to continue to reimburse GTB for emergency anesthesiology services in such an unlawful manner.

93. United has reimbursed GTB for the emergent anesthesiology services it has rendered to United HMO's Members from May 21, 2017 to present at substantially less than the fair value of GTB's services.

94. United continues to reimburse GTB for the emergent and non-emergent anesthesiology services it renders to United's Members at substantially less than the fair value of GTB's services.

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95. GTB and United intend for GTB to continue to provide anesthesiology services to United's Members as an out-of-network provider.

96. Based on the foregoing allegations, real and substantial justiciable controversies exist between United PPO and GTB concerning whether the rates at which United PPO reimburses GTB for emergency and non-emergency anesthesiology services rendered to United PPO's Members violate Fla. Stat. § 627.64194(4).

97. Based on the foregoing allegations, real and substantial justiciable controversies exist between United HMO and GTB concerning whether the rates at which United HMO reimburses GTB for emergency anesthesiology services rendered to United PPO's Members violate Fla. Stat. § 641.513(5).





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98. Based on the foregoing allegations, real and substantial justiciable controversies exist between United and GTB concerning the rates of reimbursement to which GTB is entitled as an out-of-network provider of emergency and non-emergency anesthesiology services to United's Members under the Florida common law doctrines of breach of implied-in-fact contract, *quantum meruit*, and unjust enrichment.

99. These are actual, definite, concrete and substantial controversies that require an immediate determination of GTB's rights of reimbursement and whether the rates of reimbursement that United has paid to GTB comply with Florida law.

100. Declaratory relief is appropriate here because such judgment will serve a useful purpose in clarifying and settling the rates of reimbursement to which GTB is entitled from United for the anesthesiology services GTB renders to United's Members for so long as GTB remains an out-of-network provider.

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101. There is a bona fide, actual, present practical need for a declaration. Declaratory relief will terminate and afford relief from uncertainty, insecurity, and controversy concerning the rates at which United must reimburse GTB for the anesthesiology services GTB continues to render to United's Members as an out-of-network provider.

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102. All antagonistic and adverse interests relating to the declaration sought herein are parties to this action.

103. The relief sought is not merely to seek legal advice of the Court nor does GTB seek answers to questions propounded from mere curiosity.

104. GTB is consequently entitled to a declaration of its rights pursuant to Section 86.021, Florida Statutes.

**PRAYER FOR RELIEF**

WHEREFORE, GTB prays that this Court:



Lash&Goldberg LLP
LASHGOLDBERG.COM
MIAMI 100 Southeast 2nd Street, Suite 1200 • Miami, Florida 33131-2158 • 305 347 4040 tel 305 347 4050 fax
FT. LAUDERDALE 2500 Weston Road, Suite 220 • Weston, Florida 33331-3615 • 954 384 2500 tel 954 384 2510 fax
TAMPA 142 West Platt Street, Suite 118 • Tampa, FL 33606-2315 • 813-284-4002 tel

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(i) enter judgment against Defendants and in GTB's favor, awarding GTB compensatory damages for the anesthesiology services GTB's professionals have rendered to United's Members from May 21, 2017 through the date of judgment;

(ii) award GTB prejudgment and postjudgment interest at a rate of 12% per annum on the amounts overdue on the underpaid claims;

(iii) award GTB its costs;

(iv) enter an order declaring the rate(s) at which United must reimburse GTB for the anesthesiology services GTB renders to United's Members as an out-of-network provider;

(v) issue a mandatory injunction compelling United to reimburse GTB no less than the reimbursement rates to which the Court declares GTB is entitled from United for the anesthesiology services GTB renders to United's Members as an out-of-network provider; and

(vi) grant GTB any and all further relief as the Court deems just and appropriate under the circumstances.

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**JURY DEMAND**

Plaintiff hereby demands a trial by jury for all claims so triable.



Lash&Goldberg LLP
LASHGOLDBERG.COM
MIAMI 100 Southeast 2nd Street, Suite 1200 • Miami, Florida 33131-2158 • 305 347 4040 tel 305 347 4050 fax
FT. LAUDERDALE 2500 Weston Road, Suite 220 • Weston, Florida 33331-3615 • 954 384 2500 tel 954 384 2510 fax
TAMPA 142 West Platt Street, Suite 118 • Tampa, FL 33606-2315 • 813-284-4002 tel

005020

Respectfully Submitted:

**LASH & GOLDBERG LLP**
142 West Platt Street, Suite 118
Tampa, FL 33606-2315
Miami, Florida 33131
Tel: 813-284-4002 / Fax: 305-347-4050
*Counsel for Plaintiff Gulf-to-Bay Anesthesiology Associates, LLC*

By: */s/ Alan D. Lash*
**ALAN D. LASH**
Florida Bar No. 510904
alash@lashgoldberg.com
**JUSTIN C. FINEBERG**
Florida Bar No. 0053716
jfineberg@lashgoldberg.com
**JONATHAN E. FEUER**
Florida Bar No. 0068752
mehren@lashgoldberg.com
**NICHOLAS A. ORTIZ**
Florida Bar No. 117381
nortiz@lashgoldberg.com

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Dated: February 12, 2019

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing document was served on February 12, 2019, via the Florida Courts E-Filing Portal upon counsel of record identified on the below Service List.

By: */s/ Alan D. Lash*
**ALAN D. LASH**





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**SERVICE LIST**

DANIEL ALTER, ESQ.
Dan.alter@gray-robinson.com
SHAYNA A. FREYMAN, ESQ.
Shayna.freyman@gray-robinson.com
GRAY ROBINSON, P.A.
401 East Las Olas Boulevard, Suite 1000
Fort Lauderdale, FL 33301
Telephone: (954) 761-8111

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# EXHIBIT 3



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EXHIBIT 3

IN THE CIRCUIT COURT FOR THE
17TH JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

CASE NO: CACE19-013026 (07)
JUDGE: JACK TUTER

FLORIDA EMERGENCY PHYSICIANS
KANG & ASSOCIATES, M.D., INC., et al.,

Plaintiffs,

vs.

SUNSHINE STATE HEALTH PLAN, INC., et al.,

Defendants.
_____/

**ORDER ON DEFENDANTS' FIRST MOTION TO COMPEL PRODUCTION**



THIS CAUSE came before the Court on Defendants' First Motion to Compel Production. The Court, having reviewed the motion and the responses, having heard argument of counsel, and being otherwise duly advised in the premises, rules as follows:

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This action arises out of the alleged failure by Defendants to pay Plaintiffs for certain emergency medicine services provided by Plaintiffs to patients covered under the commercial healthcare plans underwritten and administered by the Defendants. On February 12, 2020, Plaintiffs, Florida Emergency Physicians Kang & Associates, M.D., Inc.; InPhyNet Contracting Services, LLC; InPhyNet South Broward, LLC; Paragon Contracting Services, LLC; Paragon Emergency Services, LLC; and Southwest Florida Emergency Management, Inc. (collectively "Plaintiffs") filed their Amended Complaint against Defendants, Sunshine State Health Plan, Inc.; Celtic Insurance Company; and Centene Management Company, LLC (collectively "Defendants"), alleging the following causes of action: (1) violation of section 641.513, Florida Statutes (count I); (2) breach of implied-in-fact contract (count II); (3) breach of implied-in-law contract (count III); (4) unjust enrichment (count IV); and (5) declaratory relief (count V).

On September 28, 2020, Defendants filed the instant First Motion to Compel Production (the "Motion to Compel"). In their motion, Defendants seek to compel the production of: (1) Plaintiffs' claims data reflecting Plaintiffs' reimbursements for emergency services from Medicaid Managed Care and Medicare Advantage plans; (2) Plaintiffs' claims data reflecting Plaintiffs' reimbursements for emergency services from traditional fee-for-service Medicaid and Medicare; and (3) documents discussing or analyzing Plaintiffs' cost of care. On October 16, 2020, Plaintiffs filed their Response in Opposition. On October 19, 2020, Defendants filed a Reply in Support of the Motion to Compel. A hearing on the Motion to Compel was held before this Court on October 21, 2020. The parties filed their respective supplemental briefings as requested by the Court on October 28, 2020.

This action is premised on Plaintiffs' allegation that Defendants violated section 641.513(5), Florida Statutes, by reimbursing the claims at issue at substantially less than the statutorily-required amount. *See* Am. Comp. at ¶¶ 1 and 2. In the instant motion, Defendants seek the production of Plaintiffs' claims data for emergency services from Medicare Advantage, Medicaid Managed Care, and traditional fee-for-service Medicare and Medicaid. However, after careful review of the Amended Complaint, the claims at issue are solely comprised of **commercial, non-governmental claims** and do not include any governmental-sponsored products such as Medicare Advantage, Medicaid Managed Care or traditional Medicare or Medicaid. *See* Am. Comp. at ¶ 1. Accordingly, the Court finds Defendants' discovery requests regarding Plaintiffs' claims data for Medicare and Medicaid-based programs and traditional fee-for-service Medicare and Medicaid irrelevant.

The Court also finds Defendants' discovery requests regarding Medicare and Medicaid-based claims reimbursement data not likely to lead to admissible evidence. As recognized in *Baker County Medical Services, Inc. v. Aetna Health Management, LLC*, 31 So. 3d 842, 844 (Fla. 1st DCA 2010), "[r]imbursement to hospitals providing emergency medical services to patients who subscribe

to an HMO that does not have a contract with the hospital is determined according to section 641.513(5), Florida Statutes." Section 641.513(5), states:

> Reimbursement for services pursuant to this section by a provider who does not have a contract with the health maintenance organization shall be the lesser of:
>
> (a) The provider's charges;
>
> (b) The usual and customary provider charges for similar services in the community where the services were provided; or
>
> (c) The charge mutually agreed to by the health maintenance organization and the provider within 60 days of the submittal of the claim.

§ 641.513(5), Fla. Stat. In their Amended Complaint, Plaintiffs assert that for the non-participating claims, Defendants have underpaid Plaintiffs by reimbursing Plaintiffs substantially less than Plaintiffs' charges and the "usual and customary provider charges for similar services in the community where the services were provided." *See* Am. Comp. at ¶ 41.



The court in *Baker* interpreted the term "usual and customary provider charges" under section 641.513(5) to mean the "fair market value" of the services provided which it defined to be "the price that a willing buyer will pay and a willing seller will accept in an arm's-length transaction." *Baker,* 31 So. 3d at 845. The *Baker* court further held that "[i]n determining the fair market value of the services, it is appropriate to consider the amounts billed and the amounts accepted by providers with one exception. The reimbursement rates for Medicare and Medicaid are set by government agencies and cannot be said to be 'arm's-length.'" *Id*. at 845-46. "Moreover, in the emergency medical services context, hospitals do not have the option that private providers have to refuse to provide services to Medicare or Medicaid patients. Thus, it is not appropriate to consider the amounts accepted by providers for patients covered by Medicare and Medicaid." *Id*. at 846. As determined in *Baker*, the amounts billed and accepted to emergency services providers for Medicare and Medicaid based products are not to be considered by the fact finder in determining the fair market value of services under section 641.513(5). Accordingly, and based on the foregoing,

Plaintiffs' objections are hereby **SUSTAINED** and the Motion to Compel is hereby **DENIED** with respect to Defendants' requests for production of Medicare and Medicaid based claims reimbursement data.

Defendants also seek the production of documents discussing or analyzing Plaintiffs' cost of care. This concerns Defendants' Requests for Production No. 32-34.

> Request for Production #32: Documents sufficient to show Plaintiffs' costs of providing care for the claims identified in response to Request No. 1.
>
> Request for Production #33: All documents reflecting, discussing, or identifying the factors Plaintiffs consider when calculating the costs of providing care or services for health care claims, including the claims identified in response to Request No. 1.
>
> Request for Production #34: All documents analyzing or comparing Plaintiffs' costs of providing care to the amount of Plaintiffs' billed charges and/or amounts paid by any payor.

Defendants maintain that Plaintiffs' costs of care is relevant as it has a bearing on the determination of the "fair value" of the services. Plaintiffs objected to the above requests for production mainly on relevance and burden grounds. However, in their responses to Requests of Production No. 33 and 34, Plaintiffs also raised objections on the grounds of attorney-client privilege and/or work product doctrine.

In opposition to the instant motion, Plaintiffs maintain that cost of care is irrelevant and not discoverable in this case. Plaintiffs rely on *Baker* in support of their position. In *Baker*, the First District identified two types of information that is relevant to determining the usual and customary provider charges: (1) the amounts billed/charged, and (2) the amounts accepted, by emergency services providers for commercial claims in the relevant community where the services were provided. Plaintiffs therefore contend that since the determination does not involve any analysis or consideration of an emergency service provider's underlying costs of providing these services and thus any information regarding such costs, the information is irrelevant and not properly discoverable in this case.

Following the hearing on the instant motion, on December 4, 2020, Plaintiffs filed a Notice of Supplemental Authority, attaching an "Order Denying Defendants' Motion to Compel Discovery Regarding Plaintiff's Internal Cost Structure" issued by the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, in case styled *Gulf-to-Bay Anesthesiology Associates, LLC v. Unitedhealthcare of Florida, Inc., et al*., Case No.: 17-CA-011207. In *Gulf-to-Bay*, in denying the motion to compel, the court recognized that section 641.513(5) does not expressly contemplate any analysis for provider costs and that as set forth in *Baker*, the focus should remain on the price of the services, rather than the costs of the services. Stated differently, it is Plaintiffs' position that because neither the statute nor *Baker* identify costs as a factor in the analysis or having any relevance to the determination, providers' costs are irrelevant and not discoverable. However, this Court is not persuaded. As pointed out in Defendants' response, while the *Baker* court held that it was "appropriate to consider…amounts billed and the amounts accepted by providers," the court did not say it was inappropriate to allow discovery into other areas. *Baker*, 31 So. 3d at 845. In sum, the Court finds that *Baker* does not preclude the compelling of the cost of care discovery.

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Furthermore, in *Gulf-to-Bay*, the court found *Giacalone v. Helen Ellis Memorial Hospital Foundation, Inc.*, 8 So. 3d 1232 (Fla. 2d DCA 2009) distinguishable based in part on the fact that the defendant/patient in *Giacalone* had asserted defenses of unconscionability (unreasonable pricing). The court in *Gulf-to-Bay* determined where defendants did not raise any unreasonable pricing claims, either by affirmative defense or counterclaim, the pleadings were focused solely on a statutory analysis that addresses the fair market value of the services provided. However, after review, this Court finds *Gulf-to-Bay* distinguishable. Here, Defendants have raised at least four affirmative defenses relating to the reasonableness of Plaintiffs' charges and pricing.

Moreover, while this Court is mindful that the cases cited by Defendants in support of their position are not directly on point, *i.e.,* involve an out-of-network emergency service provider's

claims against health insurers under section 641.513(5), the Court nonetheless finds that Defendants are entitled to the requested discovery. The cases cited by Defendants found cost of care discovery relevant to analyze the reasonableness and fairness of rates. *See Colomar v. Mercy Hospital, Inc*., 461 F. Supp. 2d 1265, 1272 (S.D. Fla. 2006); *Giacalone v. Helen Ellis Memorial Hospital Foundation, Inc.*, 8 So. 3d 1232 (Fla. 2d DCA 2009); *Gulfcoast Surgery Center, Inc. v. Fisher*, 107 So. 3d 493 (Fla. 2d DCA 2013); *Lawton-Davis v. State Farm Mutual Automobile Insurance Company*, 2016 WL 1383015 (M.D. Fla. Apr. 7, 2016). Further, Plaintiffs have not provided this Court with any other authority in support of their position apart from *Baker* and the non-binding decision of *Gulf-to-Bay.* Accordingly, and based on the foregoing, Plaintiffs' objections are hereby **OVERRULED** and the Motion to Compel is hereby **GRANTED** with respect to Defendants' requests for production of documents discussing or analyzing Plaintiffs' cost of care. This ruling does not apply to any documents which Plaintiffs allege to be protected by the attorney-client privilege and/or work product doctrine. Upon review, should Plaintiffs determine a privilege applies than Plaintiffs shall file a privilege log noting the withheld document and the relevant privilege.

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Accordingly, it is hereby:

**ORDERED** that Defendants' First Motion to Compel Production is hereby **DENIED IN PART AND GRANTED IN PART** for the reasons stated above. Plaintiffs shall provide documents responsive to Requests 32-34, regarding Plaintiffs' costs of emergency services within forty-five (45) days from the date of this Order.

**DONE AND ORDERED** in Chambers, Fort Lauderdale, Florida, this 21st day of December, 2020.

/s/ *Jack Tuter*
JACK TUTER
CIRCUIT JUDGE

Copies Furnished to:
Alan D Lash, Address : alash@lashgoldberg.com
Alan D Lash, Address : lashgoldberg@gmail.com
Alan D Lash, Address : yyzquierdo@lashgoldberg.com
Baxter D. Drennon, Address : bdrennon@wlj.com
Christopher Flynn, Address : cflynn@crowell.com
Collin Kennedy, Address : cdk@hanshawkennedy.com
Collin Kennedy, Address : mrw@hanshawkennedy.com
Daniel Alter, Address : amy.miguelez@gray-robinson.com
Daniel Alter, Address : dan.alter@gray-robinson.com
G. Meredith Parnell, Address : mparnell@crowell.com
Joshua Harris, Address : jharris@azalaw.com
Judy Simmons Henry, Address : jhenry@wlj.com
Justin C. Fineberg, Address : yyzquierdo@lashgoldberg.com
Justin C. Fineberg, Address : jfineberg@lashgoldberg.com
Kevin Leyendecker, Address : kleyendecker@AZALAW.COM
Michael A. Thompson, Address : mthompson@wlj.com
Michael Killingsworth, Address : sliuskos@azalaw.com
Michael Killingsworth, Address : mkillingsworth@azalaw.com
Michael Killingsworth, Address : lpeter@azalaw.com
Michael L Ehren, Address : kevans@lashgoldberg.com
Michael L Ehren, Address : lashgoldberg@gmail.com
Michael L Ehren, Address : mehren@lashgoldberg.com
Michael L. Ehren, Address : kevans@lashgoldberg.com
Michael L. Ehren, Address : mehren@lashgoldberg.com
Michael W. Lieberman, Address : cpulliam@crowell.com
Michael W. Lieberman, Address : rrosenberg@crowell.com
Michael W. Lieberman, Address : mlieberman@crowell.com
Patrick Kevin Leyendecker, Address : etattegrain@azalaw.com
Patrick Kevin Leyendecker, Address : lpeter@azalaw.com
Patrick Kevin Leyendecker, Address : kleyendecker@azalaw.com
Rochelle-Leigh Rosenberg, Address : rrosenberg@crowell.com

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Steven D. Grierson
CLERK OF THE COURT

**MLIM**

D. Lee Roberts, Jr., Esq.
Nevada Bar No. 8877
*lroberts@wwhgd.com*
Colby L. Balkenbush, Esq.
Nevada Bar No. 13066
*cbalkenbush@wwhgd.com*
Brittany M. Llewellyn, Esq.
Nevada Bar No. 13527
*bllewellyn@wwhgd.com*
Phillip N. Smith, Jr., Esq.
Nevada Bar No. 10233
*psmithjr@wwhgd.com*
Marjan Hajimirzaee, Esq.
Nevada Bar No. 11984
*mhajimirzaee@wwhgd.com*
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
Telephone: (702) 938-3838
Facsimile: (702) 938-3864

Daniel F. Polsenberg, Esq.
Nevada Bar No. 2376
*dpolsenberg@lewisroca.com*
Joel D. Henriod, Esq.
Nevada Bar No. 8492
*jhenriod@lewisroca.com*
Abraham G. Smith, Esq.
Nevada Bar No. 13250
*asmith@lewisroca.com*
Lewis Roca Rothgerber Christie LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169-5996
Telephone: (702) 949-8200

*Attorneys for Defendants*

Dimitri D. Portnoi, Esq.(*Admitted Pro Hac Vice*)
*dportnoi@omm.com*
Jason A. Orr, Esq. (*Admitted Pro Hac Vice)*
*jorr@omm.com*
Adam G. Levine, Esq. *(Admitted Pro Hac Vice)*
*alevine@omm.com*
Hannah Dunham, Esq. *(Admitted Pro Hac Vice)*
*hdunham@omm.com*
Nadia L. Farjood, Esq. (*Admitted Pro Hac Vice*)
*nfarjood@omm.com*
O'Melveny & Myers LLP
400 S. Hope St., 18th Floor
Los Angeles, CA 90071
Telephone: (213) 430-6000

K. Lee Blalack, II, Esq.(*Admitted Pro Hac Vice)*
*lblalack@omm.com*
Jeffrey E. Gordon, Esq. *(Admitted Pro Hac Vice)*
*jgordon@omm.com*
Kevin D. Feder, Esq. *(Admitted Pro Hac Vice)*
*kfeder@omm.com*
Jason Yan, Esq. *(Admitted Pro Hac Vice)*
*jyan@omm.com*
O'Melveny & Myers LLP
1625 Eye St. NW
Washington, DC 20006
Telephone: (202) 383-5374

Paul J. Wooten, Esq. *(Admitted Pro Hac Vice)*
*pwooten@omm.com*
Amanda L. Genovese *(Admitted Pro Hac Vice)*
*agenovese@omm.com*
Philip E. Legendy *(Admitted Pro Hac Vice)*
*plegendy@omm.com*
O'Melveny & Myers LLP
Times Square Tower, Seven Times Square
New York, NY 10036
Telephone: (212) 728-5857

**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' 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, SOsocietal VALUE, OR DIFFICULTY OF THE SERVICES THEY PROVIDED**



005031



Case Number: A-19-792978-B

| | |
|---|---|
| UNITEDHEALTH GROUP, INC., a Delaware corporation; UNITED HEALTHCARE INSURANCE COMPANY, a Connecticut corporation; UNITED HEALTH CARE SERVICES INC., dba UNITEDHEALTHCARE, a Minnesota corporation; UMR, INC., dba UNITED MEDICAL RESOURCES, a Delaware corporation; OXFORD HEALTH PLANS, INC., a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., a Nevada corporation; SIERRA HEALTH-CARE OPTIONS, INC., a Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20,<br><br>Defendants. | **HEARING REQUESTED** |



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Defendants UnitedHealth Group, Inc., UnitedHealthcare Insurance Company ("UHIC"), United HealthCare Services, Inc. ("UHS", and together with UHIC, "UHC"), UMR, Inc. ("UMR"), Oxford Health Plans, Inc. ("Oxford"), Sierra Health and Life Insurance Co., Inc. ("SHL"), Sierra Health-Care Options, Inc. ("SHO"), and Health Plan of Nevada, Inc. ("HPN") (collectively "Defendants"), by and through their attorneys of the law firm of Weinberg Wheeler Hudgins Gunn & Dial, LLC, hereby submit the following Motion *in Limine* No. 8, offered in the alternative to Motion *in Limine* No. 7, to preclude Plaintiffs from offering argument or evidence as to the qualitative value, relative value, societal value, or difficulty of the services they provided ("Motion"). This Motion is made and based upon EDCR 2.47, the attached Declaration of Colby Balkenbush, Esq., the following Memorandum of Points and Authorities, the pleadings and papers on file herein, and any argument presented at the time of hearing on this matter.

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

This action concerns the rate of payment for thousands of claims for emergency medical services that TeamHealth Plaintiffs[1] allegedly rendered to members of health benefit plans

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



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administered or insured by Defendants. TeamHealth Plaintiffs contend that they are entitled to 100 percent of their billed charges, which they unilaterally set. Defendants sought discovery on TeamHealth Plaintiffs' costs of performing the emergency medicine services at issue, but this Court held in a February 4, 2021 discovery order that evidence of TeamHealth Plaintiffs' costs—which likely fac-tor into their billed charges and the reasonableness of those charges—was irrelevant to this case.

Through Defendants' Motion in Limine No. 7 to Admit Evidence of Plaintiffs' Costs to Provide Services, Defendants seek an order that allows them to present argument and evidence at trial about the TeamHealth Plaintiffs' actual costs of performing emergency medicine services. But should this Court deny that motion, it should grant this Motion and enter an order that precludes TeamHealth Plaintiffs from presenting argument or evidence about the inherent value of their services. That is, this Court should limit the evidence at trial to the amounts billed and amounts accepted for TeamHealth Plaintiffs' services, consistent with its adoption of the Special Master's Report and Recommendation No. 3 ("R&R #3").



## II. LEGAL ARGUMENT

### A. Legal Standard for Motion in Limine

The Nevada Supreme Court has tacitly approved the use of motions in limine to be within the purview of the district court's discretionary power concerning rulings on the admissibility of evidence. *See State ex. rel Dept. of Highway v. Nevada Aggregates & Asphalt Co.*, 92 Nev. 370, 551 P.2d 1095 (1976). The scope of a motion in limine is rather broad, applying to "any kind of evidence which could be objected to at trial, either as irrelevant or subject to discretionary exclusion as unduly prejudicial." *Clemens v. Am. Warranty Corp.*, 193 Cal. App. 3d 444, 451, 238 Cal. Rptr. 339, 342 (1987). "The usual purpose of motions in limine is to preclude the presentation of evidence deemed inadmissible and prejudicial by the moving party. A typical order in limine excludes the challenged evidence and directs counsel, parties, and witnesses not to refer to the excluded matters during trial. Motions in limine serve other purposes as well. They permit more careful consideration of evidentiary issues than would take place in the heat of battle during trial. They minimize side-bar conferences and disruptions during trial, allowing for



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an uninterrupted flow of evidence." *R & B Auto Ctr., Inc. v. Farmers Grp., Inc.*, 140 Cal. App. 4th 327, 371–72, 44 Cal. Rptr. 3d 426, 462 (2006) (citing *Kelly* v. *New W. Fed. Sav.*, 49 Cal. App. 4th 659, 669–70, 56 Cal. Rptr. 2d 803 (1996)). Such a motion can also be advantageous in avoiding what is obviously a futile attempt to "unring the bell" should the court grant a motion to strike during proceedings before the jury. *Blanks v. Seyfarth Shaw LLP*, 171 Cal. App. 4th 336, 375, 89 Cal. Rptr. 3d 710, 741 (2009) (citation omitted).

**B. This Court Must Apply Its Relevancy Analysis Equally to Both Parties and Exclude Evidence of Any Qualitative or Quantitative Value of TeamHealth Plaintiffs' Emergency Medicine Services**

During discovery, this Court held that TeamHealth Plaintiffs' costs of providing emergency medicine services were not relevant to the claims and defenses in this case. *See* Feb. 4, 2021 Order Denying Ds' Mot. to Compel. The Special Master extended that ruling, holding that the only evidence relevant to the fair market value of TeamHealth Plaintiffs' services is (i) the amounts billed, and (ii) the amounts accepted. R&R #3 ¶ 6.b (citing *Gulf-to-Bay Anesthesiology Associates, LLC v. UnitedHealthCare of Florida, Inc.*, No. 17-CA-011207 (Fla. 13th Jud. Cir. Ct. 2020)).[2] While Defendants adamantly disagree with that narrow view of what is probative of the reasonable value of the disputed services in this case, this Court's reasoning must apply equally to both parties. *See, e.g.*, *Centralian Controls Pty, Ltd. v. Maverick Int'l, Ltd.*, 2018 WL 4113400, at *5 (E.D. Tex. Aug. 29, 2018) (applying the idiom "what is sauce for the goose is sauce for the gander" to preclude either party's expert from offering testimony not specifically set forth in written reports). Therefore, if the amounts billed and the amounts accepted are the only considerations relevant to the reasonable-value analysis, then this Court must also exclude all other quantitative or qualitative inputs or values of the services TeamHealth Plaintiffs would introduce at trial. *See* NRS 48.025(2) ("Evidence which is not relevant is not admissible.").

During discovery, TeamHealth Plaintiffs' witnesses made repeated assertions about the qualitative value of the emergency medicine services they render. For instance, one of

[2] This Court adopted the Special Master's recommendation on August 9, 2021.

TeamHealth Plaintiffs' witnesses described TeamHealth Plaintiffs' supposed value as a "safety net for our community," pointing to TeamHealth Plaintiffs' role in providing medical assistance in the aftermath of the "1 October" shooting and the COVID-19 pandemic. *See, e.g.*, **Exhibit 1**, Dep. of Dr. Scott Scherr ("Scherr Dep.") (May 18, 2021) at 16:9–20 (TeamHealth Plaintiffs are "considered a safety net for [the Las Vegas] community"); 45:10–17 ("I mean, we are the safety net for our community."). The same witness put forward a theory that the emergency medicine services are actually ***priceless***. *Id.* at 50:17–51:1 ("… can you really put a price tag on the emergent care that we provide to [the Las Vegas] community and the multiple lives that we save and the families that we affect? I don't think you can put a price tag on that.").

If the financial costs that go into a service are not relevant to its reasonable value, then neither is any other evidence about what TeamHealth Plaintiff puts into providing these services, whether financial or otherwise. Nor would any value patients receive from the services be relevant, whether it be a quantitative financial value or a qualitative nonmonetary value. Such evidence would not only be irrelevant under this Court's prior rulings, but the admission of such evidence would unfairly prejudice Defendants, confuse the issues for the jury, and mislead the jury by mixing the reasonable-value analysis with the qualitative benefits of health care. *See* NRS 48.035(1) ("Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.").

Defendants therefore move to exclude evidence or argument of any value, financial or otherwise, that TeamHealth Plaintiffs' services provide to their individual patients or to the community. Defendants also move to exclude evidence or argument about any costs, difficulties or challenges TeamHealth Plaintiffs experience as emergency departments that would justify their billed amounts. If only billed amounts and accepted amounts are relevant to the construction of a reasonable value for the disputed services, then TeamHealth Plaintiffs should also be barred from presenting any argument or evidence that they provide a comparatively higher value of services than other emergency departments such that their bills are more reasonable.



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## III. CONCLUSION

If this Court denies Defendants' Motion in Limine Number 7, which seeks admission of TeamHealth Plaintiffs' costs to provide their services, then Defendants move to constrain TeamHealth Plaintiffs' evidence in the same way. This Court should prevent TeamHealth Plaintiffs from presenting their own argument or evidence relating to how any quantitative or qualitative costs or values of its services contribute to its fair market value.

Dated this 21st day of September, 2021.

*/s/ Colby L. Balkenbush*

D. Lee Roberts, Jr., Esq.
Colby L. Balkenbush, Esq.
Brittany M. Llewellyn, Esq.
Phillip N. Smith, Jr., Esq.
Marjan Hajimirzaee, Esq.
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd.
Suite 400
Las Vegas, Nevada 89118

Daniel F. Polsenberg, Esq.
Joel D. Henriod, Esq.
Abraham G. Smith, Esq.
Lewis Roca Rothgerber Christie LLP
3993 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169-5996
Telephone: (702) 949-8200

*Attorneys for Defendants*

Dimitri D. Portnoi, Esq.( *Pro Hac Vice*)
Jason A. Orr, Esq. (*Pro Hac Vice)*
Adam G. Levine, Esq. *(Pro Hac Vice)*
Hannah Dunham, Esq. *(Pro Hac Vice)*
Nadia L. Farjood, Esq. (*Pro Hac Vice*)
O'Melveny & Myers LLP
400 S. Hope St., 18th Floor
Los Angeles, CA 90071

K. Lee Blalack, II, Esq.( *Pro Hac Vice)*
Jeffrey E. Gordon, Esq. *(Pro Hac Vice)*
Kevin D. Feder, Esq. *(Pro Hac Vice)*
Jason Yan, Esq. *(Pro Hac Vice)*
O'Melveny & Myers LLP
1625 Eye St. NW
Washington, DC 20006

Paul J. Wooten, Esq. *(Pro Hac Vice)*
Amanda L. Genovese *(Pro Hac Vice)*
Philip E. Legendy *(Pro Hac Vice)*
O'Melveny & Myers LLP
Times Square Tower, Seven Times Square
New York, NY 10036

**CERTIFICATE OF SERVICE**

I hereby certify that on the 21st day of September, 2021, a true and correct copy of the foregoing **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** 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:

Pat Lundvall, Esq.
Kristen T. Gallagher, Esq.
Amanda M. Perach, Esq.
McDonald Carano LLP
2300 W. Sahara Ave., Suite 1200
Las Vegas, Nevada 89102
plundvall@mcdonaldcarano.com
kgallagher@mcdonaldcarano.com
aperach@mcdonaldcarano.com

Judge David Wall, Special Master
Attention:
Mara Satterthwaite & Michelle Samaniego
JAMS
3800 Howard Hughes Parkway, 11th Floor
Las Vegas, NV 89123
msatterthwaite@jamsadr.com
msamaniego@jamsadr.com

Justin C. Fineberg
Martin B. Goldberg
Rachel H. LeBlanc
Jonathan E. Feuer
Jonathan E. Siegelaub
David R. Ruffner
Emily L. Pincow
Ashley Singrossi
Lash & Goldberg LLP
Weston Corporate Centre I
2500 Weston Road Suite 220
Fort Lauderdale, Florida 33331
jfineberg@lashgoldberg.com
mgoldberg@lashgoldberg.com
rleblanc@lashgoldberg.com
jfeuer@lashgoldberg.com
jsiegelaub@lashgoldberg.com
druffner@lashgoldberg.com
epincow@lashgoldberg.com
asingrassi@lashgoldberg.com

Matthew Lavin
Aaron R. Modiano
Napoli Shkolnik PLLC
1750 Tysons Boulevard, Suite 1500
McLean, Virginia 22102

MLavin@Napolilaw.com
AModiano@Napolilaw.com

Joseph Y. Ahmad
John Zavitsanos
Jason S. McManis
Michael Killingsworth
Louis Liao
Jane L. Robinson
Patrick K. Leyendecker
Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing, P.C
1221 McKinney Street, Suite 2500
Houston, Texas 77010
joeahmad@azalaw.com
jzavitsanos@azalaw.com
jmcmanis@azalaw.com
mkillingsworth@azalaw.com
lliao@azalaw.com
jrobinson@azalaw.com
kleyendecker@azalaw.com

*Attorneys for Plaintiffs*

*/s/ Jessica Rogers*
An employee of WEINBERG, WHEELER, HUDGINS GUNN & DIAL, LLC

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WEINBERG WHEELER HUDGINS GUNN & DIAL

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**DECL**

D. Lee Roberts, Jr., Esq.
Nevada Bar No. 8877
*lroberts@wwhgd.com*
Colby L. Balkenbush, Esq.
Nevada Bar No. 13066
*cbalkenbush@wwhgd.com*
Brittany M. Llewellyn, Esq.
Nevada Bar No. 13527
*bllewellyn@wwhgd.com*
Phillip N. Smith, Jr., Esq.
Nevada Bar No. 10233
*psmithjr@wwhgd.com*
Marjan Hajimirzaee, Esq.
Nevada Bar No. 11984
*mhajimirzaee@wwhgd.com*
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
Telephone: (702) 938-3838
Facsimile: (702) 938-3864

Daniel F. Polsenberg, Esq.
Nevada Bar No. 2376
*dpolsenberg@lewisroca.com*
Joel D. Henriod, Esq.
Nevada Bar No. 8492
*jhenriod@lewisroca.com*
Abraham G. Smith, Esq.
Nevada Bar No. 13250
*asmith@lewisroca.com*
Lewis Roca Rothgerber Christie LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169-5996
Telephone: (702) 949-8200

*Attorneys for Defendants*

Dimitri D. Portnoi, Esq.(*Admitted Pro Hac Vice*)
*dportnoi@omm.com*
Jason A. Orr, Esq. (*Admitted Pro Hac Vice)*
*jorr@omm.com*
Adam G. Levine, Esq. *(Admitted Pro Hac Vice)*
*alevine@omm.com*
Hannah Dunham, Esq. *(Admitted Pro Hac Vice)*
*hdunham@omm.com*
Nadia L. Farjood, Esq. (*Admitted Pro Hac Vice*)
*nfarjood@omm.com*
O'Melveny & Myers LLP
400 S. Hope St., 18th Floor
Los Angeles, CA 90071
Telephone: (213) 430-6000

K. Lee Blalack, II, Esq.(*Admitted Pro Hac Vice)*
*lblalack@omm.com*
Jeffrey E. Gordon, Esq. *(Admitted Pro Hac Vice)*
*jgordon@omm.com*
Kevin D. Feder, Esq. *(Admitted Pro Hac Vice)*
*kfeder@omm.com*
Jason Yan, Esq. *(Admitted Pro Hac Vice)*
*jyan@omm.com*
O'Melveny & Myers LLP
1625 Eye St. NW
Washington, DC 20006
Telephone: (202) 383-5374

Paul J. Wooten, Esq. *(Admitted Pro Hac Vice)*
*pwooten@omm.com*
Amanda L. Genovese *(Admitted Pro Hac Vice)*
*agenovese@omm.com*
Philip E. Legendy *(Admitted Pro Hac Vice)*
*plegendy@omm.com*
O'Melveny & Myers LLP
Times Square Tower, Seven Times Square
New York, NY 10036
Telephone: (212) 728-5857

**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

**DECLARATION OF COLBY L. BALKENBUSH, ESQ. IN SUPPORT OF DEFENDANTS' MOTIONS IN LIMINE**

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

Defendants.

I, COLBY L. BALKENBUSH, declare as follows:

1. I am an attorney licensed to practice law in the State of Nevada, a partner at the law firm of Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC, counsel for Defendants in the above-captioned matter.

2. This Declaration is submitted in support of Defendants' Motions in Limine. I have personal knowledge of the matters set forth herein and, unless otherwise stated, am competent to testify to the same if called upon to do so.

3. On September 16, 2021, I sent an email to Plaintiffs' counsel Pat Lundvall listing the motions in limine that Defendants were contemplating filing.

4. On September 17, 2021, in compliance with EDCR 2.47, I had a meet and confer phone call with Plaintiffs' counsel Pat Lundvall and John Zavitsanos to determine whether a compromise could be reached on Defendants' motions in limine. Other counsel for Plaintiffs may also have been on the phone call. Defendants' counsel D. Lee Roberts, Jr. and Dimitri Portnoi were also on this meet and confer call.

5. The following motions in limine were the subject of the phone call:

MIL 1. Motion to authorize Defendants to offer evidence relating to Plaintiffs' agreements with other market players and related negotiations.

MIL 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



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negotiations.

MIL 3. Motion to authorize Defendants to offer evidence relating to Plaintiffs' decision-making and process for setting billed charges.

MIL 4. Motion offered in the alternative to MIL No. 3, to preclude Plaintiffs from offering evidence that their billed charges were reasonable or discussing United's strategy for setting in-network rates and out-of-network rates for the disputed claims.

MIL 5. Motion to authorize Defendants to introduce evidence as to the reasonableness of Plaintiffs' billed charges.

MIL 6. Motion offered in the alternative to MIL No. 5, to preclude Plaintiffs from offering evidence that their billed charges were reasonable.

MIL 7. Motion to authorize Defendants to offer evidence of the costs of the services that Plaintiffs provided.

MIL 8. Motion 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.

MIL 9. Motion 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.

MIL 10. Motion offered in the alternative to MIL No. 9, to preclude Plaintiffs from discussing Defendants' organizational, management, and ownership structure, including flow of funds between related entities, operating companies, parent companies, and subsidiaries.

MIL 11. Motion to authorize Defendants to offer evidence relating to Plaintiffs' strategy and deliberations regarding negotiations with Defendants.

MIL 12. Motion offered in the alternative to MIL No. 11 to preclude Plaintiffs from offering evidence relating to Defendants' strategy and deliberations regarding negotiations with Plaintiffs.

MIL 13. Motion to authorize Defendants to offer evidence relating to Plaintiffs' collection practices for healthcare claims.



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MIL 14. Motion offered in the alternative to 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.

MIL 15. Motion to preclude Plaintiffs from offering evidence that they do not balance bill members.

MIL 16. Motion to preclude Plaintiffs from offering evidence relating to most claims with dates of service on or after January 2020, claims paid pursuant to government programs, claims resolved through a negotiated agreement, claims that Defendants partially denied, and claims that Plaintiffs did not submit to one of the Defendants.

MIL 17. Motion to preclude Plaintiffs from offering evidence of Defendants' size, wealth, or market power.

MIL 18. Motion to preclude Plaintiffs from contesting any of Defendants' defenses that are based on the line-level detail in Defendant's produced claims data, and from offering evidence against Defendants based on the same.

MIL 19. Motion to preclude Plaintiffs from offering evidence of Plaintiffs' and their representatives' discussions with Data iSight.

MIL 20. Motion to preclude Plaintiffs from offering evidence relating to the "Yale Study," Defendants' discussions with Zack Cooper, or the Center for Health Policy at Brookings study; and from offering evidence regarding Defendants' lobbying activities relating to balance billing.

MIL 21. Motion to preclude Plaintiffs from offering evidence relating to any of Defendants' filings with the Securities and Exchange Commission or other corporate filings.

MIL 22. Motion to preclude Plaintiffs from offering evidence relating to Defendants' general corporate profits, or from characterizing medical cost savings or administrative fees earned from out-of-network programs as profits or corporate profits.

MIL 23. Motion to preclude Plaintiffs from offering evidence relating to Defendants' executives' compensation.



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MIL 24. Motion to authorize Defendants to refer to Plaintiffs as the "TeamHealth Plaintiffs," and to preclude Plaintiffs from referring to themselves as doctors, physicians, or healthcare providers, or from arguing that granting damages in Plaintiffs' favor would result in a damages award to a doctor, physician, or healthcare provider.

MIL 24b. Motion offered in the alternative to MIL No. 24, to preclude Plaintiffs from referring collectively to Defendants as "United" and requiring Plaintiffs instead to refer to each Defendant entity separately by its individual name.

MIL 25. Motion to preclude Plaintiffs from offering evidence relating to any emergency room service they provided in connection with the 2017 Las Vegas shooting or other public disaster.

MIL 26. Motion to preclude Plaintiffs from offering evidence relating to the Ingenix settlement.

MIL 27. Motion to preclude Plaintiffs from offering evidence relating to complaints by providers or members about United's out-of-network payments or rates; and from arguing that the absence of complaints about Plaintiffs' billed charges is evidence of the reasonableness of those charges.

MIL 28. Motion to preclude Plaintiffs from offering evidence relating to any of Defendants' employees' performance reviews.

MIL 29. Motion to preclude Plaintiffs from offering evidence relating to Defendants' evaluation and development of a company that would offer a service similar to MultiPlan and Data iSight; and/or the impact that such a company would have on MultiPlan financially or otherwise.

MIL 30. Motion to preclude Plaintiffs from offering evidence relating to Defendants' out-of-network programs that do not apply to emergency services claims, including but not limited to: Facility R&C, MNRP, Pay the Enrollee, and projects focused on lab or facility claims.

MIL 31. Motion to preclude Plaintiffs from arguing or offering evidence that Plaintiffs' RICO conspiracy claims involve Defendants that never utilized Data iSight or disputed

claims that were not priced and/or adjudicated using Data iSight.

MIL 32. Motion to preclude Plaintiffs from offering evidence relating to conduct on or after January 2020, because disputes relating to claims from that date forward must be resolved exclusively pursuant to the mandatory dispute resolution mechanisms set forth by Nevada Statutes.

MIL 33. Motion to preclude Plaintiffs from offering evidence of wanton or reckless conduct, given that Plaintiffs cannot succeed on a breach of implied covenant of good faith and fair dealing claim without making a triable issue of whether Plaintiffs are a sophisticated party who cannot bring such a claim.

MIL 34. Motion to preclude Plaintiffs from arguing or offering evidence that Defendants tried to delay trial and/or litigation as part of a strategy to not pay Plaintiffs a reasonable rate on the disputed claims, or to delay paying Plaintiffs a reasonable rate on those claims.

MIL 35. Motion to pre-admit certain evidence.

MIL 36. Motion to preclude Plaintiffs from offering evidence related to the amount of punitive damages that should be awarded until the conclusion of the liability phase of the trial.

MIL 37. Motion to preclude Plaintiffs from offering evidence relating to services provided in response to the COVID-19 pandemic, or difficulties that Plaintiffs experienced as a result of the COVID-19 pandemic.

6. We appeared to reach agreement with Plaintiffs on certain motion in limine issues as follows:

- Plaintiffs agreed in principle Defendants' proposed motion that they be precluded from offering any evidence related to the Defendants' executive compensation so long as the requirement was reciprocal. However, Plaintiffs wanted to see the agreement memorialized in a stipulation before formalizing the agreement. Defendants are amenable to this being a reciprocal requirement.

- Plaintiffs agreed in principle to Defendants' proposed motion that they be precluded from offering any evidence relating to Defendants' employees' performance reviews so long as this requirement was reciprocal. However, Plaintiffs wanted to see the agreement memorialized in a stipulation before formalizing the agreement. Defendants are amenable to this being a reciprocal requirement.

- As to Defendants' proposed motion in limine to pre-admit certain key evidence, Plaintiffs proposed that the Defendants wait to file that motion until after the Parties have exchanged exhibit lists and objections to same so that each side can determine if the issues in the motion may be narrowed or if the motion may ultimately be unnecessary. Based on Plaintiffs' request, Defendants have not filed their proposed motion in limine to pre-admit certain evidence.

- Plaintiffs agreed in principle to Defendants' motion to preclude Plaintiffs from offering evidence related to the amount of punitive damages that should be awarded until the conclusion of the liability phase of the trial. However, Plaintiffs wanted to see the agreement memorialized in a stipulation before formalizing the agreement and requested that the stipulation track the language of NRS 42.005.

7. As to Defendants' proposed motion to preclude Plaintiffs from offering evidence relating to Defendants' out-of-network programs that do not apply to emergency services, Plaintiffs appeared to agree in principle to this motion but wanted to see a list of all of Defendants' out-of-network programs that they would be precluded from referring to before memorializing this agreement.

8. As to Defendants' other proposed motions in limine listed above, the Parties were not able to reach agreement on them despite conferring in good faith. Therefore, these motions are ripe for the Court's consideration.

9. Given that the meet and confer call occurred on September 17, 2021 and the deadline to file motions in limine and motions for summary judgment was September 21, 2021, the Parties were not able to memorialize the above described agreements in stipulations prior to today's filing deadline. Therefore, Defendants have proposed that, after each side files their respective motions in limine today, the Parties work on drafting stipulations to memorialize the above agreements and that those stipulations be finalized prior to the September 29, 2021 motion in limine opposition deadline. Once those stipulations are finalized, Defendants intend to withdraw the motions in limine filed today where the Parties have reached agreement.

10. On September 19, 2021, I sent an email to Pat Lundvall and John Zavitsanos, counsel for Plaintiffs, notifying them of two additional motions in limine the Defendants were considering filing. Those motions were:

(1) A motion to exclude Plaintiffs' non-retained expert Dr. Joseph Crane from offering

expert testimony on the grounds that (1) he is not a proper non-retained expert witness and (2) his opinions are not relevant given the Court's prior discovery orders; and

(2) A motion to strike Plaintiffs' expert David Leathers' supplemental expert report on the grounds that it was not served by the rebuttal expert deadline. The motion will also seek to strike Leathers' supplemental analysis associated with his initial report that was served on Defendants the night before his expert deposition.

11. On September 20, 2021, in compliance with EDCR 2.47, I had a meet and confer call with Plaintiffs' counsel Jane Robinson on these two proposed motions. We conferred in good faith but were not able to reach agreement on them. Therefore, these two motions in limine are also ripe for the Court's consideration.

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

Executed: September 21, 2021.

*/s/ Colby L. Balkenbush*
Colby L. Balkenbush



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# EXHIBIT 1

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EXHIBIT 1

DISTRICT COURT

CLARK COUNTY, NEVADA

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|---|---|
| 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,<br><br>Plaintiffs,<br><br>vs.<br><br>UNITEDHEALTH GROUP, INC., a Delaware corporation; UNITED HEALTHCARE INSURANCE COMPANY, a Connecticut corporation; UNITED HEALTH CARE SERVICES INC., dba UNITEDHEALTHCARE, a Minnesota corporation; UMR, INC., dba UNITED MEDICAL RESOURCES, a Delaware corporation, OXFORD HEALTH PLANS, INC., a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., a Nevada corporation; SIERRA HEALTH-CARE OPTIONS, INC., a Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20,<br><br>Defendants.<br>_____ | CASE NO: A-19-792978-B<br><br>DEPT NO: 27<br><br>***ATTORNEYS' EYES ONLY***<br><br>VIDEOTAPED DEPOSITION OF<br>DR. SCOTT SCHERR<br><br>TUESDAY, MAY 18, 2021<br><br>REPORTED BY:<br>BRITTANY CASTREJON, RPR, CRR, NV CCR #926<br><br>JOB NO.: 760293 |

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VIDEOTAPED DEPOSITION OF DR. SCOTT SCHERR, held at Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC, 6385 South Rainbow Boulevard, Suite 400, Las Vegas, Nevada 89118, on TUESDAY, MAY 18, 2021, at 9:01 a.m., before Brittany Castrejon, Certified Court Reporter, in and for the State of Nevada.

APPEARANCES:

For Plaintiffs:

LASH & GOLDBERG LLP
BY: JONATHAN FEUER, ESQ. (Via Zoom)
2500 Weston Road
Suite 220
Fort Lauderdale, Florida 33331
305-347-4040
jfeuer@lashgoldberg.com

--AND--

MCDONALD CARANO
BY: AMANDA PERACH, ESQ.
2300 West Sahara Avenue
Suite 1200
Las Vegas, Nevada 89102
702-873-4100
aperach@mcdonaldcarano.com

For Defendants:

WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
BY: D. LEE ROBERTS, JR., ESQ.
6385 South Rainbow Boulevard
Suite 400
Las Vegas, Nevada 89118
702-938-3838
lroberts@wwhgd.com

Also Present: Terrell Holloway, Videographer

**Q. Was he formally assigned as a mentor to you when you were an x-ray tech?**

A. No. Just met him during clinical shifts in the ER or the trauma center and respected the work that he did.

**Q. Was your relationship with Dr. Carrison part of the reason you decided to go into emergency medicine?**

A. Yes, sir.

**Q. Tell me about -- a little bit more about why you chose emergency medicine as your specialty.**

A. Yeah, it kind of fits my personality, high paced. You know, you get a knowledge base of a lot of different things. And really, were the first -- first folks for any disasters in the community, you know, including this last pandemic that lasted greater than 15 months, and I was the medical director for Sunrise Hospital during the October 1st shooting. So, you know, myself and my team members, 20 emergency physicians, cared for over 260 patients that night and only lost 12. So we're considered a safety net for our community.

**Q. You said that you worked at UMC for six months; correct?**

A. Uh-huh.

**Q. And what was your role at UMC for those six months?**

BY MR. ROBERTS:

**Q. Without regard to any specific contract between Fremont and any hospital, can you explain to me how hospital subsidies generally work?**

MS. PERACH: Again, the court has already determined that sources of payment from third parties are outside the scope of this case, and on that basis, I'm going to instruct the witness not to respond.

BY MR. ROBERTS:

**Q. If someone shows up to an emergency room with a medical emergency, is Fremont obligated to treat those patients regardless of their ability to pay?**

MS. PERACH: Objection. Calls for a legal conclusion. You may proceed.

THE WITNESS: Yes. I mean, we are the safety net for our community. Each physician does not ask of insurance prior to rendering emergent care.

BY MR. ROBERTS:

**Q. Is it your understanding that you have that obligation directly, or does the hospital have that obligation directly?**

MS. PERACH: Objection. Compound. Calls for a legal conclusion.

MR. ROBERTS: Let me restate.

///

agreements -- well, let me strike that objection. Just one moment.

Can you restate that question?

MR. ROBERTS: Yes.

BY MR. ROBERTS:

**Q. Are the amounts billed to United from the chargemasters based in part upon what other payers are paying Fremont for similar services?**

MS. PERACH: Okay. Same objections as previously. The court has already determined that the setting of charges is outside the scope of this case. Information relating to the setting of charges is outside the scope of this case and is not discoverable.

And on that basis, I will instruct the witness not to respond.

BY MR. ROBERTS:

**Q. In your own words, tell me how much money Fremont is entitled to receive from the United defendants when they treat one of their insured members?**

MS. PERACH: Objection. Lacks foundation and vague and ambiguous.

THE WITNESS: Well, you know, I mean, can you really put a price tag on the emergent care that we provide to our community and the multiple lives that we save and the families that we affect? I don't think you



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can put a price tag on that.
BY MR. ROBERTS:
**Q. Do you bill commercial payers like the United defendants more to subsidize the free care you're required to provide by law?**
MS. PERACH: Objection. Outside the scope of this case, and the court has already ruled that payments from third-party sources are not discoverable.
On that basis, I will instruct the witness not to respond.
And, also, with respect to the fact that it's asking about the setting of rates and charges.
BY MR. ROBERTS:
**Q. Does Fremont currently have any type of joint venture agreement with any of the Nevada hospitals which you staff?**
MS. PERACH: Objection. The court has already ruled that questions and information relating to the corporate structure of the plaintiff provider entities is outside the scope of this case, and on that basis, I will instruct the witness not to respond.
BY MR. ROBERTS:
**Q. Is Fremont currently accepting less money from other payers than it is currently billing to United in this lawsuit?**


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STATE OF NEVADA )
) SS:
COUNTY OF CLARK )

CERTIFICATE OF REPORTER

I, Brittany J. Castrejon, a Certified Court Reporter licensed by the State of Nevada, do hereby certify: That I reported the VIDEOTAPED DEPOSITION OF DR. SCOTT SCHERR, on TUESDAY, MAY 18, 2021, at 9:01 a.m.;

That prior to being deposed, the witness was duly sworn by me to testify to the truth. That I thereafter transcribed my said stenographic notes into written form, and that the typewritten transcript is a complete, true and accurate transcription of my said stenographic notes. That the reading and signing of the transcript was requested.

I further certify that I am not a relative, employee or independent contractor of counsel or of any of the parties involved in the proceeding; nor a person financially interested in the proceeding; nor do I have any other relationship that may reasonably cause my impartiality to be questioned.

IN WITNESS WHEREOF, I have set my hand in my office in the County of Clark, State of Nevada, this 25th day of May, 2021.

Brittany J. Castrejon

Brittany J. Castrejon, RPR, CRR, CCR #926



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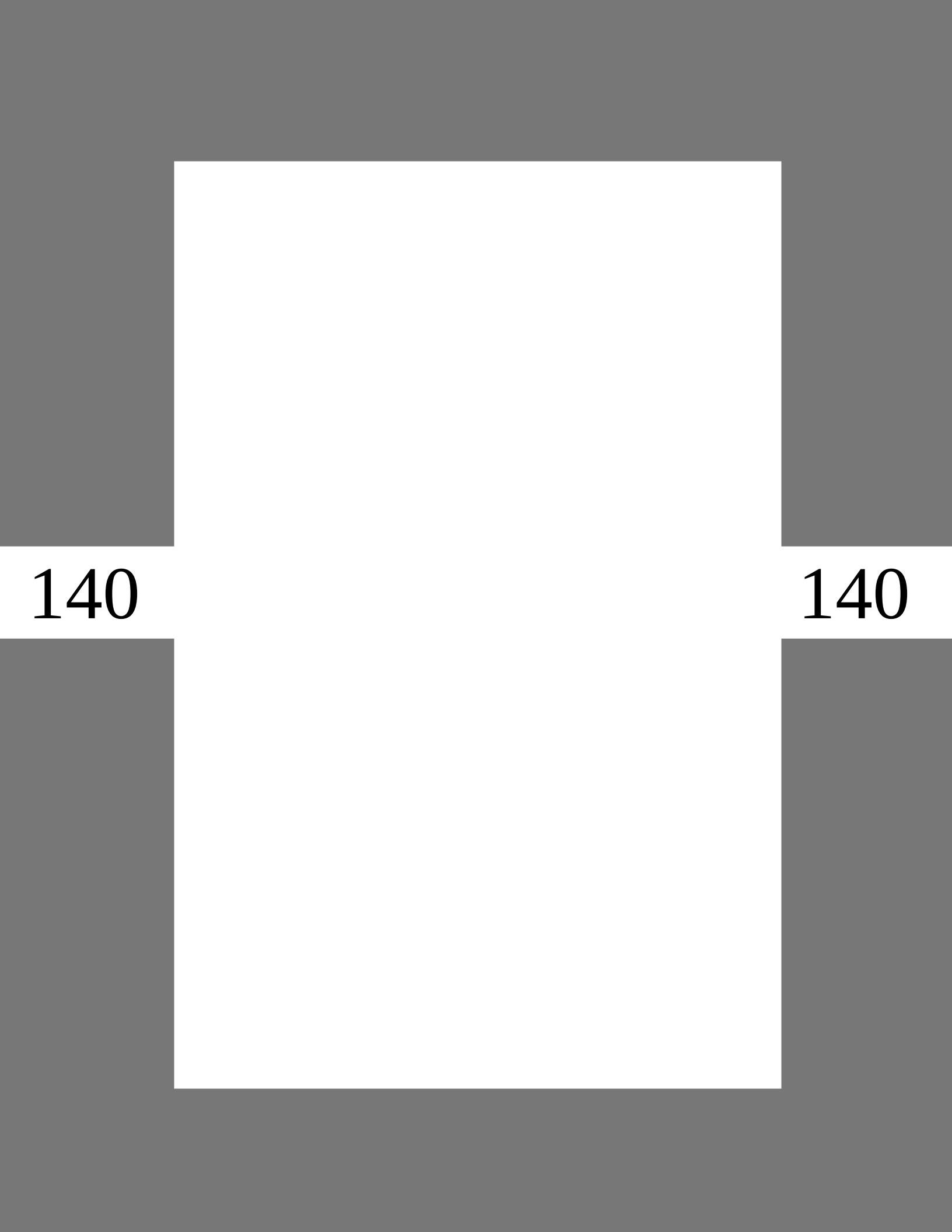
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**MLIM**

D. Lee Roberts, Jr., Esq.
Nevada Bar No. 8877
*lroberts@wwhgd.com*
Colby L. Balkenbush, Esq.
Nevada Bar No. 13066
*cbalkenbush@wwhgd.com*
Brittany M. Llewellyn, Esq.
Nevada Bar No. 13527
*bllewellyn@wwhgd.com*
Phillip N. Smith, Jr., Esq.
Nevada Bar No. 10233
*psmithjr@wwhgd.com*
Marjan Hajimirzaee, Esq.
Nevada Bar No. 11984
*mhajimirzaee@wwhgd.com*
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
Telephone: (702) 938-3838
Facsimile: (702) 938-3864

Daniel F. Polsenberg, Esq.
Nevada Bar No. 2376
*dpolsenberg@lewisroca.com*
Joel D. Henriod, Esq.
Nevada Bar No. 8492
*jhenriod@lewisroca.com*
Abraham G. Smith, Esq.
Nevada Bar No. 13250
*asmith@lewisroca.com*
Lewis Roca Rothgerber Christie LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169-5996
Telephone: (702) 949-8200

*Attorneys for Defendants*

Dimitri D. Portnoi, Esq.(*Admitted Pro Hac Vice*)
*dportnoi@omm.com*
Jason A. Orr, Esq. (*Admitted Pro Hac Vice)*
*jorr@omm.com*
Adam G. Levine, Esq. *(Admitted Pro Hac Vice)*
*alevine@omm.com*
Hannah Dunham, Esq. *(Admitted Pro Hac Vice)*
*hdunham@omm.com*
Nadia L. Farjood, Esq. (*Admitted Pro Hac Vice*)
*nfarjood@omm.com*
O'Melveny & Myers LLP
400 S. Hope St., 18th Floor
Los Angeles, CA 90071
Telephone: (213) 430-6000

K. Lee Blalack, II, Esq.(*Admitted Pro Hac Vice)*
*lblalack@omm.com*
Jeffrey E. Gordon, Esq. *(Admitted Pro Hac Vice)*
*jgordon@omm.com*
Kevin D. Feder, Esq. *(Admitted Pro Hac Vice)*
*kfeder@omm.com*
Jason Yan, Esq. *(Admitted Pro Hac Vice)*
*jyan@omm.com*
O'Melveny & Myers LLP
1625 Eye St. NW
Washington, DC 20006
Telephone: (202) 383-5374

Paul J. Wooten, Esq. *(Admitted Pro Hac Vice)*
*pwooten@omm.com*
Amanda L. Genovese *(Admitted Pro Hac Vice)*
*agenovese@omm.com*
Philip E. Legendy *(Admitted Pro Hac Vice)*
*plegendy@omm.com*
O'Melveny & Myers LLP
Times Square Tower, Seven Times Square
New York, NY 10036
Telephone: (212) 728-5857

**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' 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,**



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| UNITEDHEALTH GROUP, INC., a Delaware corporation; UNITED HEALTHCARE INSURANCE COMPANY, a Connecticut corporation; UNITED HEALTH CARE SERVICES INC., dba UNITEDHEALTHCARE, a Minnesota corporation; UMR, INC., dba UNITED MEDICAL RESOURCES, a Delaware corporation; OXFORD HEALTH PLANS, INC., a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., a Nevada corporation; SIERRA HEALTH-CARE OPTIONS, INC., a Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20,<br><br>Defendants. | **PARENT COMPANIES, AND SUBSIDIARIES**<br><br>**HEARING REQUESTED** |



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Defendants UnitedHealth Group, Inc., UnitedHealthcare Insurance Company ("UHIC"), United HealthCare Services, Inc. ("UHS", and together with UHIC, "UHC"), UMR, Inc. ("UMR"), Oxford Health Plans, Inc. ("Oxford"), Sierra Health and Life Insurance Co., Inc. ("SHL"), Sierra Health-Care Options, Inc. ("SHO"), and Health Plan of Nevada, Inc. ("HPN") (collectively "Defendants"), by and through their attorneys of the law firm of Weinberg Wheeler Hudgins Gunn & Dial, LLC, hereby submit the following Motion in Limine No. 9 to authorize Defendants to offer evidence and argument related to Plaintiffs organizational, management, and ownership structure, including flow of funds between related entities, operating companies, parent companies, and subsidiaries ("Motion").

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This Motion is made and based upon EDCR 2.47, the attached Declaration of Colby Balkenbush, Esq., the following Memorandum of Points and Authorities, the pleadings and papers on file herein, and any argument presented at the time of hearing on this matter.

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

Non-party TeamHealth Holdings, Inc. ("TeamHealth") is the controlling intermediary between its affiliated entities and health plans like those administered or issued by Defendants. TeamHealth, in turn, is itself ultimately owned and/or controlled by private equity business Blackstone, Inc. ("Blackstone"), a publicly traded company (NYSE: BX). TeamHealth



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Plaintiffs'[1] own pleadings contend that they are a "part of the" TeamHealth "organization, *see* First Amended Complaint ("FAC") ¶ 3, and that TeamHealth has negotiated and dealt with UnitedHealthcare entities on their behalf, *see id.* ¶¶ 108–109—thus making TeamHealth an agent of TeamHealth Plaintiffs for purposes of this case. In fact, each and every one of TeamHealth Plaintiffs' witnesses—including their NRCP 30(b)(6) corporate designees—were employees of *TeamHealth* rather than Fremont, TPN, or Ruby Crest, the named plaintiffs in this action. And to promote the attorney-client privilege, in another example of coordination, the TeamHealth Plaintiffs have insisted throughout this case that *TeamHealth's* in-house counsel should be considered *their* in-house counsel. TeamHealth Plaintiffs are but the Nevada appendage to a single, coordinated, and nationwide enterprise.

In its February 4, 2021 discovery order, this Court denied Defendants' motion to compel documents related to TeamHealth Plaintiffs' corporate structure and finances, holding that these subjects "are not relevant to the claims or defenses in this case." At trial, however, Defendants need to describe TeamHealth Plaintiffs' corporate structure and relationship to TeamHealth and Blackstone. Defendants seek to introduce this evidence only to lay appropriate foundation. Documentary and testimonial evidence will reference TeamHealth and Blackstone as decision makers, meeting attendees, and email correspondents. The evidence will also show that each subordinate entity pays dividends or distributions to its upline owner. The jury must have a simple, general understanding of this enterprise's structure—such as a demonstrative organizational chart—or they will lack the context to understand the import of evidence introduced by both TeamHealth Plaintiffs and Defendants. Indeed, Defendants cannot ask TeamHealth Plaintiffs' witnesses where they work—a basic foundational question—without implicating TeamHealth, since no witness at trial is employed by TeamHealth Plaintiffs.

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

In addition, TeamHealth Plaintiffs' relationships with TeamHealth and Blackstone bear directly on the sophistication of TeamHealth Plaintiffs as commercial actors—an element of their cause of action for tortious breach of the covenant of good faith and fair dealing. Defendants have moved for summary judgment on this claim because TeamHealth Plaintiffs are sophisticated parties who cannot maintain a claim for tortious breach. But if this Court denies that motion, TeamHealth Plaintiffs will have to prove to the jury that they are ***not*** sophisticated commercial actors, resulting in a mini-trial on TeamHealth Plaintiffs' business relationships, affiliations, structure, and history.

For this reason, Defendants request an order permitting them to present argument and evidence on TeamHealth Plaintiffs' corporate structure, their relationship to nonparty affiliates TeamHealth and Blackstone, and payment of dividends within that structure.

## II. LEGAL ARGUMENT

### A. Legal Standard for Motion in Limine

The Nevada Supreme Court has tacitly approved the use of motions in limine to be within the purview of the district court's discretionary power concerning rulings on the admissibility of evidence. *See State ex. rel Dept. of Highway v. Nevada Aggregates & Asphalt Co.*, 92 Nev. 370, 551 P.2d 1095 (1976). The scope of a motion in limine is rather broad, applying to "any kind of evidence which could be objected to at trial, either as irrelevant or subject to discretionary exclusion as unduly prejudicial." *Clemens v. Am. Warranty Corp.*, 193 Cal. App. 3d 444, 451, 238 Cal. Rptr. 339, 342 (1987). "The usual purpose of motions in limine is to preclude the presentation of evidence deemed inadmissible and prejudicial by the moving party. A typical order in limine excludes the challenged evidence and directs counsel, parties, and witnesses not to refer to the excluded matters during trial. Motions in limine serve other purposes as well. They permit more careful consideration of evidentiary issues than would take place in the heat of battle during trial. They minimize side-bar conferences and disruptions during trial, allowing for an uninterrupted flow of evidence." *R & B Auto Ctr., Inc. v. Farmers Grp., Inc.*, 140 Cal. App. 4th 327, 371–72, 44 Cal. Rptr. 3d 426, 462 (2006) (citing *Kelly* v. *New W. Fed. Sav.*, 49 Cal. App. 4th 659, 669–70, 56 Cal. Rptr. 2d 803 (1996)). Such a motion can also be advantageous in

avoiding what is obviously a futile attempt to "unring the bell" should the court grant a motion to strike during proceedings before the jury. *Blanks v. Seyfarth Shaw LLP*, 171 Cal. App. 4th 336, 375, 89 Cal. Rptr. 3d 710, 741 (2009) (citation omitted).

**B. Relevant Evidence Standard**

Pursuant to NRS 48.015, relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." While relevant evidence is generally admissible, such evidence is inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues[,] or of misleading the jury." NRS 48.025(1); NRS 48.035(1). Conversely, irrelevant evidence is always inadmissible. NRS 48.025(2).

**C. Evidence of Corporate Structure Is Relevant to Lay Foundation and Give the Jury Appropriate Context**

Evidence of the TeamHealth Plaintiffs' corporate structure and financial relationships with TeamHealth and Blackstone is relevant to laying a basic foundation for the jury to understand who the parties are. In a complex case like this, the jury must understand the plaintiffs' structure and relation to its controlling affiliates. Even where the involvement of parent or affiliated entities is not an element of the causes of action to be tried, testimony concerning corporate structure is relevant to put individuals' or organization's conduct in the appropriate context. *Cf.* 1 CLIFFORD S. FISHMAN & ANNE T. MCKENNA, JONES ON EVIDENCE § 62:64 (West 7th ed. [updated] 2020) ("Even where the involvement of a criminal organization is not an element of a crime, expert testimony about such an organization may be relevant to put an individual defendants' conduct in context," including "testimony about the structure and modus operandi of such organizations—in general, or concerning a particular organization").

Without evidence of a party's corporate structure, laypersons cannot discern which individuals or entities act (or omit to act) and therefore bear responsibility. *See Landex, Inc. v. State ex rel. List*, 94 Nev. 469, 480, 582 P.2d 786, 792 (1978) (citation omitted) (noting that "juries tend to be reluctant to apply criminal sanctions in white-collar crimes" because "it is





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difficult for outsiders to fix responsibility in the modern corporate structure"). Evidence about an organization's structure or relationship to affiliates is often appropriately compiled into demonstrative evidence such as charts and diagrams. *See, e.g.*, *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1217 (3d Cir. 1995) (permitting plaintiff to introduce company organizational charts derived from memory and magazine article because they were "used primarily as testimonial aids to describe the employees' positions relative to key decisionmakers," not substantive related to the employment discrimination claims at issue).

National enterprises with local subsidiaries—such as TeamHealth and TeamHealth Plaintiffs, respectively—commonly use a unified "cash management system" by which funds received at a local level are regularly "swept" into a common account controlled by the parent corporation. *See JSA, LLC v. Golden Gaming, Inc.*, 129 Nev. 1130 (table), *reported at* 2013 WL 5437333, at *6, (2013) (citing *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1459 (2d Cir. 1995) and other cases in the alter ego context). Subsidiaries are also formed for the express purpose of regularly paying their parent corporations—their owners—dividends as a return on investment. *See* 14A FLETCHER CYC. CORP. 6967.50 (West [updated] 2021).

At trial, then, Defendants wish to describe TeamHealth Plaintiffs' corporate structure and relationship to TeamHealth and Blackstone, including how funds flow from the TeamHealth Plaintiffs up to their ultimate owners and managers. Defendants seek only to lay appropriate foundation. Documentary and testimonial evidence will reference TeamHealth and Blackstone as decision makers, meeting attendees, and email addresses. The jury must have a simple, general understanding of this organization structure or they will lack the context to understand the import of evidence.

### D. TeamHealth Plaintiffs' Corporate Structure Is Directly Relevant to Their Claim for Tortious Breach of the Covenant of Good Faith and Fair Dealing

TeamHealth Plaintiffs do not have a viable claim for tortious breach because, as argued in Defendants' Partial Motion for Summary Judgment, they are sophisticated commercial actors who cannot bring such a claim. *See* Mot. for Partial Summ. J., § III.G. In Nevada, there is no liability for a tortious breach where the underlying agreements have been heavily negotiated and



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both parties are sophisticated commercial actors. *Aluevich v. Harrah's*, 99 Nev. 215, 660 P.2d 986, 986 (1983). Under Nevada law, bad faith tort actions are limited to "cases involving special relationships" that give rise to fiduciary duties on the part of the defendants. *Great Am. Ins. Co. v. Gen. Builders, Inc.*, 113 Nev. 346, 354–55, 934 P.2d 257, 263 (1997). Where both parties are experienced commercial entities and represented by experienced agents, there is no "special relationship" between the parties that would give rise to fiduciary duties. *Id.*

There is no genuine dispute that TeamHealth Plaintiffs are sophisticated commercial actors. *See* Mot. for Partial Summ. J., § III.G. TeamHealth was a publicly traded company until it was acquired by the Blackstone Group at a valuation of $6.1 billion. Deal Rep. at 10. TeamHealth describes itself as "the nation's largest clinical practice." **Exhibit 1**, Dep. of Kent Bristow ("Bristow Dep.") (May 13, 2021) at 52:7–21. TeamHealth staffs over 20,000 affiliated healthcare professionals in about 3,400 hospitals, and submits tens of thousands of reimbursement claims annually to the Defendants alone. **Exhibit 1**, Bristow Dep. at 39:9–40:9; **Exhibit 2**, Expert Report of Bruce Deal at 10 (July 30, 2021). TeamHealth Plaintiffs are affiliated with one of the largest and most well-resourced corporations in the United States, on at least equal footing with Defendants. **Exhibit 3**, Dep. of Rena Harris (June 25, 2021) at 90:20–25 (lead negotiator for Fremont testified that TeamHealth and the Defendants had equal bargaining power).

If this Court denies Defendants' Partial Motion for Summary Judgment, there will be a trial on the question of TeamHealth Plaintiffs' commercial sophistication. In order to prevail on this claim, TeamHealth Plaintiffs would need to persuade the jury that they are not sophisticated commercial actors, resulting in a mini-trial on TeamHealth Plaintiffs' business relationships, affiliations, structure, and history. *See generally* Mots. in Limine Nos. 9 & 10. Evidence related to TeamHealth Plaintiffs' relationships with TeamHealth and Blackstone is crucial to this element of TeamHealth Plaintiffs' claim for tortious breach.

## III. CONCLUSION

This Court should grant this motion and issue a limine order permitting Defendants to offer evidence and argument concerning TeamHealth Plaintiffs' corporate structure, their relationship to nonparty affiliates TeamHealth Holdings, Inc. and Blackstone, Inc., and payment

of dividends within that structure—all for the purpose of laying foundation.

Dated this 21st day of September, 2021.

*/s/ Colby L. Balkenbush*

D. Lee Roberts, Jr., Esq.
Colby L. Balkenbush, Esq.
Brittany M. Llewellyn, Esq.
Phillip N. Smith, Jr., Esq.
Marjan Hajimirzaee, Esq.
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd.
Suite 400
Las Vegas, Nevada 89118

Daniel F. Polsenberg, Esq.
Joel D. Henriod, Esq.
Abraham G. Smith, Esq.
Lewis Roca Rothgerber Christie LLP
3993 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169-5996
Telephone: (702) 949-8200

*Attorneys for Defendants*

Dimitri D. Portnoi, Esq.( *Pro Hac Vice*)
Jason A. Orr, Esq. (*Pro Hac Vice)*
Adam G. Levine, Esq. *(Pro Hac Vice)*
Hannah Dunham, Esq. *(Pro Hac Vice)*
Nadia L. Farjood, Esq. (*Pro Hac Vice*)
O'Melveny & Myers LLP
400 S. Hope St., 18th Floor
Los Angeles, CA 90071

K. Lee Blalack, II, Esq.( *Pro Hac Vice)*
Jeffrey E. Gordon, Esq. *(Pro Hac Vice)*
Kevin D. Feder, Esq. *(Pro Hac Vice)*
Jason Yan, Esq. *(Pro Hac Vice)*
O'Melveny & Myers LLP
1625 Eye St. NW
Washington, DC 20006

Paul J. Wooten, Esq. *(Pro Hac Vice)*
Amanda L. Genovese *(Pro Hac Vice)*
Philip E. Legendy *(Pro Hac Vice)*
O'Melveny & Myers LLP
Times Square Tower, Seven Times Square
New York, NY 10036

**CERTIFICATE OF SERVICE**

I hereby certify that on the 21st day of September, 2021, a true and correct copy of the foregoing **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** 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:

Pat Lundvall, Esq.
Kristen T. Gallagher, Esq.
Amanda M. Perach, Esq.
McDonald Carano LLP
2300 W. Sahara Ave., Suite 1200
Las Vegas, Nevada 89102
plundvall@mcdonaldcarano.com
kgallagher@mcdonaldcarano.com
aperach@mcdonaldcarano.com

Judge David Wall, Special Master
Attention:
Mara Satterthwaite & Michelle Samaniego
JAMS
3800 Howard Hughes Parkway, 11th Floor
Las Vegas, NV 89123
msatterthwaite@jamsadr.com
msamaniego@jamsadr.com

Justin C. Fineberg
Martin B. Goldberg
Rachel H. LeBlanc
Jonathan E. Feuer
Jonathan E. Siegelaub
David R. Ruffner
Emily L. Pincow
Ashley Singrossi
Lash & Goldberg LLP
Weston Corporate Centre I
2500 Weston Road Suite 220
Fort Lauderdale, Florida 33331
jfineberg@lashgoldberg.com
mgoldberg@lashgoldberg.com
rleblanc@lashgoldberg.com
jfeuer@lashgoldberg.com
jsiegelaub@lashgoldberg.com
druffner@lashgoldberg.com
epincow@lashgoldberg.com
asingrassi@lashgoldberg.com

Joseph Y. Ahmad
John Zavitsanos
Jason S. McManis
Michael Killingsworth
Louis Liao

Jane L. Robinson
Patrick K. Leyendecker
Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing, P.C
1221 McKinney Street, Suite 2500
Houston, Texas 77010
joeahmad@azalaw.com
jzavitsanos@azalaw.com
jmcmanis@azalaw.com
mkillingsworth@azalaw.com
lliao@azalaw.com
jrobinson@azalaw.com
kleyendecker@azalaw.com

*Attorneys for Plaintiffs*

*/s/ Jessica Rogers*
An employee of WEINBERG, WHEELER, HUDGINS GUNN & DIAL, LLC

**DECL**

D. Lee Roberts, Jr., Esq.
Nevada Bar No. 8877
*lroberts@wwhgd.com*
Colby L. Balkenbush, Esq.
Nevada Bar No. 13066
*cbalkenbush@wwhgd.com*
Brittany M. Llewellyn, Esq.
Nevada Bar No. 13527
*bllewellyn@wwhgd.com*
Phillip N. Smith, Jr., Esq.
Nevada Bar No. 10233
*psmithjr@wwhgd.com*
Marjan Hajimirzaee, Esq.
Nevada Bar No. 11984
*mhajimirzaee@wwhgd.com*
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
Telephone: (702) 938-3838
Facsimile: (702) 938-3864

Daniel F. Polsenberg, Esq.
Nevada Bar No. 2376
*dpolsenberg@lewisroca.com*
Joel D. Henriod, Esq.
Nevada Bar No. 8492
*jhenriod@lewisroca.com*
Abraham G. Smith, Esq.
Nevada Bar No. 13250
*asmith@lewisroca.com*
Lewis Roca Rothgerber Christie LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169-5996
Telephone: (702) 949-8200

*Attorneys for Defendants*

Dimitri D. Portnoi, Esq.(*Admitted Pro Hac Vice*)
*dportnoi@omm.com*
Jason A. Orr, Esq. (*Admitted Pro Hac Vice)*
*jorr@omm.com*
Adam G. Levine, Esq. *(Admitted Pro Hac Vice)*
*alevine@omm.com*
Hannah Dunham, Esq. *(Admitted Pro Hac Vice)*
*hdunham@omm.com*
Nadia L. Farjood, Esq. (*Admitted Pro Hac Vice*)
*nfarjood@omm.com*
O'Melveny & Myers LLP
400 S. Hope St., 18th Floor
Los Angeles, CA 90071
Telephone: (213) 430-6000

K. Lee Blalack, II, Esq.(*Admitted Pro Hac Vice)*
*lblalack@omm.com*
Jeffrey E. Gordon, Esq. *(Admitted Pro Hac Vice)*
*jgordon@omm.com*
Kevin D. Feder, Esq. *(Admitted Pro Hac Vice)*
*kfeder@omm.com*
Jason Yan, Esq. *(Admitted Pro Hac Vice)*
*jyan@omm.com*
O'Melveny & Myers LLP
1625 Eye St. NW
Washington, DC 20006
Telephone: (202) 383-5374

Paul J. Wooten, Esq. *(Admitted Pro Hac Vice)*
*pwooten@omm.com*
Amanda L. Genovese *(Admitted Pro Hac Vice)*
*agenovese@omm.com*
Philip E. Legendy *(Admitted Pro Hac Vice)*
*plegendy@omm.com*
O'Melveny & Myers LLP
Times Square Tower, Seven Times Square
New York, NY 10036
Telephone: (212) 728-5857

**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

**DECLARATION OF COLBY L. BALKENBUSH, ESQ. IN SUPPORT OF DEFENDANTS' MOTIONS IN LIMINE**

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

Defendants.

I, COLBY L. BALKENBUSH, declare as follows:

1. I am an attorney licensed to practice law in the State of Nevada, a partner at the law firm of Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC, counsel for Defendants in the above-captioned matter.

2. This Declaration is submitted in support of Defendants' Motions in Limine. I have personal knowledge of the matters set forth herein and, unless otherwise stated, am competent to testify to the same if called upon to do so.

3. On September 16, 2021, I sent an email to Plaintiffs' counsel Pat Lundvall listing the motions in limine that Defendants were contemplating filing.

4. On September 17, 2021, in compliance with EDCR 2.47, I had a meet and confer phone call with Plaintiffs' counsel Pat Lundvall and John Zavitsanos to determine whether a compromise could be reached on Defendants' motions in limine. Other counsel for Plaintiffs may also have been on the phone call. Defendants' counsel D. Lee Roberts, Jr. and Dimitri Portnoi were also on this meet and confer call.

5. The following motions in limine were the subject of the phone call:

MIL 1. Motion to authorize Defendants to offer evidence relating to Plaintiffs' agreements with other market players and related negotiations.

MIL 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



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negotiations.

MIL 3. Motion to authorize Defendants to offer evidence relating to Plaintiffs' decision-making and process for setting billed charges.

MIL 4. Motion offered in the alternative to MIL No. 3, to preclude Plaintiffs from offering evidence that their billed charges were reasonable or discussing United's strategy for setting in-network rates and out-of-network rates for the disputed claims.

MIL 5. Motion to authorize Defendants to introduce evidence as to the reasonableness of Plaintiffs' billed charges.

MIL 6. Motion offered in the alternative to MIL No. 5, to preclude Plaintiffs from offering evidence that their billed charges were reasonable.

MIL 7. Motion to authorize Defendants to offer evidence of the costs of the services that Plaintiffs provided.

MIL 8. Motion 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.

MIL 9. Motion 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.

MIL 10. Motion offered in the alternative to MIL No. 9, to preclude Plaintiffs from discussing Defendants' organizational, management, and ownership structure, including flow of funds between related entities, operating companies, parent companies, and subsidiaries.

MIL 11. Motion to authorize Defendants to offer evidence relating to Plaintiffs' strategy and deliberations regarding negotiations with Defendants.

MIL 12. Motion offered in the alternative to MIL No. 11 to preclude Plaintiffs from offering evidence relating to Defendants' strategy and deliberations regarding negotiations with Plaintiffs.

MIL 13. Motion to authorize Defendants to offer evidence relating to Plaintiffs' collection practices for healthcare claims.

MIL 14. Motion offered in the alternative to 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.

MIL 15. Motion to preclude Plaintiffs from offering evidence that they do not balance bill members.

MIL 16. Motion to preclude Plaintiffs from offering evidence relating to most claims with dates of service on or after January 2020, claims paid pursuant to government programs, claims resolved through a negotiated agreement, claims that Defendants partially denied, and claims that Plaintiffs did not submit to one of the Defendants.

MIL 17. Motion to preclude Plaintiffs from offering evidence of Defendants' size, wealth, or market power.

MIL 18. Motion to preclude Plaintiffs from contesting any of Defendants' defenses that are based on the line-level detail in Defendant's produced claims data, and from offering evidence against Defendants based on the same.

MIL 19. Motion to preclude Plaintiffs from offering evidence of Plaintiffs' and their representatives' discussions with Data iSight.

MIL 20. Motion to preclude Plaintiffs from offering evidence relating to the "Yale Study," Defendants' discussions with Zack Cooper, or the Center for Health Policy at Brookings study; and from offering evidence regarding Defendants' lobbying activities relating to balance billing.

MIL 21. Motion to preclude Plaintiffs from offering evidence relating to any of Defendants' filings with the Securities and Exchange Commission or other corporate filings.

MIL 22. Motion to preclude Plaintiffs from offering evidence relating to Defendants' general corporate profits, or from characterizing medical cost savings or administrative fees earned from out-of-network programs as profits or corporate profits.

MIL 23. Motion to preclude Plaintiffs from offering evidence relating to Defendants' executives' compensation.



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MIL 24. Motion to authorize Defendants to refer to Plaintiffs as the "TeamHealth Plaintiffs," and to preclude Plaintiffs from referring to themselves as doctors, physicians, or healthcare providers, or from arguing that granting damages in Plaintiffs' favor would result in a damages award to a doctor, physician, or healthcare provider.

MIL 24b. Motion offered in the alternative to MIL No. 24, to preclude Plaintiffs from referring collectively to Defendants as "United" and requiring Plaintiffs instead to refer to each Defendant entity separately by its individual name.

MIL 25. Motion to preclude Plaintiffs from offering evidence relating to any emergency room service they provided in connection with the 2017 Las Vegas shooting or other public disaster.

MIL 26. Motion to preclude Plaintiffs from offering evidence relating to the Ingenix settlement.

MIL 27. Motion to preclude Plaintiffs from offering evidence relating to complaints by providers or members about United's out-of-network payments or rates; and from arguing that the absence of complaints about Plaintiffs' billed charges is evidence of the reasonableness of those charges.

MIL 28. Motion to preclude Plaintiffs from offering evidence relating to any of Defendants' employees' performance reviews.

MIL 29. Motion to preclude Plaintiffs from offering evidence relating to Defendants' evaluation and development of a company that would offer a service similar to MultiPlan and Data iSight; and/or the impact that such a company would have on MultiPlan financially or otherwise.

MIL 30. Motion to preclude Plaintiffs from offering evidence relating to Defendants' out-of-network programs that do not apply to emergency services claims, including but not limited to: Facility R&C, MNRP, Pay the Enrollee, and projects focused on lab or facility claims.

MIL 31. Motion to preclude Plaintiffs from arguing or offering evidence that Plaintiffs' RICO conspiracy claims involve Defendants that never utilized Data iSight or disputed



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claims that were not priced and/or adjudicated using Data iSight.

MIL 32. Motion to preclude Plaintiffs from offering evidence relating to conduct on or after January 2020, because disputes relating to claims from that date forward must be resolved exclusively pursuant to the mandatory dispute resolution mechanisms set forth by Nevada Statutes.

MIL 33. Motion to preclude Plaintiffs from offering evidence of wanton or reckless conduct, given that Plaintiffs cannot succeed on a breach of implied covenant of good faith and fair dealing claim without making a triable issue of whether Plaintiffs are a sophisticated party who cannot bring such a claim.

MIL 34. Motion to preclude Plaintiffs from arguing or offering evidence that Defendants tried to delay trial and/or litigation as part of a strategy to not pay Plaintiffs a reasonable rate on the disputed claims, or to delay paying Plaintiffs a reasonable rate on those claims.

MIL 35. Motion to pre-admit certain evidence.

MIL 36. Motion to preclude Plaintiffs from offering evidence related to the amount of punitive damages that should be awarded until the conclusion of the liability phase of the trial.

MIL 37. Motion to preclude Plaintiffs from offering evidence relating to services provided in response to the COVID-19 pandemic, or difficulties that Plaintiffs experienced as a result of the COVID-19 pandemic.

6. We appeared to reach agreement with Plaintiffs on certain motion in limine issues as follows:

- Plaintiffs agreed in principle Defendants' proposed motion that they be precluded from offering any evidence related to the Defendants' executive compensation so long as the requirement was reciprocal. However, Plaintiffs wanted to see the agreement memorialized in a stipulation before formalizing the agreement. Defendants are amenable to this being a reciprocal requirement.

- Plaintiffs agreed in principle to Defendants' proposed motion that they be precluded from offering any evidence relating to Defendants' employees' performance reviews so long as this requirement was reciprocal. However, Plaintiffs wanted to see the agreement memorialized in a stipulation before formalizing the agreement. Defendants are amenable to this being a reciprocal requirement.

- As to Defendants' proposed motion in limine to pre-admit certain key evidence, Plaintiffs proposed that the Defendants wait to file that motion until after the Parties have exchanged exhibit lists and objections to same so that each side can determine if the issues in the motion may be narrowed or if the motion may ultimately be unnecessary. Based on Plaintiffs' request, Defendants have not filed their proposed motion in limine to pre-admit certain evidence.

- Plaintiffs agreed in principle to Defendants' motion to preclude Plaintiffs from offering evidence related to the amount of punitive damages that should be awarded until the conclusion of the liability phase of the trial. However, Plaintiffs wanted to see the agreement memorialized in a stipulation before formalizing the agreement and requested that the stipulation track the language of NRS 42.005.

7. As to Defendants' proposed motion to preclude Plaintiffs from offering evidence relating to Defendants' out-of-network programs that do not apply to emergency services, Plaintiffs appeared to agree in principle to this motion but wanted to see a list of all of Defendants' out-of-network programs that they would be precluded from referring to before memorializing this agreement.

8. As to Defendants' other proposed motions in limine listed above, the Parties were not able to reach agreement on them despite conferring in good faith. Therefore, these motions are ripe for the Court's consideration.

9. Given that the meet and confer call occurred on September 17, 2021 and the deadline to file motions in limine and motions for summary judgment was September 21, 2021, the Parties were not able to memorialize the above described agreements in stipulations prior to today's filing deadline. Therefore, Defendants have proposed that, after each side files their respective motions in limine today, the Parties work on drafting stipulations to memorialize the above agreements and that those stipulations be finalized prior to the September 29, 2021 motion in limine opposition deadline. Once those stipulations are finalized, Defendants intend to withdraw the motions in limine filed today where the Parties have reached agreement.

10. On September 19, 2021, I sent an email to Pat Lundvall and John Zavitsanos, counsel for Plaintiffs, notifying them of two additional motions in limine the Defendants were considering filing. Those motions were:

(1) A motion to exclude Plaintiffs' non-retained expert Dr. Joseph Crane from offering

expert testimony on the grounds that (1) he is not a proper non-retained expert witness and (2) his opinions are not relevant given the Court's prior discovery orders; and

(2) A motion to strike Plaintiffs' expert David Leathers' supplemental expert report on the grounds that it was not served by the rebuttal expert deadline. The motion will also seek to strike Leathers' supplemental analysis associated with his initial report that was served on Defendants the night before his expert deposition.

11. On September 20, 2021, in compliance with EDCR 2.47, I had a meet and confer call with Plaintiffs' counsel Jane Robinson on these two proposed motions. We conferred in good faith but were not able to reach agreement on them. Therefore, these two motions in limine are also ripe for the Court's consideration.

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

Executed: September 21, 2021.

*/s/ Colby L. Balkenbush*
Colby L. Balkenbush



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# EXHIBIT 1

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EXHIBIT 1

# EXHIBIT 2

# FILED UNDER SEAL

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EXHIBIT 2

# EXHIBIT 3



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EXHIBIT 3

DISTRICT COURT

CLARK COUNTY, NEVADA

| | |
|---|---|
| FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., a Nevada Professional corporation; TEAM PHYSICIANS OF NEVADA MANDAVIA, P.C., a Nevada professional corporation; CRUM, STEFANKO AND JONES, LTD., dba, RUBY CREST EMERGENCY MEDICINE, a Nevada professional corporation, Plaintiffs, vs. UNITEDHEALTH GROUP, INC., UNITED HEALTHCARE INSURANCE COMPANY, a Connecticut corporation; UNITED HEALTH CARE SERVICES INC., dba UNITEDHEALTHCARE, a Minnesota corporation; UMR, INC., dba UNITED MEDICAL RESOURCES, a Delaware Corporation; OXFORD HEALTH PLANS, INC., a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., a Nevada corporation; SIERRA HEALTH-CARE OPTIONS, INC., a Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20, Defendants. | CASE NO: A-19-792978-B<br>DEPT NO: 27<br>FOR ATTORNEYS' EYES ONLY<br>VIDEOTAPED DEPOSITION OF RENA HARRIS<br>FRIDAY, JUNE 25, 2021 |

REPORTED BY: BRITTANY CASTREJON, RPR, CRR, NV CCR #926

JOB NO.: 772298

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VIDEOTAPED DEPOSITION OF RENA HARRIS, held at 6320 Canoga Avenue, Woodland Hills, California 91367, on FRIDAY, JUNE 25, 2021, at 9:07 A.M., remotely before Brittany Castrejon, Certified Court Reporter, in and for the State of Nevada.

APPEARANCES:

For Plaintiffs:

LASH & GOLDBERG LLP
BY: DAVID RUFFNER, ESQ. (Via Zoom)
BY: ERIN GRIEBEL, ESQ. (Via Zoom)
BY: RACHEL LeBLANC, ESQ. (Via Zoom)
BY: MARTY GOLDBERG, ESQ. (Via Zoom)
Miami Tower
100 Southeast 2nd Street, Suite 1200
Miami, Florida 33131-2158
305-347-4040
druffner@lashgoldberg.com

--AND--

MCDONALD CARANO
BY: PAT LUNDVALL, ESQ. (Via Zoom)
2300 West Sahara Avenue
Suite 1200
Las Vegas, Nevada 89102
702-873-4100
lundvall@mcdonaldcarano.com

--AND--

NAPOLI SHKOLNIK
BY: WENDY MITCHELL, ESQ.
BY: MATTHEW LAVIN, ESQ. (Via Zoom)
1717 K Street NW
Suite 900
Washington, DC 20006
844-822-9684
mlavin@napolilaw.com



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APPEARANCES (CONTINUED:)

For Defendants:

WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
BY: COLBY BALKENBUSH, ESQ.
6385 South Rainbow Boulevard
Suite 400
Las Vegas, Nevada 89118
702-938-3838
cbalkenbush@wwhgd.com

Also Present: Eugene Cordell, Videographer
Ryan Wong (Via Zoom)

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And -- just vague. You can answer.
BY MR. BALKENBUSH:
**Q. And go ahead. Just before you answer, do you understand my question?**
A. Yes.
**Q. Go ahead and answer it.**
A. With Shaun Schoener, I knew he was a VP. So I got the same person who is my direct -- my VP, Mark Kline, involved to speak to Shaun Schoener.
Jacy, he was my equal, so I spoke to Jacy directly.
**Q. Okay. Did you ever view Jacy to be more sophisticated than you in the sense of more skilled at negotiating?**
A. I look at him as my equal.
**Q. And same question comparing Mr. Shaun Schoener versus Mark Kline. Did you view them to be relatively the same level of sophistication as far as negotiators?**
A. Yes.
**Q. And as far as the bargaining power that they brought to the table based on the entities that they represented, UnitedHealthcare on the one side and TEAMHealth on the other, did you view their bargaining power to be relatively equal?**
A. Yes.

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STATE OF NEVADA )
) SS:
COUNTY OF CLARK )

CERTIFICATE OF REPORTER

I, Brittany J. Castrejon, a Certified Court Reporter licensed by the State of Nevada, do hereby certify: That I reported the VIDEOTAPED DEPOSITION OF RENA HARRIS, on FRIDAY, JUNE 25, 2021, at 9:07 A.M.;

That prior to being remotely deposed, the witness was duly sworn by me via Zoom, per stipulation of the attorneys, to testify to the truth. That I thereafter transcribed my said stenographic notes into written form, and that the typewritten transcript is a complete, true and accurate transcription of my said stenographic notes. That the reading and signing of the transcript was requested.

I further certify that I am not a relative, employee or independent contractor of counsel or of any of the parties involved in the proceeding; nor a person financially interested in the proceeding; nor do I have any other relationship that may reasonably cause my impartiality to be questioned.

IN WITNESS WHEREOF, I have set my hand in my office in the County of Clark, State of Nevada, this 30th day of June, 2021.

Brittany J. Castrejon

Brittany J. Castrejon, RPR, CRR, CCR #926



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**OML**

D. Lee Roberts, Jr., Esq.
Nevada Bar No. 8877
*lroberts@wwhgd.com*
Colby L. Balkenbush, Esq.
Nevada Bar No. 13066
*cbalkenbush@wwhgd.com*
Brittany M. Llewellyn, Esq.
Nevada Bar No. 13527
*bllewellyn@wwhgd.com*
Phillip N. Smith, Jr., Esq.
Nevada Bar No. 10233
*psmithjr@wwhgd.com*
Marjan Hajimirzaee, Esq.
Nevada Bar No. 11984
*mhajimirzaee@wwhgd.com*
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
Telephone: (702) 938-3838
Facsimile: (702) 938-3864

Daniel F. Polsenberg, Esq.
Nevada Bar No. 2376
*dpolsenberg@lewisroca.com*
Joel D. Henriod, Esq.
Nevada Bar No. 8492
*jhenriod@lewisroca.com*
Abraham G. Smith, Esq.
Nevada Bar No. 13250
*asmith@lewisroca.com*
Lewis Roca Rothgerber Christie LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169-5996
Telephone: (702) 949-8200

*Attorneys for Defendants*

Dimitri D. Portnoi, Esq.(*Admitted Pro Hac Vice*)
*dportnoi@omm.com*
Jason A. Orr, Esq. (*Admitted Pro Hac Vice)*
*jorr@omm.com*
Adam G. Levine, Esq. *(Admitted Pro Hac Vice)*
*alevine@omm.com*
Hannah Dunham, Esq. *(Admitted Pro Hac Vice)*
*hdunham@omm.com*
Nadia L. Farjood, Esq. (*Admitted Pro Hac Vice*)
*nfarjood@omm.com*
O'Melveny & Myers LLP
400 S. Hope St., 18th Floor
Los Angeles, CA 90071
Telephone: (213) 430-6000

K. Lee Blalack, II, Esq.(*Admitted Pro Hac Vice)*
*lblalack@omm.com*
Jeffrey E. Gordon, Esq. *(Admitted Pro Hac Vice)*
*jgordon@omm.com*
Kevin D. Feder, Esq. *(Admitted Pro Hac Vice)*
*kfeder@omm.com*
Jason Yan, Esq. *(Admitted Pro Hac Vice)*
*jyan@omm.com*
O'Melveny & Myers LLP
1625 Eye St. NW
Washington, DC 20006
Telephone: (202) 383-5374

Paul J. Wooten, Esq. *(Admitted Pro Hac Vice)*
*pwooten@omm.com*
Amanda L. Genovese *(Admitted Pro Hac Vice)*
*agenovese@omm.com*
Philip E. Legendy *(Admitted Pro Hac Vice)*
*plegendy@omm.com*
O'Melveny & Myers LLP
Times Square Tower, Seven Times Square
New York, NY 10036
Telephone: (212) 728-5857

**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' 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**



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

Defendants.

**Hearing Date: October 14, 2021**
**Hearing Time: 1:30 p.m.**



Defendants UnitedHealth Group, Inc., UnitedHealthcare Insurance Company ("UHIC"), United HealthCare Services, Inc. ("UHS", which does business as UnitedHealthcare or "UHC" and through UHIC), UMR, Inc. ("UMR"), Oxford Health Plans, Inc. ("Oxford"), Sierra Health and Life Insurance Co., Inc. ("SHL"), Sierra Health-Care Options, Inc. ("SHO"), and Health Plan of Nevada, Inc. ("HPN") (collectively "Defendants"), by and through their attorneys of record, hereby submit the following Opposition to Plaintiffs' Fremont Emergency Services (Mandavia), Ltd., Team Physicians of Nevada-Mandavia, P.C., and Crum, Stefanko and Jones, Ltd. d/b/a Ruby Crest Emergency Medicine (collectively, the "TeamHealth 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 ("MIL No. 1").

This Motion is made and based upon the following Memorandum of Points and Authorities, the pleadings and papers on file herein, and any argument presented at the time of hearing on this matter.

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

The TeamHealth Plaintiffs have often described their action as a "rate of payment" case. Their pleadings and intended presentation at trial do indeed implicate the "rate of payment," but they go much further. The jury will also have to evaluate the elements of TeamHealth Plaintiffs'



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eight causes of action that include breach of implied-in-fact contract, unjust enrichment, fraud, and alleged violations of the Nevada Racketeer Influenced and Corrupt Organizations Act ("RICO"), not to mention their request for punitive damages. These various causes of action and the rebuttals that will be offered by the Defendants implicate a host of legal questions that extend far beyond the proper "rate of payment," including issues of scienter. Indeed, to support their RICO claim, TeamHealth Plaintiffs also allege multiple Penal Code violations, each of which requires proof of the same scienter that would be adjudicated in any criminal trial.

The fact and expert evidence that TeamHealth Plaintiffs have identified in their disclosures for trial confirms that they intend to offer evidence and arguments to the jury that extend beyond the singular question of the proper rate of payment. For example, TeamHealth Plaintiffs point to Defendants' reimbursements to their competitors that do business outside of Nevada. *See* **Exhibit 1**, Dep. of Daniel Schumacher ("Schumacher Dep.") at 260:22-261:17 (May 26, 2021) (questioning Defendants' reimbursement to their (TeamHealth Plaintiffs) competitor, Envision). Likewise, TeamHealth Plaintiffs want to depict Defendants as monopolists that act arbitrarily and illicitly. Moreover, despite arguing in MIL No. 1 that "purported future effect" evidence is impermissible, TeamHealth Plaintiffs intend to present expert testimony regarding the potential negative consequences of inadequate reimbursements for emergency medicine services. **Exhibit 2**, Dep. of Dr. Joseph T. Crane ("Crane Dep.") at 111:13-113:21 (Sept. 3, 2021) (confirming that TeamHealth Plaintiffs' expert testimony will include discussion of TeamHealth Plaintiffs not receiving their "proper reimbursement," *i.e.*, full billed charges, such as problems with physician recruitment, retention, and operational challenges that could cause patients to not receive care during "crises like a mass casualty event").

Even before pre-trial disclosures were served, TeamHealth Plaintiffs have made clear that out-of-network reimbursement is not the only relevant issue. Their sole corporate representative, TeamHealth Holdings, Inc., senior vice president Kent Bristow, testified that an implied-in-fact contract exists not because of some prior course of dealing between the parties in this case, but because every healthcare payor and every emergency services provider has an implied-in-fact

contract, based on the economics inherent to emergency medical services. The market dynamics of emergency services that formed the alleged implied-in-fact contract are therefore squarely at issue. The jury must necessarily consider the relationship between out-of-network reimbursement on the one hand, and, on the other, medical costs, premiums, and the scope of the health plan benefits. Without evaluating that relationship, the jury cannot determine what is a reasonable reimbursement or the parameters of the parties' alleged implied-in-fact contract.

Additionally, their RICO, fraud, and punitive damages claims each requires proof of scienter. They must therefore prove that Defendants acted intentionally or knowingly, depending on the Penal Code violation or claim at issue, and that Defendants acted maliciously, fraudulently, or with oppression to injure the TeamHealth Plaintiffs. But, under Nevada law, the jury also must be permitted to hear Defendants' countervailing evidence explaining the Defendants' conduct and state of mind. For example, the jury is entitled to hear that Defendants' actions were motivated by their clients' imperative to control medical costs in order to restrain growing premiums and that they acted to abide by specific directives from their clients regarding how to reimburse out-of-network emergency medicine services.

As a matter of basic due process, Defendants must be permitted to introduce evidence and advance arguments to rebut each element of the TeamHealth Plaintiffs' eight causes of action, including evidence of the parties' course of dealing and their state of mind. Contrary to TeamHealth Plaintiffs' MIL No. 1, Defendants will make no arguments that implicate the prohibition against "Golden Rule" jury arguments. Defendants will not argue to the jury that a verdict in Plaintiffs' favor would produce an increase in the jurors' health insurance premiums or that they would suffer a loss of wages or benefits.

Instead, Defendants will simply offer evidence regarding the inevitable market impact of the TeamHealth Plaintiffs' contention that out-of-network providers' full billed charges represent the reasonable value of those services. Through fact and expert testimony, Defendants will demonstrate to the jury that, if the reasonable value of the disputed services is full billed charges, as the TeamHealth Plaintiffs allege, the premiums that Defendants would have charged for fully insured health benefit plans and the medical costs that self-funded clients incurred would have

been much higher. **Exhibit 3**, Dep. of Rebecca Paradise ("Paradise Dep.") at 55:4-25 (June 30, 2021) ("provider groups are inflating their billed charges, that's driving up those reimbursement levels and it's creating a dynamic where providing out-of-network benefits . . . [i]s getting unaffordable"). Defendants will also offer evidence that their employer clients knew and regularly discussed the relationship between out-of-network reimbursements, rising medical costs, increased health insurance premiums, and the scope of health plan coverage. *See* **Exhibit 1**, Schumacher Dep. at 105:19-107:13; **Exhibit 4**, Dep. of Angela Nierman ("Nierman Dep.") at 125:21-127:16 (May 28, 2021) ("We have customers that are fed up."). They will offer evidence that the employers and unions that hired Defendants to administer health benefit plans instructed Defendants to restrain those growing healthcare costs, including through the implementation of the out-of-network programs that the TeamHealth Plaintiffs attack in this lawsuit. **Exhibit 3**, Paradise Dep. at 55:4-25 ("clients pay us to manage their out-of-network spend, and it's our job to . . . manage their med expense").

This fact and expert evidence is highly probative of ***at least*** two disputed issues in this case: (1) it supports Defendants' contention that they did not enter an implied-in-fact contract with the TeamHealth Plaintiffs to reimburse the disputed services at full billed charges, because such an agreement would have necessarily resulted in substantially higher medical costs, increased premiums for their fully insured products, and resulted in payments for self-insured clients that exceeded the benefits available to the clients' employees; and (2) it supports Defendants' contention that the reason they implemented programs to reimburse out-of-network healthcare services at reasonable amounts was in response to their clients' demands to restrain exploding out-of-network healthcare costs tied to the inflated charges of providers, not as part of an unlawful scheme to cheat the TeamHealth Plaintiffs out of reimbursements to which they were entitled. Evidence of these market forces, and the Defendants' knowledge of these market forces, renders it more probable that the jury would agree with Defendants' rebuttal than if such evidence was not admitted. Therefore, the TeamHealth Plaintiffs' request to exclude evidence and argument that is necessary to explain these market forces should be rejected. If the TeamHealth Plaintiffs wish to attack the credibility of this evidence, they are free to do so with

their own evidence, but the attacks that they cite in MIL No. 1 go to the weight of the evidence and not its admissibility. For all of these reasons, the Court should deny the TeamHealth Plaintiffs' MIL No. 1.

## II. LEGAL ARGUMENT

### A. Legal Standard for Motions in Limine

The Nevada Supreme Court has tacitly approved the use of motions in limine to be within the purview of the district court's discretionary power concerning rulings on the admissibility of evidence. *See State ex. Rel. Dep't of Highways v. Nevada Aggregates & Asphalt Co.*, 92 Nev. 370, 551 P.2d 1095 (1976). The scope of a motion in limine is broad, applying to "any kind of evidence which could be objected to at trial, either as irrelevant or subject to discretionary exclusion as unduly prejudicial." *Clemens v. Am. Warranty Corp.*, 193 Cal. App. 3d 444, 451, 238 Cal. Rptr. 339, 342 (1987).

### B. Relevant Evidence

Pursuant to NRS 48.015, relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." While relevant evidence is generally admissible, such evidence is inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues[,] or of misleading the jury." NRS 48.025(1); NRS 48.035(1). While irrelevant evidence is always inadmissible, NRS 48.025(2), a trial court can admit evidence that it previously deemed irrelevant. *See, e.g., Johnson v. State*, 113 Nev. 772, 776, 942 P.2d 167, 170 (1997) (stating decision to admit or exclude is within the sound discretion of the trial court).

### C. TeamHealth Plaintiffs Must Present Evidence of The Parties' Course of Dealing and Defendants' Allegedly Illicit Conduct, Each Requiring State of Mind Evidence, Which Defendants' Have the Basic Due Process Right to Rebut.

TeamHealth Plaintiffs' MIL No. 1 presents a simplistic, narrow view of their case. At trial, TeamHealth Plaintiffs will present eight causes of action and request punitive damages. Specifically: (1) breach of an implied-in-fact contract; (2) tortious breach of the implied

covenant of good faith and fair dealing; (3) unjust enrichment; (4) violation of NRS 686A.020 and 686A.310; (5) violation of Nevada's prompt pay laws; (6) violation of the consumer fraud and deceptive trade practices acts; (7) violation of Nevada's RICO statute; and (8) declaratory judgment.

TeamHealth Plaintiffs must demonstrate that the reimbursement that they received for the disputed services, more than $3.1 million, was not reasonable value and convince the jury that Defendants instead entered into an implied-in-fact contract setting reimbursement at their billed charges, which exceeds $14 million. *But see* **Exhibit 5**, Email from R. Harris to K. Bristow, et al. (Sept. 8, 2017) (FESM003066) (recounting the parties' course of conduct and failure to enter into an express contract in which TeamHealth Plaintiffs proposed reimbursement below full billed charges); **Exhibit 6**, Email from J. Jefferson to R. Harris, et al. (Feb. 21, 2019) (FESM001217) (same). Under Nevada law, reasonable value is a fact-intensive inquiry that considers a broad range of factors. *See Certified Fire Prot. Inc. v. Precision Constr., Inc.*, 128 Nev. 371, 379, 283 P.3d 250, 256 (2012) (the price of an implied-in-fact contract is presumed to be a reasonable value, usually the market value); *Las Vegas Sands Corp. v. Suen*, 132 Nev. 998 (table), *reported at* 2016 WL 4076421 at *9, 14 (2016) (unpublished) (holding that "any other evidence regarding the value of services," including "previous agreement between the parties" or offers, are proper considerations in determining reasonable value). And, as detailed below, the elements of TeamHealth Plaintiffs' causes of action further reveal the complexity of their burden of proof. In short, those elements require, *inter alia*, evidence of the parties' conduct, the market economy for emergency room services that allegedly forms the basis of their implied-in-fact contract, and scienter.

Furthermore, TeamHealth Plaintiffs must carry their burden of proving each cause of actions' elements in the face of Defendants' rebuttal evidence. *Nguyen v. Sw. Leasing & Rental Inc.*, 282 F.3d 1061, 1068 (9th Cir. 2002) (holding that if one party is permitted to introduce certain evidence—whether or not that evidence is relevant—the opposing party must be permitted to introduce similar evidence); *see also Hall v. Ortiz*, 129 Nev. 1120, *reported at* 2013 WL 7155073 (2013) (unpublished) (applying the same doctrine under Nevada law). The

TeamHealth Plaintiffs intend to carry their burden of proof by attacking Defendants' approach to reimbursing the disputed claims. For example, TeamHealth Plaintiffs will argue that Defendants' sole motivation for reimbursing the disputed claims at less than full billed charges was their own profits. However, Defendants will offer evidence that their approach to determining out-of-network reimbursement was in response to the demands of their clients, including Nevada employers, to abide by specific health insurance plans and to restrain rising costs to protect premium and benefit levels for members. Thus, Defendants have the right to use those facts to rebut the notion that their out-of-network reimbursements were remitted in bad faith or nefariously.

Simply, TeamHealth Plaintiffs' MIL No. 1 is a veiled attempt to prevent Defendants from presenting rebuttal evidence that answers the arguments that the TeamHealth Plaintiffs will present to the jury. As such, MIL No. 1 should be denied.



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**D. The Elements of TeamHealth Plaintiffs' Causes of Action and Request for Punitive Damages.**

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A cursory review of the various causes of action asserted by the TeamHealth Plaintiffs shows why the challenged evidence is relevant evidence that must be admitted in this trial.

First, TeamHealth Plaintiffs bring a claim for breach of an implied-in-fact contract. The elements of an implied-in-fact-contract are: (1) the parties' conduct manifested an intent to contract; (2) exchanged bargained-for promises; and (3) the terms of the bargain are sufficiently clear. *Magnum Opes Const. v. Sanpete Steel Corp.*, 129 Nev. 1135, *reported at* 2013 WL 7158997 (2013) (unpublished); *Certified Fire Prot. Inc.*, 128 Nev. at 379, 283 P.3d at 256. To satisfy these elements, TeamHealth Plaintiffs assert the implied-in-fact contract exists because of the market economy inherent to emergency medicine services, which is a subset of the broader healthcare economy. **Exhibit 7**, Dep. of Kent Bristow ("Fremont NRCP 30(b)(6) Dep.") at 154:6-13 (May 28, 2021); **Exhibit 8**, Pls.' Response to Interrogatory No. 5 (July 29, 2019) ("it is implicit and expected that [Defendants] will pay . . . for the billed charges.").

Defendants are entitled to rebut the implied-in-fact contract claim by, *inter alia*, demonstrating that there was no intent to contract for reimbursement at billed charges, which



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TeamHealth Plaintiffs allege, because such an agreement makes no economic sense for Defendants and their self-funded employer clients. Defendants must be permitted to offer evidence that such a contract would have contributed to higher medical costs for their self-insured clients, increased premiums for their fully insured products, and harmed Defendants' competitive position relative to other health insurers when bidding for new business from the employers and unions that hire Defendants to administer their health benefit plans.

Second, TeamHealth Plaintiffs' cause of action for tortious breach of the implied covenant of good faith and fair dealing has the following elements: (1) the parties entered into a contract; (2) Defendants owed a duty of good faith to TeamHealth Plaintiffs; (3) TeamHealth Plaintiffs justifiably relied on Defendants or there was a fiduciary relationship with Defendants being in the superior or entrusted position; (4) Defendants engaged in grievous and perfidious misconduct (*i.e.*, scienter) that breached the duty of good faith; and (5) damages. *A.C. Shaw Constr., Inc. v. Washoe Cnty*., 105 Nev. 913, 914, 784 P.2d 9, 9 (1989); *Great Am. Ins. Co. v. Gen. Builders, Inc.*, 113 Nev. 346, 354, 934 P.2d 257, 263 (1997) (requiring a special element of reliance or fiduciary duty, and is limited to rare and exceptional cases); *State v. Sutton*, 120 Nev. 972, 989, 103 P.3d 8, 19 (2004). Evidence that a requirement to pay billed charges for out-of-network emergency services would necessarily increase medical costs, premiums, and reduce the scope of health plan benefits supports the reasonable inference that Defendants implemented the contested out-of-network programs to meet a bona fide client demand to control healthcare costs and premiums. It rebuts the notion that their conduct was grievous or perfidious in violation of their duty of good faith and fair dealing by offering the jury a legitimate business rationale for the disputed business practices.

Third, TeamHealth Plaintiffs' allegation that Defendants violated NRS 686A.020 and 686A.310 requires proof that Defendants engaged in an unfair method of competition or an unfair or deceptive act or practice as defined or determined by statute. NRS 686A.010, NRS 686A.310, NRS 686A.170. They must further prove that Defendants failed to effectuate prompt, fair, and equitable settlements of claims where the liability on those claims has become reasonably clear. NRS 686A.310. Evidence that a requirement to pay billed charges for out-of-



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network emergency services would necessarily increase medical costs, premiums and reduce the scope of health plan benefits supports the reasonable inference that Defendants remitted fair and reasonable payments to the TeamHealth Plaintiffs. Indeed, it would bolster Defendants' contention that payment of full charges for all out-of-network services would be economically irrational and put Defendants at a competitive disadvantage with other health insurers that offer services to Defendants' clients. This evidence also lends credence to Defendants' argument that reimbursement of full billed charges would contradict their clients' demands that they restrain increasing out-of-network medical costs and limit reimbursements to rates specified in the administrative services contracts with those clients. All of this evidence negates the contention that Defendants acted unfairly or deceptively when seeking to resolve this dispute with the TeamHealth Plaintiffs over the proper reimbursement of the disputed services. The jury may very well find the TeamHealth Plaintiffs' allegations regarding the Defendants' motives more credible but that does not render the rebuttal evidence and arguments offered by the Defendants inadmissible.

Fourth, TeamHealth Plaintiffs will attempt to satisfy their RICO burden of proof by, *inter alia*, offering evidence and argument that Defendants: (1) obtained possession of money or property rightfully belonging to TeamHealth Plaintiffs valued at $650 or more by means of false pretenses; (2) (a) engaged in multiple transactions involving fraud or deceit in the course of operating Defendants' business (b) by having knowingly made a false representation or omitted a material fact (c) that TeamHealth Plaintiffs relied upon (d) which caused them to suffer a loss; and (3) (a) subjected TeamHealth Plaintiffs to involuntary servitude through (b) extortion or causing or threatening to cause financial harm to TeamHealth Plaintiffs. *See* NRS 207.400 *et seq*. Evidence that a requirement to pay full billed charges for out-of-network emergency services would necessarily increase medical costs, inflate premiums, and reduce the scope of health plan benefits supports the reasonable inference that Defendants did not violate any Nevada penal code provision, much less with the requisite scienter. Because the TeamHealth Plaintiffs will argue to the jury that Defendants' out-of-network reimbursement programs were part of a scheme to knowingly defraud them of money or property, Defendants are entitled to



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rebut this argument with evidence that the market forces governing health insurance plans provided the actual motivation for their out-of-network programs–e.g., managing medical costs to the benefit of their fully insured and self-funded clients. As a matter of basic fairness, Defendants must be permitted to present fact and expert testimony about the market impact of a requirement to reimburse out-of-network emergency services based on the providers' full billed charges and how such a requirement would have impacted the Defendants' self-funded clients and the premiums charged to fully-insured clients. Such evidence will explain why the employers that hired Defendants to administer their health benefit plans insisted that Defendants implement out-of-network programs designed to restrain the increasing medical costs associated with out-of-network services and the premium hikes that necessarily follow from such an increase in medical costs. This evidence will negate the TeamHealth Plaintiffs' argument that these out-of-network programs did not serve a legitimate business purpose but were instead intended to defraud them of money or property.

Fifth, punitive damages can only be awarded in this case if TeamHealth Plaintiffs prove by clear and convincing evidence that Defendants are "guilty of oppression, fraud or malice, express or implied." NRS 42.005; *Garcia v. Awerbach*, 136 Nev. 229, 232-33, 463 P.3d 461, 464 (2020). "'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person." NRS 42.001. "'Fraud' means an intentional misrepresentation, deception or concealment of a material fact known to the person with the intent to deprive another person of his or her rights or property or to otherwise injure another person." *Id*. "Express malice is conduct intended to injure a person, while implied malice is despicable conduct that a person engages in with conscious disregard of another's rights." *Garcia*, 136 Nev. at 233, 463 P.3d at 464 (citing NRS 42.001). "A defendant acts with conscious disregard when he or she has knowledge of the probable harmful consequences of a wrongful act and . . . willful[ly] and deliberate[ly] fail[s] to act to avoid those consequences." *Id.* (internal marks omitted).

Because TeamHealth Plaintiffs must attack Defendants' conduct and prove a malicious state of mind that meets this exceptionally high standard, Defendants have a due process right to



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explain their challenged actions. That includes explaining that a requirement to pay billed charges for out-of-network emergency services would necessarily increase medical costs, health insurance premiums, and reduce the scope of health plan benefits, all of which supports the reasonable inference that their reimbursement was motivated by a good-faith desire to limit the premiums paid by their fully-insured clients and manage the medical costs borne by their self-funded clients. After all, if the jury agrees that Defendants implemented the out-of-network reimbursement programs to respond to their clients' demands to control out-of-network healthcare costs, and thereby restrain future premium increases, the jury is more likely to reject the TeamHealth Plaintiffs' argument that Defendants' business practices were motivated by malice, an intent to defraud and/or a conscious disregard of the rights of others.

**E. Evidence and Argument that a Requirement to Reimburse Out-of-Network Services at Full Billed Charges Would Result in an Increase in Premiums for Fully-Insured Clients, Higher Medical Costs for Self-Funded Clients and Reduced Benefits for Members is Relevant Because It Rebuts TeamHealth Plaintiffs' Evidence that Defendants Entered into an Implied-in-Fact Contract to Reimburse Their Services at Full Billed Charges and that Defendants Knew Their Out-of-Network Reimbursements Were Unreasonable.**

TeamHealth Plaintiffs argue that evidence and argument regarding the market impact of a requirement to reimburse out-of-network services at full billed charges is irrelevant and should be excluded. Pls.' MIL No. 1, Section B. Their argument is too simplistic for the complexity of the case that they brought and that they must prove to the jury.[1]

TeamHealth Plaintiffs will argue to the jury that Defendants are required by Nevada law to reimburse their out-of-network services at full billed charges. **Exhibit 8**, Pls.' Response to

[1] TeamHealth Plaintiffs also reduce a central dispute to an assertion of law and fact: Defendants are obligated to pay full billed charges. Pls.' MIL No. 1 at 8:3-8 (arguing that evidence of the market economy that serves as the basis for their implied-in-fact contract has "no bearing on whether [Defendants] ha[ve] an obligation to pay billed charges for the out-of-network claims at issue" because their "obligation to pay billed charges exists irrespective of the premiums paid" and "would exist even if [Defendants] did not receive *any* premiums" (emphasis in original)). Yet, it is undisputed that there are no written contracts between the parties requiring payment of full billed charges or Nevada laws or regulations equating reasonable reimbursement to full billed charges. *See* FAC ¶ 20 (admitting no written contract); **Exhibit 9**, Ruby Crest NRCP 30(b)(6) Dep. at 210:17-212:20 (testifying that Nevada's laws and regulations do not contain a fee schedule or specify a particular reimbursement methodology); NRS 439B.754 (making clear that billed charges can be rejected).



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Interrogatory No. 5 ("[I]t is implicit and expected that UnitedHealthcare will pay Fremont for the billed charges."); **Exhibit 9**, Dep. of Kent Bristow ("Ruby Crest NRCP 30(b)(6) Dep.") at 72:20-75:24 (May 14, 2021). As proof, TeamHealth Plaintiffs will argue that every health insurer has an implied-in-fact contract with every provider of emergency medicine services in Nevada. *See, e.g.*, **Exhibit 7**, Fremont NRCP 30(b)(6) Dep. at 154:6-13. Defendants are entitled to rebut that argument by offering evidence that such a requirement would have specific adverse impacts on the market for health insurance and that those adverse market impacts undermine the credibility of the TeamHealth Plaintiffs' legal claims.

***First***, TeamHealth Plaintiffs will attack Defendants' implementation of various out-of-network reimbursement programs. *See, e.g.*, FAC ¶¶ 55, 100-103, 121-127; **Exhibit 10**, Dep. of John Haben ("Haben Dep.") at 37:24-38:6 (May 21, 2021) (questioning out-of-network reimbursement programs); **Exhibit 4**, Nierman Dep. at 34:8-35:19 (same). They will do so to prove that the reimbursement for the At-Issue Claims was unreasonable and to prove that Defendants perpetrated a wide-ranging racketeering conspiracy with third-party companies that marketed those out-of-network programs. *See* FAC ¶ 102 ("Since January 2019, Defendants have engaged in a scheme and conspired with Data iSight to impose arbitrary and unreasonable payment rates."); **Exhibit 11**, Dep. of Susan Mohler ("Mohler Dep.") 71:9-24 (June 18, 2021) (questioning third-party company's public website statements); **Exhibit 12**, Dep. of Jolene Bradley ("Bradley Dep.") at 108:15-22 (May 7, 2021) (same). Defendants are entitled to rebut the notion that their out-of-network programs were the product of a racketeering conspiracy by offering evidence that these programs were in response to demands from clients for programs to control out-of-network medical costs and the increases in premiums that result from higher medical costs. *See* **Exhibit 3**, Paradise Dep. at 55:4-25 ("[A]s provider groups are inflating their billed charges, that's driving up those reimbursement levels and it's creating a dynamic where providing out-of-network benefits . . . [i]s getting unaffordable. So, obviously, clients pay us to manage their out-of-network spend, and it's our job to . . . manage their med expense effectively for them."); **Exhibit 10**, Haben Dep. at 13:3-12, 44:8-16 (testifying that the parties' relationship cannot "parse . . . out" Defendants' clients because Defendants "are expected to manage their

spend"). Evidence that a requirement to pay full billed charges for out-of-network services would produce higher medical costs, increases in health insurance premiums, and reductions in the scope of plan benefits lends powerful support to Defendants' rebuttal argument. By presenting evidence regarding the operation of the health insurance market, Defendants can show the jury that their true intent was to restrain medical costs from spiraling ever higher and passing along those costs to their clients.

***Second***, the TeamHealth Plaintiffs contend that an implied-in-fact contract exists between the parties that establishes an obligation to reimburse their full billed charges. *See* FAC ¶¶ 20, 39-40, 57, 157, 184, 189-206; **Exhibit 8**, Pls.' Response to Interrogatory No. 5 ("It is implicit and expected that UnitedHealthcare will pay Fremont for the billed charges."); **Exhibit 9**, Ruby Crest NRCP 30(b)(6) Dep. at 72:20-75:24. This contract exists, they contend, because providers of emergency medicine services must provide service to every patient who appears at an emergency room and because all third-party payors are obligated to reimburse emergency service providers for those emergency services. *See* **Exhibit 7**, Fremont NRCP 30(b)(6) Dep. at 154:6-155:2 ("Because Fremont has already provided emergency medicine services . . . it is implicit and expected that [Defendants] will pay Fremont for the billed charges."); **Exhibit 9**, Ruby Crest NRCP 30(b)(6) Dep. at 72:8-73:4 (testifying that third-party payor "is responsible for operating the plan," so "our implied-in-fact contract is with" that payor, "who is the healthcare administrator on behalf of the employer group"). Thus, the TeamHealth Plaintiffs will argue that Nevada law imposes an implied-in-fact contract on the parties that requires health insurers to pay the unilaterally set full billed charges of emergency service providers.

Given this unprecedented theory, the jury must understand the economics of emergency medicine services and, in order to rebut TeamHealth Plaintiffs' one-sided presentation, Defendants are entitled to present evidence regarding the impact of such a requirement on the health insurance market. The jury will be asked to determine whether Defendants agreed to an implied-in-fact contract whereby there was mutual assent to reimburse the disputed services at full billed charges–charges over which the Defendants have zero control. *Magnum*, 129 Nev. 1135, 2013 WL 7158997; *Certified Fire Prot. Inc.*, 128 Nev. at 256. Defendants are entitled to

show the jury that there was no intent to contract for reimbursement at billed charges, because such an agreement would have made no economic sense for Defendants and their self-funded employer clients. Defendants must be permitted to offer evidence that such a contract would have contributed to higher medical costs for their self-insured clients, increased premiums for their fully insured products, and harmed Defendants' competitive position relative to other health insurers when bidding for new business from the employers and unions that hire Defendants to administer benefit plans. **Pls' MIL No. 1 Exhibit 2**, Expert Report of Karen King ("King Rep.") at 145-146, 154-155 (July 30, 2021). Although it would help TeamHealth Plaintiffs to present this case by only focusing on one side of the story—payments to emergency room staffing companies like TeamHealth Plaintiffs—that is only one small part of the larger story that the jury must consider when evaluating their legal claims.

### F. The Evidence and Arguments that Defendants Will Offer Does Not Violate the Prohibition Against Golden Rule Arguments.

TeamHealth Plaintiffs cry wolf in their attempt to exclude Defendants' evidence and argument regarding the market impact of a requirement to reimburse out-of-network services at full billed charges. To be clear, Defendants will not ask the jury to step into their shoes, to send a message about some social issue, or to ignore the evidence.

As the Court knows, counsel "enjoys wide latitude in arguing facts and drawing inferences from evidence." *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 364, 212 P.3d 1068, 1078 (2009). However, counsel is prohibited from making so-called "Golden Rule" arguments. *Lioce v. Cohen*, 124 Nev. 1, 22-23, 174 P.3d 970, 983-84 (2008). The prohibition is directed at argument of counsel, not evidence. *See, e.g., id.* Counsel only advances a Golden Rule argument if the jury is asked, notwithstanding the evidence, to do unto others that which they would want done unto them. *See id.*; *see also Shaffer v. Ward*, 510 So. 2d 602, 602-03 (Fla. Dist. Ct. App. 1987) (finding Golden Rule arguments pertain to the damages context). Counsel only does so by asking the jury to "place themselves in the position of one of the parties" or by asking them "to send a message about some social issue." *Loice*, 124 Nev. at 20, 22-23, 174 P.3d at 982, 984; *Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 269, 396 P.3d 783, 790

(2017) (clarifying that "'send a message' . . . arguments are not prohibited so long as the attorney is not asking the jury to ignore the evidence" (citing *Loice*)).

Defendants' intended argument will be based on evidence. From documents and fact testimony, Defendants will argue that if there was an obligation to reimburse out-of-network services at full billed charges, the costs of health benefit plans would sky rocket. **Exhibit 3**, Paradise Dep. at 55:4-25 ("as provider groups are inflating their billed charges, that's driving up those reimbursement levels and it's creating a dynamic where providing out-of-network benefits . . . was getting unaffordable"). Defendants will also argue that they would not be able to compete as effectively against other health insurers, if they had to reimburse out-of-network services at billed charges and other payors did not. **Exhibit 13**, Email from E. Lagestrom to L. McDonnel (Sept. 27, 2019) (DEF330043) (describing Defendants' late adoption of out-of-network programs vis-à-vis their competitors); **Exhibit 14**, MultiPlan Presentation, Competitive Landscape for Cost Management (Sept. 26, 2019) (DEF299508) (presenting that Defendants were 10 years behind some competitors in terms of what out-of-network programs they were using); **Exhibit 1**, Schumacher Dep. at 105:19-107:13 ("We weren't as competitive and our enrollment was challenged."). And, Defendants will argue that their employer clients tasked them with restraining growing premiums because the clients understood the relationship between out-of-network reimbursements, rising medical costs, increased health insurance premiums and the scope of health plan coverage. *See id*; **Exhibit 4**, Nierman Dep. at 125:21-127:16 ("We have customers that are fed up."). In sum, the evidence will show that it would have been economically irrational for Defendants to have entered into the alleged implied-in-fact contract with the TeamHealth Plaintiffs.

The TeamHealth Plaintiffs in MIL No. 1, however, distort Defendants' intended arguments. For example, TeamHealth Plaintiffs take issue with the deposition testimony of Karen King, an expert in health plan benefits that Defendants retained in this case, testimony ***that the TeamHealth Plaintiffs elicited***. Pls.' MIL No. 1 at 11:1-11. Defendants do not intend to offer the opinions quoted from Ms. King's deposition testimony to the extent that this testimony suggests that the jury's verdict in this specific case might impact future health



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insurance premiums or the availability of coverage for members. Nor do Defendants intend to ask the questions that counsel for TeamHealth Plaintiffs asked that they now find objectionable. Instead, Ms. King's proffered expert testimony will be limited to the opinions and bases stated in her report. Ms. King's report opines that Defendants' clients require out-of-network reimbursement programs to manage medical costs. She will explain that those self-funded employer clients hire Defendants to manage medical costs and reduce the costs that are passed along to their employees:

> Charge-based [out-of-network or] OON payment methodologies . . . relied on the providers' billed charges to determine reasonable reimbursement. The flaw in this methodology, however, was that providers could just keep increasing . . . their charges every year to drive up the payment amounts . . . . In response to the rapidly increasing OON healthcare spending in the last five to ten years, plan sponsors . . . have shifted fairly dramatically away from the old traditional adjudication methodologies for OON claims. To meet this demand from their clients and remain competitive for the business offered by these plan sponsors, [third-party administrators or] TPAs have had to develop alternative payment methodologies for OON claims. . . . [M]ore competitive TPAs offer multiple different options for OON claim reimbursement so that plan sponsors can select the option that best suits their intended plan design[.] at 10-11
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> I have also been asked to opine on the potential implications for plan sponsors and their employees if their self-funded plans were required to reimburse all OON services at the providers' full billed charges. . . . If plan sponsors were required to pay OON providers at their full billed charges, such a mandate would represent a significant, unplanned increase in the cost of self-funded plans. In the immediate future, the self-funded client would be responsible for paying these increased healthcare costs. However, in the following year, those increased costs would, in my experience, be passed along to employees in the form of less generous health benefits, higher premiums, and/or lower wages because more of the plan sponsor's (i.e., employer's) funds would be directed to increased health plan costs.

**Pls' MIL No. 1 Exhibit 2**, King Rep. at 145-146, 154-155 (July 30, 2021).

Ms. King's report does not, and the intended testimony will not, state that the verdict in this case will cause an increase to premiums or costs or a decrease to benefits. The central focus of Ms. King's opinion on this point is to offer an explanation for why Defendants sought to implement programs to reimburse out-of-network services at less than billed charges. In doing so, Ms. King's report discusses the implications for the health insurance market of a requirement

to reimburse out-of-network emergency medicine services at the providers' full billed charges. *Id.*

Similarly, even though TeamHealth Plaintiffs' MIL No. 1 only cites Bruce Deal's expert report as a relevant fact without arguing that his report or deposition testimony would lead to a prohibited Golden Rule argument, Defendants wish to confirm that counsel will not make an improper Golden Rule argument based on his report or expected expert testimony. To be sure, his expert report explains that, as a general matter of healthcare economics, "[r]equiring payors that are not contracted with a provider to reimburse that provider for healthcare services at full billed charges would lead to higher healthcare costs and higher premiums for consumers, and result in reduced affordability of health insurance coverage in the U.S." **Pls' MIL No. 1 Exhibit 1**, Expert Report of Bruce Deal ("Deal Rep.") at ¶ 48 (035-036) (July 30, 2021). This testimony is highly relevant to this case because it rebuts the testimony of TeamHealth Plaintiffs' expert witnesses as well as arms the jury with the contextual information required to discharge their duty of assessing Defendants' state of mind. *See* **Exhibit 2**, Crane Dep. at 111:13-113:21 (confirming that TeamHealth Plaintiffs' expert testimony will discuss negative impacts of TeamHealth Plaintiffs' not receiving their "proper reimbursement," *i.e.*, full billed charges, such as problems with physician recruitment, retention, and operational challenges that could cause patients to not receive care during "crises like a mass casualty event"). Although Mr. Deal's report discusses the axiomatic fact that a requirement to reimburse out-of-network services at full billed charges would also increase costs for the Defendants' employer clients, this opinion is merely offered as an illustrative example and not a prediction about a particular outcome for a particular employer or juror. **Pls' MIL No. 1 Exhibit 1**, Deal Report at ¶¶ 48-49 (035-037). The Defendants will not offer testimony regarding the financial impact to specific employer customers or their employees stemming from any particular verdict in this case.

The expert evidence, and counsel's argument based thereon, directly supports Defendants' contention that they did not enter an implied-in-fact contact with the TeamHealth Plaintiffs to reimburse the disputed services at full billed charges, since such an agreement would have been economically irrational and required them to reimburse covered services

directly contrary to the directions of their self-funded clients. That evidence and argument also supports Defendants' contention that their challenged business practices for out-of-network reimbursement were motivated by legitimate business objectives to restrain their clients' healthcare costs and premiums rather than a desire to fraudulently cheat the TeamHealth Plaintiffs of payments to which they were entitled. *See Charyulu v. California Cas. Indem. Exch.*, 523 F. App'x 478, 480 (9th Cir. 2013) (holding that no Golden Rule argument occurred when plaintiff put "in issue the reasonableness of the conduct of both sides in the litigation").

Argument based on such evidence is not a Golden Rule argument. The jury is not encouraged to trade places with Defendants or to send a message to anyone. In *DuBois v. Grant*, 108 Nev. 478, 481, 835 P.2d 14, 16 (1992), a girl attended an event at a home where the owners kept horses. After being kicked in the face by a horse, the girl's parents brought a negligence suit against the homeowners. To rebut the negligence claim, defendants argued that "homeowners . . . are entitled to make their homes 'convenient.'" The Nevada Supreme Court held that there was no Golden Rule violation even though arguments concerning "homeowners[] include[ed] the jurors." Thus, presenting argument to the jury about the inevitable economic impact of a requirement to reimburse out-of-network emergency services at full billed charges is not transformed into an impermissible Golden Rule argument simply because members of the jury might also be among the class of persons in the larger community who benefit from health insurance.

The Florida jurisprudence stemming from the case that TeamHealth Plaintiffs cite, *Miami Beach Texaco, Inc. v. Price*, 433 So. 2d 1227 (Fla. Dist. Ct. App. 1983), agrees. In *Cummins Alabama, Inc. v. Allbritten*, 548 So. 2d 258 (Fla. Dist. Ct. App. 1989), the Florida appellate court found that there is no Golden Rule argument based on counsel asking the "jurors [to] analyze a [party's] actions . . . in light of what the jurors, themselves, would have done," so long as counsel uses the appropriate legal standard. *Id*. at 263.

Defendants rest here on even more sure footing than the defendants in *Dubois* and *Cummins Alabama*. Defendants will not ask the jury how they would have priced and paid the disputed claims if they were in Defendants' position. Defendants will not ask the jury to send a




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message to healthcare providers or litigants that seeking their full billed charges is improper. Rather, Defendants will merely ask the jury to do what it must: evaluate TeamHealth Plaintiffs' allegation that there is a requirement to reimburse out-of-network emergency medicine services at the providers' full billed charges and then decide whether, in light of the evidence regarding the impact of such a requirement on the health insurance market, those allegations are credible. Defendants will also ask the jury to decide whether, in light of this evidence about the operation of the health insurance market, TeamHealth Plaintiffs have proven that Defendants acted with the scienter and evil mind required to prove a violation of RICO and to recover punitive damages.

### G. Any Argument Made by Defendants Regarding Potential Increases to Health Insurance Premiums and Medical Costs or Decreases to Benefits Is Not Unfairly Prejudicial, Confusing, or Misleading.

TeamHealth Plaintiffs also argue that the evidence in question is unfairly prejudicial, confusing, or misleading. They contend that evidence of the "potential future financial impact to a juror elicits a strong emotional reaction." Pls.' MIL No. 1 at 9:4-5. But this argument is a straw man. Defendants will not offer evidence or argue that the jurors will be financially impacted by the relief requested in this trial. Moreover, counsel may present argument with emotional appeal so long as it does not "appeal ***solely*** to the emotions of the jury." *Grosjean*, 125 Nev. at 364, 212 P.3d at 1078 (emphasis added).

As explained above, the evidence and argument that a requirement to pay billed charges for out-of-network emergency services would necessarily increase medical costs for self-funded clients, increase premiums for fully-insured clients and reduce the scope of health plan benefits for members relates to the health insurance market writ large, not the individual jurors in this case. Also, such evidence does not "appeal solely to the emotions of the jury." *Id.* That evidence applies to rebutting the substantive elements of TeamHealth Plaintiffs' case-in-chief, including whether it is credible that Defendants agreed to the implied-in-fact contract alleged in this case and whether Defendants acted with the requisite scienter to prove their RICO, fraud, and punitive damages claims. In fact, it would be highly prejudicial, confusing, and misleading

for the jury to only hear one-side of the story by excluding this evidence probative of Defendants' conduct and state of mind when the TeamHealth Plaintiffs have stated their intention to impugn both. *See Nguyen*, 282 F.3d at 1068 (holding that if one party is permitted to introduce certain evidence—whether or not that evidence is relevant—the opposing party must be permitted to introduce similar evidence); *see also Hall*, 129 Nev. 1120, 2013 WL 7155073 (applying the same doctrine under Nevada law).

## III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny TeamHealth Plainitffs' Motion in Limine No. 1.

Dated this 29th day of September, 2021.

*/s/ Colby L. Balkenbush*

D. Lee Roberts, Jr., Esq.
Colby L. Balkenbush, Esq.
Brittany M. Llewellyn, Esq.
Phillip N. Smith, Jr., Esq.
Marjan Hajimirzaee, Esq.
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd.
Suite 400
Las Vegas, Nevada 89118

Daniel F. Polsenberg, Esq.
Joel D. Henriod, Esq.
Abraham G. Smith, Esq.
Lewis Roca Rothgerber Christie LLP
3993 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169-5996
Telephone: (702) 949-8200

Dimitri D. Portnoi, Esq.( *Pro Hac Vice*)
Jason A. Orr, Esq. (*Pro Hac Vice)*
Adam G. Levine, Esq. *(Pro Hac Vice)*
Hannah Dunham, Esq. *(Pro Hac Vice)*
Nadia L. Farjood, Esq. (*Pro Hac Vice*)
O'Melveny & Myers LLP
400 S. Hope St., 18th Floor
Los Angeles, CA 90071

K. Lee Blalack, II, Esq.( *Pro Hac Vice)*
Jeffrey E. Gordon, Esq. *(Pro Hac Vice)*
Kevin D. Feder, Esq. *(Pro Hac Vice)*
Jason Yan, Esq. *(Pro Hac Vice)*
O'Melveny & Myers LLP
1625 Eye St. NW
Washington, DC 20006

Paul J. Wooten, Esq. *(Pro Hac Vice)*
Amanda L. Genovese *(Pro Hac Vice)*
Philip E. Legendy *(Pro Hac Vice)*
O'Melveny & Myers LLP
Times Square Tower, Seven Times Square
New York, NY 10036

*Attorneys for Defendants*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 29th day of September, 2021, a true and correct copy of the foregoing **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** 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:

Pat Lundvall, Esq.
Kristen T. Gallagher, Esq.
Amanda M. Perach, Esq.
McDonald Carano LLP
2300 W. Sahara Ave., Suite 1200
Las Vegas, Nevada 89102
plundvall@mcdonaldcarano.com
kgallagher@mcdonaldcarano.com
aperach@mcdonaldcarano.com

Judge David Wall, Special Master
Attention:
Mara Satterthwaite & Michelle Samaniego
JAMS
3800 Howard Hughes Parkway, 11th Floor
Las Vegas, NV 89123
msatterthwaite@jamsadr.com
msamaniego@jamsadr.com

Justin C. Fineberg
Martin B. Goldberg
Rachel H. LeBlanc
Jonathan E. Feuer
Jonathan E. Siegelaub
David R. Ruffner
Emily L. Pincow
Ashley Singrossi
Lash & Goldberg LLP
Weston Corporate Centre I
2500 Weston Road Suite 220
Fort Lauderdale, Florida 33331
jfineberg@lashgoldberg.com
mgoldberg@lashgoldberg.com
rleblanc@lashgoldberg.com
jfeuer@lashgoldberg.com
jsiegelaub@lashgoldberg.com
druffner@lashgoldberg.com
epincow@lashgoldberg.com
asingrassi@lashgoldberg.com

Joseph Y. Ahmad
John Zavitsanos
Jason S. McManis
Michael Killingsworth
Louis Liao
Jane L. Robinson

Patrick K. Leyendecker
Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing, P.C
1221 McKinney Street, Suite 2500
Houston, Texas 77010
joeahmad@azalaw.com
jzavitsanos@azalaw.com
jmcmanis@azalaw.com
mkillingsworth@azalaw.com
lliao@azalaw.com
jrobinson@azalaw.com
kleyendecker@azalaw.com

*Attorneys for Plaintiffs*

*/s/ Kelly L. Pierce*
An employee of WEINBERG, WHEELER, HUDGINS GUNN & DIAL, LLC

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Steven D. Grierson
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**NEOJ**

Pat Lundvall (NSBN 3761)
Kristen T. Gallagher (NSBN 9561)
Amanda M. Perach (NSBN 12399)
McDONALD CARANO LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
Telephone: (702) 873-4100
plundvall@mcdonaldcarano.com
kgallagher@mcdonaldcarano.com
aperach@mcdonaldcarano.com

Justin C. Fineberg (admitted *pro hac vice*)
Martin B. Goldberg (admitted *pro hac vice)*
Rachel H. LeBlanc (admitted *pro hac vice*)
Jonathan E. Feuer (admitted *pro hac vice*)
Jonathan E. Siegelaub (admitted *pro hac vice*)
David R. Ruffner (admitted *pro hac vice*)
Emily L. Pincow (admitted *pro hac vice*)
Ashley Singrossi (admitted *pro hac vice*)
Lash & Goldberg LLP
Weston Corporate Centre I
2500 Weston Road Suite 220
Fort Lauderdale, Florida 33331
Telephone: (954) 384-2500
jfineberg@lashgoldberg.com
mgoldberg@lashgoldberg.com
rleblanc@lashgoldberg.com
jfeuer@lashgoldberg.com
jsiegelaub@lashgoldberg.com
druffner@lashgoldberg.com
epincow@lashgoldberg.com
asingrossi@lashgoldberg.com

Joseph Y. Ahmad (admitted *pro hac vice*)
John Zavitsanos (admitted *pro hac vice*)
Jason S. McManis (admitted *pro hac vice*)
Michael Killingsworth (admitted *pro hac vice*)
Louis Liao (admitted *pro hac vice)*
Jane L. Robinson (admitted *pro hac vice*)
P. Kevin Leyendecker (admitted *pro hac vice*)
Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing, P.C
1221 McKinney Street, Suite 2500
Houston, Texas 77010
Telephone: 713-600-4901
joeahmad@azalaw.com
jzavitsanos@azalaw.com
jmcmanis@azalaw.com
mkillingsworth@azalaw.com
lliao@azalaw.com
jrobinson@azalaw.com
kleyendecker@azalaw.com

*Attorneys for Plaintiffs*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Plaintiffs,

vs.

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

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

**NOTICE OF ENTRY 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**



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

Defendants.

PLEASE TAKE NOTICE that a Stipulation And 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 was entered on September 28, 2021, a copy of which is attached hereto.

Dated this 29th day of September, 2021.

McDONALD CARANO LLP

By: */s/ Kristen T. Gallagher*
Pat Lundvall (NSBN 3761)
Kristen T. Gallagher (NSBN 9561)
Amanda M. Perach (NSBN 12399)
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
plundvall@mcdonaldcarano.com
kgallagher@mcdonaldcarano.com
aperach@mcdonaldcarano.com

*Attorneys for Plaintiffs*

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

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**CERTIFICATE OF SERVICE**

I certify that I am an employee of McDonald Carano LLP, and that on this 29th day of September, 2021, I caused a true and correct copy of the foregoing **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** to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

D. Lee Roberts, Jr., Esq.
Colby L. Balkenbush, Esq.
Brittany M. Llewellyn, Esq.
Phillip N. Smith, Jr., Esq.
Marjan Hajimirzaee, Esq.
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
lroberts@wwhgd.com
cbalkenbush@wwhgd.com
bllewellyn@wwhgd.com
psmithjr@wwhgd.com
mhajimirzaee@wwhgd.com

Paul J. Wooten, Esq. (admitted *pro hac vice*)
Amanda Genovese, Esq. (admitted *pro hac vice*)
Philip E. Legendy, Esq. (admitted *pro hac vice*)
O'Melveny & Myers LLP
Times Square Tower,
Seven Times Square,
New York, New York 10036
pwooten@omm.com
agenovese@omm.com
plegendy@omm.com

Dimitri Portnoi, Esq. (admitted *pro hac vice*)
Jason A. Orr, Esq. (admitted *pro hac vice*)
Adam G. Levine, Esq. (admitted *pro hac vice*)
Hannah Dunham, Esq. (admitted *pro hac vice*)
Nadia L. Farjood, Esq. (admitted *pro hac vice*)
O'MELVENY & MYERS LLP
400 South Hope Street, 18th Floor
Los Angeles, CA 90071-2899
dportnoi@omm.com
jorr@omm.com
alevine@omm.com
hdunham@omm.com
nfarjood@omm.com

Daniel F. Polsenberg, Esq.
Joel D. Henriod, Esq.
Abraham G. Smith, Esq.
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
dpolsenberg@lewisroca.com
jhenriod@lewisroca.com
asmith@lewisroca.com

*Attorneys for Defendants*

K. Lee Blalack, II, Esq. (admitted *pro hac vice*)
Jeffrey E. Gordon, Esq. (admitted *pro hac vice*)
Kevin D. Feder, Esq. (admitted *pro hac vice*)
Jason Yan, Esq. (*pro hac vice* pending)
O'Melveny & Myers LLP
1625 I Street, N.W.
Washington, D.C. 20006
Telephone: (202) 383-5374
lblalack@omm.com
jgordon@omm.com
kfeder@omm.com

*Attorneys for Defendants*

Judge David Wall, Special Master
Attention: Mara Satterthwaite & Michelle Samaniego
JAMS
3800 Howard Hughes Parkway, 11th Floor
Las Vegas, NV 89123
msatterthwaite@jamsadr.com
msamaniego@jamsadr.com

/s/ *Marianne Carter*
An employee of McDonald Carano LLP



McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966



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005106

**SAO**

Pat Lundvall (NSBN 3761)
Kristen T. Gallagher (NSBN 9561)
Amanda M. Perach (NSBN 12399)
McDONALD CARANO LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
Telephone: (702) 873-4100
plundvall@mcdonaldcarano.com
kgallagher@mcdonaldcarano.com
aperach@mcdonaldcarano.com

Justin C. Fineberg (admitted *pro hac vice*)
Martin B. Goldberg (admitted *pro hac vice)*
Rachel H. LeBlanc (admitted *pro hac vice*)
Jonathan E. Feuer (admitted *pro hac vice*)
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David R. Ruffner (admitted *pro hac vice*)
Emily L. Pincow (admitted *pro hac vice*)
Ashley Singrossi (admitted *pro hac vice*)
Lash & Goldberg LLP
Weston Corporate Centre I
2500 Weston Road Suite 220
Fort Lauderdale, Florida 33331
Telephone: (954) 384-2500
jfineberg@lashgoldberg.com
mgoldberg@lashgoldberg.com
rleblanc@lashgoldberg.com
jfeuer@lashgoldberg.com
jsiegelaub@lashgoldberg.com
druffner@lashgoldberg.com
epincow@lashgoldberg.com
asingrossi@lashgoldberg.com

Joseph Y. Ahmad (admitted *pro hac vice*)
John Zavitsanos (admitted *pro hac vice*)
Jason S. McManis (admitted *pro hac vice*)
Michael Killingsworth (admitted *pro hac vice*)
Louis Liao (admitted *pro hac vice*)
Jane L. Robinson (admitted *pro hac vice*)
P. Kevin Leyendecker (admitted *pro hac vice*)
Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing, P.C.
1221 McKinney Street, Suite 2500
Houston, Texas 77010
Telephone: 713-600-4901
joeahmad@azalaw.com
jzavitsanos@azalaw.com
jmcmanis@azalaw.com
mkillingsworth@azalaw.com
lliao@azalaw.com
jrobinson@azalaw.com
kleyendecker@azalaw.com

*Attorneys for Plaintiffs*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Plaintiffs,

vs.

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

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

**STIPULATION AND 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**



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

Defendants.

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"); and defendants UnitedHealth Group, Inc.; UnitedHealthcare Insurance Company; United HealthCare Services, Inc.; UMR, Inc.; Oxford Health Plans, Inc.; Sierra Health and Life Insurance Co., Inc.; Sierra Health-Care Options, Inc.; and Health Plan of Nevada, Inc. (collectively, "Defendants") stipulate and agree as follows:

1. On June 24, 2021, Defendants filed a Motion to Compel Plaintiffs' Production of Documents About Which Plaintiffs' Witnesses Testified on Order Shortening Time (the "Motion to Compel"); the Health Care Providers opposed the Motion to Compel and United filed a reply.

2. The Motion to Compel seeks the following documents referred to by witnesses at deposition: (a) summary of David Greenberg's, Lisa Zima's, and Kent Bristow's call notes with Data iSight referred to during their respective depositions; (b) summary document listing wrap/rental networks referred to by Kent Bristow during the deposition of the Team Physicians' NRCP 30(b)(6) designee; (c) data on full billed charges for the period 2015-2017; (d) TeamHealth documents and data relating to 4,000 claims from Defendants' administrative services only ("ASO") customers; and (e) the Health Care Providers' contracts with third-party

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966



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insurers; (f) balance billing policy separate from the policy contained in deposition Exhibit 31 to the NRCP 30(b)(6) Designee for Team Physicians.

3. On July 22, 2021, the Special Master held a telephonic hearing and on August 11, 2021 issued Report and Recommendation #11 Regarding United's Motion To Compel Plaintiffs' Production Of Documents About Which Plaintiffs' Witnesses Testified On Order Shortening Time (R&R #11).

4. On August 25, 2021, Defendants filed an Objection to R&R #11 regarding the Special Master's recommendation as to the first category identified in paragraph 2(a), a summary of David Greenberg's, Lisa Zima's, and Kent Bristow's call notes with Data iSight referred to during their respective depositions. Defendants' Objection did not challenge the remainder of R&R #11 set forth in paragraph 2(b)-(f).

5. Currently, the hearing on Defendants' Objection to R&R #11 is set for September 29, 2021.

6. The Health Care Providers intend to respond to the Objection and dispute Defendants' arguments contained in their Objection, but as a point of compromise and in exchange for Defendants' withdrawal of its Objection to R&R #11, the Health Care Providers agree to produce copies of the notes identified in paragraph 2(a) herein. The Health Care Providers shall be entitled to redact material that is protected by NRCP 26(b)(3)(B). Through this stipulation, the Defendants waive the right to contend that the Plaintiffs waived any attorney-client privilege or work product protection for the notes by putting material from the notes in the First Amended Complaint. However, Defendants retain the right to challenge whether the Health Care Providers' redactions have been properly limited to material protected by NRCP 26(b)(3)(B). The Health Care Providers do not waive any available attorney-client privilege or application of the attorney work product doctrine to the documents they will produce.

7. The Health Care Providers will produce the documents contemplated by paragraph 2(a) within one (1) business day of service of Defendants' notice of withdrawal of Objection from the Court's electronic filing system.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966



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8. This stipulation is intended to fully resolve Defendants' Objection.

9. The parties further stipulate, agree and respectfully request that the Court adopt and affirm R&R #11 on the remaining four matters identified in paragraph 2(b)-(f) herein.

Dated this 28th day of September, 2021.

McDONALD CARANO LLP

By: */s/ Kristen T. Gallagher*
Pat Lundvall (NSBN 3761)
Kristen T. Gallagher (NSBN 9561)
Amanda M. Perach (NSBN 12399)
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
plundvall@mcdonaldcarano.com
kgallagher@mcdonaldcarano.com
aperach@mcdonaldcarano.com

*Attorneys for Plaintiffs*

WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC

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

**ORDER**

**IT IS SO ORDERED.**

September 28, 2021

**Dated this 28th day of September, 2021**

Nancy L Allf

TW

**2E9 632 65D5 471D**
**Nancy Allf**
**District Court Judge**

Respectfully submitted by:

McDONALD CARANO LLP

By: /s/ *Kristen T. Gallagher*
Pat Lundvall (NSBN 3761)
Kristen T. Gallagher (NSBN 9561)
Amanda M. Perach (NSBN 12399)
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
plundvall@mcdonaldcarano.com
kgallagher@mcdonaldcarano.com
aperach@mcdonaldcarano.com

*Attorneys for Plaintiffs*

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966



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005110

**Colby Balkenbush <cbalkenbush@wwhgd.com>** 9/28/2021 12:13 PM

# RE: FW: Fremont v. United - R&R #11 compromise offer

To KRISTEN GALLAGHER <ktgallagher@ t>

Kristy,

You may insert my e-signature and file this with the Court. I am free for a call between now and 10 am and then again after 11 am.

**From:** KRISTEN GALLAGHER [mailto: ]
**Sent:** Tuesday, September 28, 2021 8:39 AM
**To:** Balkenbush, Colby
**Subject:** Re: FW: Fremont v. United - R&R #11 compromise offer

**This Message originated outside your organization.**

Colby - please see the attached which accepts your last proposed edit. I have also updated the Plaintiffs' attorney block on page 1. Please provide authority to insert your electronic signature for filing with the Court. Also, may I suggest that we contact Chambers to alert the Judge and her staff that tomorrow's hearing will not go forward? If you agree, please let me know what time we may make a joint call to chambers this morning.



> On September 27, 2021 at 10:46 PM KRISTEN GALLAGHER < t> wrote:
>
> Thank you for sending. I believe we are in agreement with the proposed language you returned. I will confirm in the morning.
>
> Regards,
> Kristy
>
> On September 27, 2021 at 6:43 PM Balkenbush, Colby wrote:
>
> **From:** Balkenbush, Colby
> **Sent:** Monday, September 27, 2021 3:40 PM
> **To:** 'Kristen T. Gallagher'
> **Subject:** FW: Fremont v. United - R&R #11 compromise offer

**CSERV**

DISTRICT COURT
CLARK COUNTY, NEVADA

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

**AUTOMATED CERTIFICATE OF SERVICE**

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

Service Date: 9/28/2021

| | |
|---|---|
| Michael Infuso | minfuso@greeneinfusolaw.com |
| Frances Ritchie | fritchie@greeneinfusolaw.com |
| Greene Infuso, LLP | filing@greeneinfusolaw.com |
| Audra Bonney | abonney@wwhgd.com |
| Cindy Bowman | cbowman@wwhgd.com |
| D. Lee Roberts | lroberts@wwhgd.com |
| Raiza Anne Torrenueva | rtorrenueva@wwhgd.com |
| Pat Lundvall | plundvall@mcdonaldcarano.com |
| Kristen Gallagher | kgallagher@mcdonaldcarano.com |
| Amanda Perach | aperach@mcdonaldcarano.com |

005112

005112

005112

| | |
|---|---|
| Beau Nelson | bnelson@mcdonaldcarano.com |
| Marianne Carter | mcarter@mcdonaldcarano.com |
| Karen Surowiec | ksurowiec@mcdonaldcarano.com |
| Colby Balkenbush | cbalkenbush@wwhgd.com |
| Daniel Polsenberg | dpolsenberg@lewisroca.com |
| Joel Henriod | jhenriod@lewisroca.com |
| Abraham Smith | asmith@lewisroca.com |
| Brittany Llewellyn | bllewellyn@wwhgd.com |
| Phillip Smith, Jr. | psmithjr@wwhgd.com |
| Flor Gonzalez-Pacheco | FGonzalez-Pacheco@wwhgd.com |
| Kelly Gaez | kgaez@wwhgd.com |
| Justin Fineberg | jfineberg@lashgoldberg.com |
| Yvette Yzquierdo | yyzquierdo@lashgoldberg.com |
| Virginia Boies | vboies@lashgoldberg.com |
| Martin Goldberg | mgoldberg@lashgoldberg.com |
| Rachel LeBlanc | rleblanc@lashgoldberg.com |
| Jonathan Feuer | jfeuer@lashgoldberg.com |
| Jason Orr | jorr@omm.com |
| Adam Levine | alevine@omm.com |
| Jeff Gordon | jgordon@omm.com |
| Hannah Dunham | hdunham@omm.com |
| Paul Wooten | pwooten@omm.com |
| Dimitri Portnoi | dportnoi@omm.com |

005113

005113

| | |
|---|---|
| Lee Blalack | lblalack@omm.com |
| David Ruffner | druffner@lashgoldberg.com |
| Amanda Genovese | agenovese@omm.com |
| Kimberly Kirn | kkirn@mcdonaldcarano.com |
| Emily Pincow | epincow@lashgoldberg.com |
| Cheryl Johnston | Cheryl.Johnston@phelps.com |
| Ashley Singrossi | asingrossi@lashgoldberg.com |
| Jonathan Siegelaub | jsiegelaub@lashgoldberg.com |
| Marjan Hajimirzaee | mhajimirzaee@wwhgd.com |
| Jessica Helm | jhelm@lewisroca.com |
| Cynthia Kelley | ckelley@lewisroca.com |
| Emily Kapolnai | ekapolnai@lewisroca.com |
| Maxine Rosenberg | Mrosenberg@wwhgd.com |
| Mara Satterthwaite | msatterthwaite@jamsadr.com |
| Tara Teegarden | tteegarden@mcdonaldcarano.com |
| Errol KIng | errol.King@phelps.com |
| Philip Legendy | plegendy@omm.com |
| Andrew Eveleth | aeveleth@omm.com |
| Kevin Feder | kfeder@omm.com |
| Nadia Farjood | nfarjood@omm.com |
| Jason Yan | jyan@omm.com |
| AZAlaw AZAlaw | TMH010@azalaw.com |
| Beau Nelson | beaunelsonmc@gmail.com |

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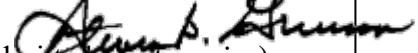
Steven D. Grierson
CLERK OF THE COURT



**OML**
Pat Lundvall (NSBN 3761)
Kristen T. Gallagher (NSBN 9561)
Amanda M. Perach (NSBN 12399)
McDONALD CARANO LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
Telephone: (702) 873-4100
plundvall@mcdonaldcarano.com
kgallagher@mcdonaldcarano.com
aperach@mcdonaldcarano.com

Justin C. Fineberg (admitted *pro hac vice*)
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Ashley Singrossi (admitted *pro hac vice*)
Lash & Goldberg LLP
Weston Corporate Centre I
2500 Weston Road Suite 220
Fort Lauderdale, Florida 33331
Telephone: (954) 384-2500
jfineberg@lashgoldberg.com
mgoldberg@lashgoldberg.com
rleblanc@lashgoldberg.com
jfeuer@lashgoldberg.com
jsiegelaub@lashgoldberg.com
druffner@lashgoldberg.com
epincow@lashgoldberg.com
asingrossi@lashgoldberg.com

Joseph Y. Ahmad (admitted *pro hac vice*)
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Michael Killingsworth (admitted *pro hac vice*)
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P. Kevin Leyendecker (admitted *pro hac vice*)
Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing, P.C.
1221 McKinney Street, Suite 2500
Houston, Texas 77010
Telephone: 713-600-4901
joeahmad@azalaw.com
jzavitsanos@azalaw.com
jmcmanis@azalaw.com
mkillingsworth@azalaw.com
lliao@azalaw.com
jrobinson@azalaw.com
kleyendecker@azalaw.com

*Attorneys for Plaintiffs*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Plaintiffs,

vs.

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

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

**PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION IN LIMINE NOS. 3, 4, 5, 6 REGARDING BILLED CHARGES**

Hearing Date: October 14, 2021
Hearing Time: 1:30 p.m.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

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

Defendants.

Plaintiffs Fremont Emergency Services (Mandavia), Ltd. ("Fremont"); Team Physicians of Nevada-Mandavia, P.C. ("Health Care Providers" or "Plaintiffs"); Crum, Stefanko and Jones, Ltd. dba Ruby Crest Emergency Medicine ("Ruby Crest" and collectively the "Health Care Providers") hereby oppose defendants UnitedHealth Group, Inc.; UnitedHealthcare Insurance Company; United HealthCare Services, Inc.; UMR, Inc.; Oxford Health Plans, Inc.; Sierra Health and Life Insurance Co., Inc.; Sierra Health-Care Options, Inc.; and Health Plan of Nevada, Inc.'s (collectively, "United" or "Defendants") motion in limine for the exclusion of all evidence, testimony and/or argument relating to the reasonableness of Plaintiffs billed charges.

This Opposition is based upon the record in this matter, the points and authorities that follow, the pleadings and papers on file in this action, and any argument of counsel entertained by the Court.

DATED this 29th day of September, 2021.

McDONALD CARANO LLP

By: */s/ Amanda M. Perach*
Pat Lundvall (NSBN 3761)
Kristen T. Gallagher (NSBN 9561)
Amanda M. Perach (NSBN 12399)
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
plundvall@mcdonaldcarano.com
kgallagher@mcdonaldcarano.com
aperach@mcdonaldcarano.com

*Attorneys for Plaintiffs*

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966





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McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

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**MEMORANDUM OF POINTS AND AUTHORITIES**

## I. INTRODUCTION

As a general principle, the Health Care Providers do not oppose United introducing certain evidence on the reasonableness of Health Care Providers' billed charges. United, however, in unsurprising fashion, uses its Motions in Limine ("MIL") Nos. 3, 4, 5, and 6 to attempt to expand the scope of relevant evidence by failing to define the exact evidence United seeks to introduce and instead states that United should be able to get into "reasonableness." This is a trap set by United. United does not want to define the scope of "reasonableness" because it wants to introduce evidence at trial that is out-of-bounds based on the Court's prior rulings and call it evidence that speaks to the "reasonableness" of Health Care Providers billed charges. Knowing this is improper, United shows its true motive and seeks in the alternative to prevent clearly relevant evidence from being introduced at trial regarding United's catalog of reimbursement programs and the reasonableness of Health Care Providers' billed charges. In seeking this relief, United is asking the Court to essentially rule on the merits by preventing Health Care Providers from putting on evidence of the reasonable value of the services provided to United's insureds. United's Motion in Limine Nos. 3, 4, 5, and 6 should be denied in their entirety.

## II. ARGUMENT

### A. United Relies on a False Premise. Health Care Providers' Have Sought Billed Charge Damages Since the Inception of this Lawsuit.

As the basis for United's Motion in Limine Nos. 3, 4, 5, and 6, United argues that "Plaintiffs have shifted their position and they now contend that they are entitled to recover their full billed charges rather than the UCR or reasonable rate of reimbursement." MIL 3 at 3; *see also* MIL. 4 at 2-3; MIL 5 at 5; MIL 6 at 4. This is incorrect. Since the inception of this lawsuit, Health Care Providers have sought the recoupment of the difference between the billed charge and the paltry amount United has reimbursed Health Care Providers to date. *See, e.g.,* Original Complaint at ¶¶ 23, 29, 37, 40; Firs Am. Complaint at ¶¶ 21, 57, 62, 69. As Health Care Providers' Corporate Representative, Kent Bristow, testified on numerous occasions, the "usual





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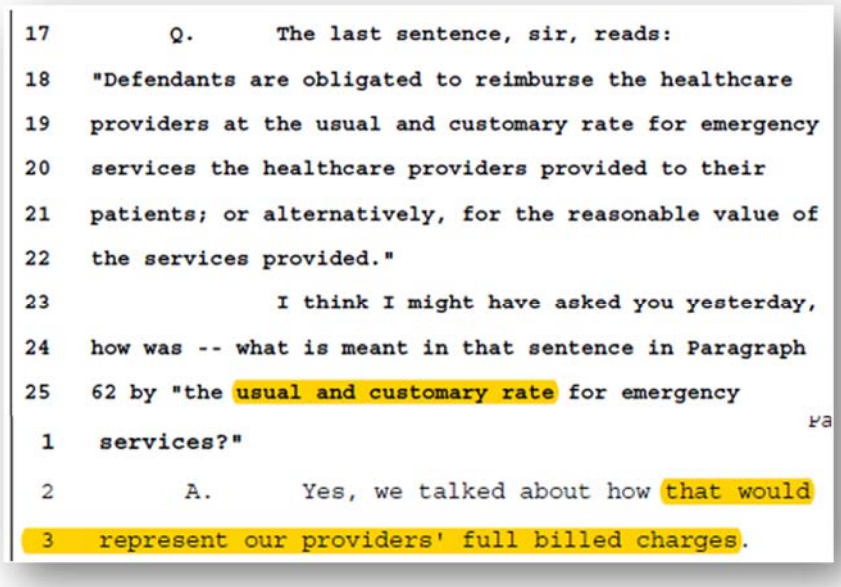
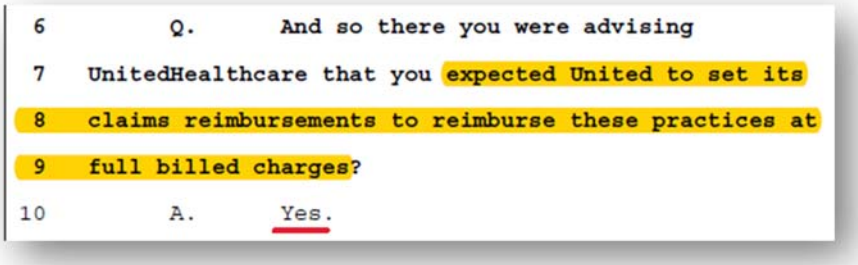
and customary rate" that Health Care Providers have sought in this litigation means Health Care Providers' billed charges:



17 Q. The last sentence, sir, reads:
18 "Defendants are obligated to reimburse the healthcare
19 providers at the usual and customary rate for emergency
20 services the healthcare providers provided to their
21 patients; or alternatively, for the reasonable value of
22 the services provided."
23 I think I might have asked you yesterday,
24 how was -- what is meant in that sentence in Paragraph
25 62 by "the usual and customary rate for emergency
1 services?"
2 A. Yes, we talked about how that would
3 represent our providers' full billed charges.

**Exhibit 1,** Ruby Crest 30(b)(6) Depo. Tr. at 86:23-87:8; *see also* **Exhibit 2**, Team Physicians 30(b)(6) Depo. Tr. at 317:3-20. Health Care Providers made this clear in a July 2, 2019 letter to United, which states that United must pay the "usual and customary charge." *See* **Exhibit 3**, FESM000001 (excluding attachment). Mr. Bristow testified that this letter advised United that it owes the full billed charge to Health Care Providers:



6 Q. And so there you were advising
7 UnitedHealthcare that you expected United to set its
8 claims reimbursements to reimburse these practices at
9 full billed charges?
10 A. Yes.

**Exhibit 2**,Team Physicians 30(b)(6) at 154:6-10. Moreover, Mr. Bristow testified in his individual capacity that Health Care Providers are seeking the billed charge in this action:

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
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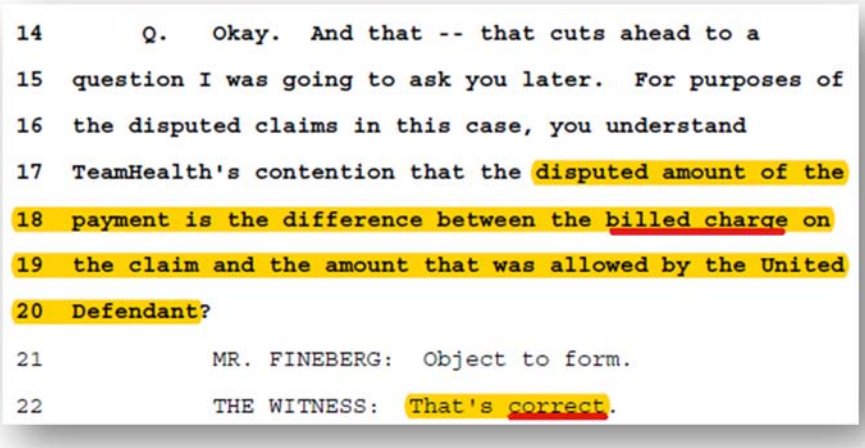
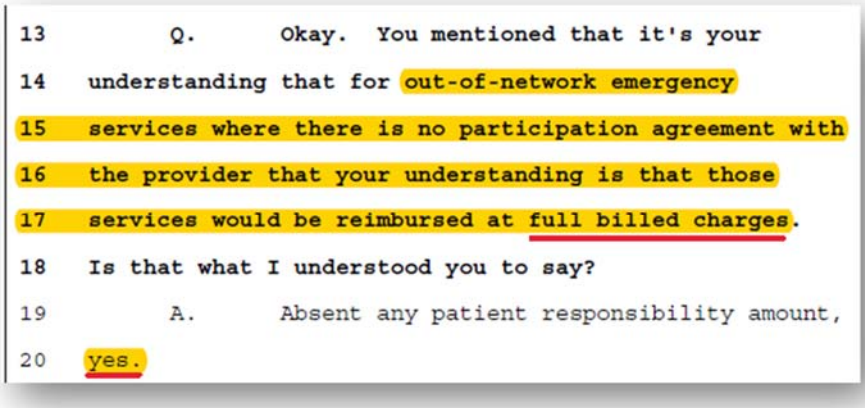


14 Q. Okay. And that -- that cuts ahead to a
15 question I was going to ask you later. For purposes of
16 the disputed claims in this case, you understand
17 TeamHealth's contention that the disputed amount of the
18 payment is the difference between the billed charge on
19 the claim and the amount that was allowed by the United
20 Defendant?
21 MR. FINEBERG: Object to form.
22 THE WITNESS: That's correct.

**Exhibit 4**, Bristow Depo. Tr. at 20:14-22. Mr. Bristow further testified that, in his significant experience in the industry, he would expect United to pay billed charges when reimbursing for out-of-network emergency services:



13 Q. Okay. You mentioned that it's your
14 understanding that for out-of-network emergency
15 services where there is no participation agreement with
16 the provider that your understanding is that those
17 services would be reimbursed at full billed charges.
18 Is that what I understood you to say?
19 A. Absent any patient responsibility amount,
20 yes.

*Id.* at 190:13-20. In fact, in response to the Health Care Providers' repeated assertions that it was entitled to full billed charges, this Court concluded in its October 26, 2020 order that: "The relevant inquiry in this action is the **proper rate of reimbursement which is based on the amount billed by the Health Care Providers** and the amount paid by United." 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 An Order Shortening Time at ¶ 18 (emphasis added). Finally, in disclosing damages at the start of this case and continuing forward, the Health Care Providers have always calculated

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966





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damages based on their full billed charges. *See* **Exhibit 5**, FRCP[1] 26(a) Initial Disclosures, served October 2, 2019.

Despite it being clear since the inception of this lawsuit that Health Care Providers seek their billed charges, United feigns surprise and cries of "prejudice" that Health Care Providers suddenly "shifted" to seek billed charges. On this false premise, United seeks motions in limine to introduce unidentified evidence of the "reasonableness" of Health Care Providers charges without defining the scope of the evidence it seeks to introduce. Given United's false premise, as an initial matter, United's Motion in Limine Nos. 3, 4, 5, and 6 should be denied in their entirety.

**B. United's "Alternative" Structuring of MILs 3, 4, 5, and 6 are Deliberately Designed to Either Open the Door to Inadmissible Evidence from United, or Prevent the Health Care Providers from Putting on their Case.**

United designed MILs 3, 4, 5, and 6 to work as purported alternatives, but the result is anything but a goose/gander scenario. Instead, United presents the Court with two equally inappropriate alternatives: either (1) United gets to introduce an undefined scope of evidence (that undoubtedly violates the Court's prior rulings and would overstep other motions in limine) or (2) United gets to prevent the Health Care Providers from introducing evidence that is necessary to its case. In other words, "heads United wins, tails the Health Care Providers lose."

**1. United's MIL 3 seeks an undefined scope of "reasonableness" evidence to be introduced as it relates to Health Care Providers setting of their billed charges.**

United's MIL No. 3 specifically requests that the Court "allow Defendants to introduce evidence of how the Health Care Providers determine their billed charges and their strategy for setting billed charges to ensure a level playing field" in response to any introduction by Health Care Providers that their billed charges are reasonable. MIL 3 at 3. But United purposefully does not define the scope of the evidence it seeks to admit at trial. This alone warrants denial of MIL 3. *See, e.g.*, *Leonard v. Stemtech Health Sciences*, 981 F.Supp. 2d 273, 276 (D. Del 2013)

[1] At the time of service of these disclosures, the matter was in Federal Court.



McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966



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(finding that a court should deny a motion in limine when it lacks the necessary specificity with respect to the evidence to be excluded); *see also TDN Money Sys. Inc. v. Everi Payments, Inc.*, 2017 WL 5148359, at *6 (D. Nev. 2017) (citing *Leonard*).

The only specifics United provides are a few examples of evidence it would like to introduce, but these pieces of evidence have nothing to do with the Health Care Providers' billed charges. United cites to the deposition of Rena Harris where Ms. Harris testified about the difference between rural and urban emergency roomsî this is not an inquiry related to Health Care Providers' billed charges. *See* MIL 3, Exhibit 2 at 289:6-290:6. Similarly, United cites to Ms. Harris' testimony regarding the TIN issue, the subject of Health Care Providers' MIL 1î this, again, is not an inquiry related to Health Care Providers' billed charges. *Id*. at 290:10-17, 291:14-292:4. United also cites to an email where Health Care Providers contemplate going out-of-network to get a better contracted rate; this has no bearing on Health Care Providers' billed charges. *See* MIL No. 3, Exhibit 4 and Exhibit 3 at 109:8-11. United finally cites to a discussion during Mr. Bristow's deposition regarding an in-network, flat rate contract, which is also not relevant to Health Care Providers' billed charges. Based on the evidence provided by United, it is no surprise that United fails to define the "reasonableness" evidence it seeks to introduce.

The purpose behind the lack of specificity is clear. If MIL 3 is granted, United hopes to get into evidence that falls within categories the Court has already excluded as irrelevant, such as cost of care and government insurance programs like Medicare and Medicaid. United openly admits the information it seeks to admit has already been excluded by the Court.[2] *See* MIL 3 at 5. United asks the Court for a free pass to admit any and all evidence that United deems at all related to how the Health Care Providers' charges are set.[3]

[2] United's claim that Plaintiffs recent pivot to seek their billed charges necessitate the Court to revisit its prior rulings are nonsensical, as Plaintiffs have sought their billed charges since the inception of this lawsuit, as discussed in Section A above.

[3] This does not mean United is not allowed to introduce evidence related to reasonable value. United has two experts, Bruce Deal and Alexander Mizenko, it intends to call to discuss the FAIR Health database and challenge the Health Care Providers' evidence of reasonableness by asserting any number of arguments, including that something other than the 80th percentile should be chosen, that the mix of claims does not accurately reflect the market for these claims, etc. The Health Care Providers have not tried to preclude United from presenting that evidence.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966





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MIL 3 is overbroad and non-specific, and United is seeking it only as a means of sidestepping the Court's prior rulings. The Court should deny it.

**2. In the alternative to MIL 3, United's MIL 4 seeks to preclude the Health Care Providers from "asserting that their billed charges were reasonable."**

United admits that one of the issues in dispute is the reasonableness of the Health Care Providers' billed charges. *See, e.g.*, United's MIL 11 at 3 ("A key issue in this matter, therefore, is the reasonableness of TeamHealth Plaintiffs' billed charges and whether those charges represent a reasonable value for the emergency medicine services at issue in this case."). Despite this, United presents a purported "alternative" to its MIL 3, in which United asks the Court to preclude the Health Care Providers from even "asserting that their billed charges were reasonable." United's MIL 4 at 6. Essentially, United has positioned its MIL 4 as a summary judgment or directed verdict that the Health Care Providers' billed charges are not reasonable. This is the improper use of a motion in limine. *See Goodman v. Las Vegas Metro. Police Dep't*, 963 F. Supp. 2d 1036, 1046-47 (D. Nev. 2013), *aff'd in part, rev'd in part, dismissed in part*, 613 F. App'x 610 (9th Cir. 2015). United's MIL 4 should be denied on this basis alone.

But United does not stop there. United's MIL 4 goes one step further and seeks to exclude evidence of how United decides to reimburse emergency providers, including Health Care Providers, even though such evidence is not in any way tethered to United's MIL 3. How United decided to pay, what it paid to the Health Care Providers and what United paid others is directly relevant to demonstrate United's recognition of its obligation to pay a higher rate for the at-issue emergency services, and its deliberate decision not to do so. This is unquestionably relevant in a case with allegations of unfair settlement practices—it demonstrates United's practices are unfair. Because United's MIL 4 is a false alternative to MIL 3 and seeks to exclude relevant evidence for no justifiable reason, the Court should deny it.

**3. United's' Motion in Limine No. 5 seeks an unbounded scope of "reasonableness" evidence to be introduced as it relates to Health Care Providers' billed charges.**

United's MIL 5 is similar to MIL 3 but is even broader. United seeks entry of an order, without limitation or specific identification, that would allow it to introduce any and all evidence

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966





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"regarding the reasonableness of amounts TeamHealth Plaintiffs billed for their services."[4] MIL 5 at 3. As mentioned above, this does not mean United cannot introduce evidence or make argument regarding reasonable value. United's experts are prepared to do so. But this is not a license for free reign to trample the Court's prior discovery orders by getting into any issue that United unilaterally deems related to the "reasonableness" of the Health Care Providers' billed charges.

The bottom line is United makes no attempt to identify the evidence it seeks to introduce. This complete lack of specificity means MIL 5 should be denied. *See, e.g.*, *Leonard*, 981 F.Supp. 2d at 276 (finding that a court should deny a motion in limine when it lacks the necessary specificity with respect to the evidence to be excluded); *see also TDN Money Sys. Inc.*, 2017 WL 5148359, at *6 (citing *Leonard*). Because United has not made any effort at appropriately specify the scope of its motion, and because the motion is based on a false premise, the Court should deny MIL 5.

**4. In the alternative to MIL 5, United's MIL 6 seeks to prevent the introduction of ALL evidence related to the "reasonableness" of Health Care Providers' billed charges.**

Similar to MIL 4, United presents MIL 6 as a purported "alternative" to its MIL 5, in which United asks the Court to preclude the Health Care Providers from even asserting that their "billed amounts for emergency medical services are customary or reasonable." United's MIL 6 at 3. Given this case is about the reasonableness of the Health Care Providers billed charges, as even United admits, United has positioned its MIL 6 as a summary judgment or directed verdict that the Health Care Providers' billed charges are not reasonable. This is the improper use of a motion in limine. *See Goodman*, 963 F. Supp. 2d at 1046-47. United's MIL 6 should be denied on this basis alone.[5]

[4] The entire basis for United's Motion in Limine No. 5 is that Plaintiffs are purportedly, for the first time, seeking their billed charges as damages in this action. As discussed in Section A above, this is a false premise. Plaintiffs have sought their billed charges since the inception of this lawsuit.

[5] The caselaw cited by United is unpersuasive, as each case involves the introduction of irrelevant evidence on the one hand and a court refusing to admit rebuttal evidence to the irrelevant evidence on the other. In this case, the Health Care Providers seek to admit evidence relevant to a key issue in the case (the reasonableness of their billed

*(continued)*



McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966



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## III. CONCLUSION

For the foregoing reasons, the Health Care Providers respectfully request that the Court deny United's Motions in Limin Nos. 3, 4, 5, and 6.

DATED this 29th day of September, 2021.

McDONALD CARANO LLP

By: */s/ Amanda M. Perach*

Pat Lundvall (NSBN 3761)
Kristen T. Gallagher (NSBN 9561)
Amanda M. Perach (NSBN 12399)
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
plundvall@mcdonaldcarano.com
kgallagher@mcdonaldcarano.com
aperach@mcdonaldcarano.com

*Attorneys for Plaintiffs*



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charges) and, therefore, the cases cited by United are not on point. Additionally, the cases are further distinguished because the Health Care Providers do not oppose United introducing contrary evidence (although United seeks to also introduce irrelevant evidence). Finally, the cases cited are not binding because they are from state courts in New Hampshire, New York, and Pennsylvania.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on this 29th day of September, 2021, I caused a true and correct copy of the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION IN LIMINE NOS. 3, 4, 5, 6 REGARDING BILLED CHARGES** to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

D. Lee Roberts, Jr., Esq.
Colby L. Balkenbush, Esq.
Brittany M. Llewellyn, Esq.
Phillip N. Smith, Jr., Esq.
Marjan Hajimirzaee, Esq.
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
lroberts@wwhgd.com
cbalkenbush@wwhgd.com
bllewellyn@wwhgd.com
psmithjr@wwhgd.com
mhajimirzaee@wwhgd.com

Paul J. Wooten, Esq. (admitted *pro hac vice*)
Amanda Genovese, Esq. (admitted *pro hac vice*)
Philip E. Legendy, Esq. (admitted *pro hac vice*)
O'Melveny & Myers LLP
Times Square Tower,
Seven Times Square,
New York, New York 10036
pwooten@omm.com
agenovese@omm.com
plegendy@omm.com

Dimitri Portnoi, Esq. (admitted *pro hac vice*)
Jason A. Orr, Esq. (admitted *pro hac vice*)
Adam G. Levine, Esq. (admitted *pro hac vice*)
Hannah Dunham, Esq. (admitted *pro hac vice*)
Nadia L. Farjood, Esq. (admitted *pro hac vice*)
O'MELVENY & MYERS LLP
400 South Hope Street, 18th Floor
Los Angeles, CA 90071-2899
dportnoi@omm.com
jorr@omm.com
alevine@omm.com
hdunham@omm.com
nfarjood@omm.com

Daniel F. Polsenberg, Esq.
Joel D. Henriod, Esq.
Abraham G. Smith, Esq.
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
dpolsenberg@lewisroca.com
jhenriod@lewisroca.com
asmith@lewisroca.com

*Attorneys for Defendants*

K. Lee Blalack, II, Esq. (admitted *pro hac vice*)
Jeffrey E. Gordon, Esq. (admitted *pro hac vice*)
Kevin D. Feder, Esq. (admitted *pro hac vice*)
Jason Yan, Esq. (*pro hac vice* pending)
O'Melveny & Myers LLP
1625 I Street, N.W.
Washington, D.C. 20006
Telephone: (202) 383-5374
lblalack@omm.com
jgordon@omm.com
kfeder@omm.com

*Attorneys for Defendants*

Judge David Wall, Special Master
Attention: Mara Satterthwaite & Michelle Samaniego
JAMS
3800 Howard Hughes Parkway, 11th Floor
Las Vegas, NV 89123
msatterthwaite@jamsadr.com
msamaniego@jamsadr.com

/s/ *Marianne Carter*
An employee of McDonald Carano LLP



McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966



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# EXHIBIT 1



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EXHIBIT 1

**In the Matter Of:**

Fremont Emergency Services vs UnitedHealth Group, Inc.

**KENT BRISTOW, ATTORNEYS' EYES ONLY**

*May 14, 2021*

*Job Number: 758207*

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our attorneys are about, but I have not been personally allowed to see any of that information to know.

**Q. Okay.**

A. But irregardless of that, it doesn't change the fact that they're not paying all the claims at the usual and customary rates.

**Q. All right. Let's go on to Paragraph 62, please. And I think we might have talked about this yesterday, but let me make sure we're aligned. Do you have 62 in front of you, sir?**

A. Yes.

**Q. Okay. Read that to yourself, and I'll have a question for you on the last sentence.**

(Witness reviews document.)

THE WITNESS: Okay.

BY MR. BLALACK:

**Q. The last sentence, sir, reads: "Defendants are obligated to reimburse the healthcare providers at the usual and customary rate for emergency services the healthcare providers provided to their patients; or alternatively, for the reasonable value of the services provided."**

**I think I might have asked you yesterday, how was -- what is meant in that sentence in Paragraph 62 by "the usual and customary rate for emergency**



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**services?"**

A. Yes, we talked about how that would represent our providers' full billed charges.

**Q. Okay.**

A. Since they are set within clear boundaries of what is considered industry-acceptable standards or usual and customary rates, as defined by United and many other people.

**Q. So "usual and customary rate" in this context, as alleged in Paragraph 62, means the charges of the plaintiff?**

A. Yes.

**Q. And then the clause that starts with the "or alternatively, for the reasonable value of the services provided"; what are the reasonable value of the services provided here?**

A. Again, they had the opportunity, in exchange for consideration given, to access rental network discount arrangements that we had in place with several different rental networks, as we talked about. And/or if we had the opportunity to negotiate agreed-upon discounts for single-case agreements. Those would be examples, again, in an out-of-network situation of what's reasonable value.

**Q. So is there a difference between the**



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# C E R T I F I C A T E

STATE OF TENNESSEE

COUNTY OF KNOX

I, Rhonda S. Sansom, RPR, CRR, CRC, LCR #685, licensed court reporter in and for the State of Tennessee, do hereby certify that the above videotaped and videoconference deposition of KENT BRISTOW, as the 30(b)(6) Witness for Ruby Crest Emergency Care, was reported by me and that the foregoing 318 pages of the transcript is a true and accurate record to the best of my knowledge, skills, and ability.

I further certify that I am not related to nor an employee of counsel or any of the parties to the action, nor am I in any way financially interested in the outcome of this action.

I further certify that I am duly licensed by the Tennessee Board of Court Reporting as a Licensed Court Reporter as evidenced by the LCR number and expiration date following my name below.

Rhonda S. Sansom, RPR, CRR, CRC
Tennessee LCR# 0685
Expiration Date: 6/30/22

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# EXHIBIT 2

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EXHIBIT 2

DEPOSITION OF KENT BRISTOW
30(B)(6) WITNESS FOR TEAM PHYSICIANS

MAY 13, 2021

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

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

Job No. 758196

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**Q. Uh-huh.**

A. It does talk about: "In addition, please update all pertinent claims processing systems to assure the proper adjudication of future claims in accordance with physicians practices' charges."

**Q. And so there you were advising UnitedHealthcare that you expected United to set its claims reimbursements to reimburse these practices at full billed charges?**

A. Yes.

**Q. So let's come back -- I'm done with that, sir. Thank you.**

**Let's come back to the fall of 2019, your discussions with Ms. Nierman. As we said, you had sent a continuing offer letter to Ms. Nierman. Ms. Nierman had responded with a rejection.**

**Do you recall if you communicated any further rate proposals to Ms. Nierman as part of that ongoing negotiation?**

A. I know we had one quite later engagement on a negotiation. I'm trying to -- and that -- in that window of time in 2019, late in 2019, I -- again, I cannot recall specifically. We had lots of interactions and back and forth, and I don't remember every fact and circumstance.



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define as the provider's billed charges.

BY MR. BLALACK:

**Q. Okay. And that was my next question, sir. The reference in Paragraph 62 of the Complaint to the usual and customary rate for emergency services; does that refer to Team Physicians' billed charges or to some rate below billed charges that Team Physicians considers to be the usual and customary rate that's accepted by providers?**

MR. FINEBERG: Object to form.

THE WITNESS: Given that our providers bill charges, Team Physicians are actually below what I consider to be the usual and customary charges in the market for Team Physicians.

I believe our charges are the usual and customary charges.

BY MR. BLALACK:

**Q. Okay. So the usual and customary rate as used in Paragraph 62 is referring to full-boat charges?**

A. Yes.

**Q. Okay. And -- okay. You can set that aside, sir.**

**Now, if you go back to Exhibit 1, to the deposition notice, and you look at Subject Matter 6 in the notice, it reads: "The fair value of the at-issue**



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C E R T I F I C A T E

STATE OF TENNESSEE

COUNTY OF KNOX

I, Rhonda S. Sansom, RPR, CRR, CRC, LCR #685, licensed court reporter in and for the State of Tennessee, do hereby certify that the above videoconference deposition of KENT BRISTOW as the 30(b)(6) witness for Plaintiff Team Physicians was reported by me and that the foregoing 324 pages of the transcript is a true and accurate record to the best of my knowledge, skills, and ability.

I further certify that I am not related to nor an employee of counsel or any of the parties to the action, nor am I in any way financially interested in the outcome of this action.

I further certify that I am duly licensed by the Tennessee Board of Court Reporting as a Licensed Court Reporter as evidenced by the LCR number and expiration date following my name below.

Rhonda S. Sansom, RPR, CRR, CRC
Tennessee LCR# 0685
Expiration Date: 6/30/22



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# EXHIBIT 3



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EXHIBIT 3

HEALTH CARE FINANCIAL SERVICES
OF TEAMHealth

265 Brookview Centre Way, Suite 400 • Knoxville, TN 37919
p 800.342.2898 • 865.693.1000
www.hcfin.com

July 2, 2019

United Healthcare Services, Inc.
PO Box 740800
Atlanta, GA 30374-0800

RE: Provider Dispute Reconsideration/Appeal for the Physician Practices noted in Exhibit A (the "Physician Practices").

Dear Appeals Director:

On behalf of the Physician Practices list below, please consider this letter a provider dispute reconsideration/appeal regarding the accounts identified on Exhibit 1 (the "Disputed Claims").

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| Corp | TIN |
|---|---|
| ACS Primary Care Physicians of LA, PC | [redacted] |
| Buffalo Emergency Associates, LLP | |
| Chase Dennis Emergency Medical Group, Inc. | |
| Emergency Associates of Central TX, PA | |
| Emergency Care Services of NY, PC | |
| | |
| Emergency Department Physicians, PC | |
| Emergency Group of AZ Professional Corp | |
| Emergency Medical Services of Maine, LLC | |
| Emergency Physician Associates of Indiana, PC | |
| | |
| Emergency Physicians of Mid-America, PC | |
| Emergency Professional Services, Inc. | |
| Emergency Professionals of Michigan, PC | |
| Emergency Services of Iowa, LLC | |
| Emergency Services of Kansas, PA | |
| Emergency Services of Montgomery, PC | |
| Emergency Services of Oklahoma, PC | |
| Exigence Medical of Binghamton, PLLC | |
| Exigence Medical of Jamestown, PLLC | |
| Fremont Emergency Services Mandavia, LTD | |
| Hill Country Emergency Medical Associates, PA | |

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| | |
|---|---|
| Iowa Emergency Services, LLC | [redacted] |
| Longhorn Emerg Med Assoc, PA | |
| Longhorn Observation Medical Associates, PA | |
| MEA Chicago, PC | |
| Mercy Emergency Care Services, Inc. | |
| New Hampshire Emerg Phys Assoc, PC | |
| Northwest Emergency Physicians, LLC | |
| Observation Emergency Physicians, PC | |
| Ohio Emergency Care Services, Inc. | |
| Ohio Emergency Professionals, Inc. | |
| Oklahoma Emergency Services, PC | |
| Ruby Crest Emergency Medicine | |
| Sierra ER Department Phys Med Group, Inc | |
| Solano Gateway Medical Group, Inc. | |
| South Central Emergency Services, PC | |
| Southwest Emergency Medicine Associates of NM, PC | |
| Team Physicians of California Medical Group Inc. | |
| Team Physicians of Nevada Mandavia, PC | |
| Team Physicians of Northern CA Med Grp, Inc. | |
| Team Physicians of Southern California Medical Group Inc. | |

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As you know, the Physician Practices does not have a Participating Provider Agreement with United Healthcare Insurance Company ("United"). Accordingly, the Physician Practices has not agreed to accept discounted rates from United or to be bound by United's unilaterally imposed reimbursement policies or rate schedules with respect to the medical services the Physician Practices provides to your members.

Notwithstanding the absence of a Participating Provider Agreement, the Physician Practices provided medically necessary emergency services and care to your members, as required and appropriate. The Physician Practices timely and appropriately submitted bills to United for payment for the services provided. The Physician Practices's expected reimbursement is $4,590,537, which are the Physician Practices's usual and customary charges for the services rendered to these members.

Unfortunately, United has not adjudicated the Disputed Claims appropriately. As set forth in the claim forms submitted to United, as well as on Exhibit 1, the Physician Practices' expected total reimbursement on the Disputed Claims is $4,590,537. Instead, United has underpaid the Disputed Claims by unilaterally imposing purported "allowed amounts" substantially less than the amounts owed on the Disputed Claims. The total purported amount "allowed" on the Disputed Claims by United is, in aggregate, $1,805,904. The amount due and owing on these accounts is therefore $2,784,633.

By this letter, the Physician Practices demands that United reprocess the Disputed Claims and remit payment in full on the amount due. We expect that you will remit proper payment within ten (10) business days. In addition, please update all pertinent claims processing system(s) to ensure proper adjudication of future claims in accordance with the Physician Practices's charges.

Should you fail or refuse to remit payment in the full amount that is due and owing on the Disputed Claims, please provide:

1. A detailed explanation of your reasons for failing to do so and of your alternative calculation of the allowed amounts on each Disputed Claim, including the legal and factual bases therefor; and
2. Any information, data, documentation, resource, database, algorithm, guideline, guidance, benchmark, reference, rubric, formula, metric, or other source of data or information (to include, without limitation, any claim adjudication information from third parties, including Data iSight or otherwise) which you in any way have relied upon or utilized in the course of your determination of the amount due and owing on the Disputed Claims.

Please note that, as a non-participating provider, the Physician Practices is under no obligation to utilize United's internal appeals or dispute resolution procedures as a condition precedent to receiving formal legal redress of United's payment deficiencies on the Disputed Claims. Nevertheless, this letter is being sent in a good faith attempt to resolve the Disputed Claims. This letter is written without waiver of any of the Physician Practices's rights and remedies at law and in equity, all of which are expressly reserved.

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We appreciate your prompt attention to this matter.

Sincerely,

Kent Bristow
SVP, TeamHealth

# EXHIBIT 4



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EXHIBIT 4

**In the Matter Of:**

Fremont Emergency Services vs UnitedHealth Group, Inc.

**KENT BRISTOW**

*May 07, 2021*

*Job Number: 757311*

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it also has columns for what the patient responsibility elements were, whether it be deductibles or coinsurance. And copayments. I think it also reflects what the payment by the insurance plans was.

**Q. Does it include any amount that TeamHealth contends is the amount of the underpayment?**

MR. FINEBERG: Object to form.

THE WITNESS: I believe it does also reflect an impact column, which I should -- I think it does represent the difference between the total charge and what the allowed amount was, which is what we would claim to be as the amount in dispute.

BY MR. BLALACK:

**Q. Okay. And that -- that cuts ahead to a question I was going to ask you later. For purposes of the disputed claims in this case, you understand TeamHealth's contention that the disputed amount of the payment is the difference between the billed charge on the claim and the amount that was allowed by the United Defendant?**

MR. FINEBERG: Object to form.

THE WITNESS: That's correct.

BY MR. BLALACK:

**Q. Okay. Now, I take it because -- this file was created for purposes of discovery in the**



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**Q. Anyone else?**

A. Those are the ones I recall right now.

**Q. Okay.**

**And I may have asked this. If I did, forgive me, sir. Who is Lisa Zima?**

A. So Lisa Zima is a senior contracting manager at our Northeast Division contracting team.

**Q. And who is Mr. Greenberg?**

A. Mr. Greenberg was formerly with us. He was the vice president. At the time, I believe, he was over the West Region.

**Q. Okay.**

**Now, when Mr. Greenberg made these calls to Data iSight, were you present? Did you witness the calls?**

A. No.

**Q. Okay. Do you know when Mr. Greenberg made these calls?**

A. I don't remember dates, no.

**Q. Okay.**

**Did he make -- to your knowledge, did he make the calls at your request or direction?**

A. I don't know that I gave him direction. I think we all just agreed that a few of us would make a few calls.



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CERTIFICATE OF REPORTER

STATE OF NEVADA )
COUNTY OF CLARK )

I, Michelle R. Ferreyra, a Certified Court Reporter licensed by the State of Nevada, do hereby certify: That I reported the ZOOM videoconference deposition of KENT BRISTOW, commencing on FRIDAY, MAY 7, 2021, at 3:08 p.m.

That prior to being deposed, the witness was duly sworn by me to testify to the truth. That I thereafter transcribed my said stenographic notes into written form, and that the typewritten transcript is a complete, true and accurate transcription of my said stenographic notes, and that a request has been made to review the transcript.

I further certify that I am not a relative, employee or independent contractor of counsel or of any of the parties involved in the proceeding, nor a person financially interested in the proceeding, nor do I have any other relationship that may reasonably cause my impartiality to be questioned.

IN WITNESS WHEREOF, I have set my hand in my office in the County of Clark, State of Nevada, this 12th day of May, 2021.

Michelle R. Ferreyra

MICHELLE R. FERREYRA, CCR No. 876

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# EXHIBIT 5



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EXHIBIT 5

PAT LUNDVALL (NSBN 3761)
KRISTEN T. GALLAGHER (NSBN 9561)
AMANDA M. PERACH (NSBN 12399)
McDONALD CARANO LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
Telephone: (702) 873-4100
plundvall@mcdonaldcarano.com
kgallagher@mcdonaldcarano.com
aperach@mcdonaldcarano.com

*Attorneys for Plaintiff Fremont Emergency Services (Mandavia), Ltd.*

**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

| | |
|---|---|
| FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., a Nevada professional corporation,<br><br>Plaintiff,<br><br>vs.<br><br>UNITED HEALTHCARE INSURANCE COMPANY, a Connecticut corporation; UNITED HEALTH CARE SERVICES INC., dba UNITEDHEALTHCARE, a Minnesota corporation; UMR, INC., dba UNITED MEDICAL RESOURCES, a Delaware corporation; OXFORD HEALTH PLANS, INC., a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., a Nevada corporation; SIERRA HEALTH-CARE OPTIONS, INC., a Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20,<br><br>Defendants. | Case No.: 2:19-cv-00832-JAD-VCF<br><br>**PLAINTIFF FREMONT EMERGENCY SERVICES (MANDAVIA), LTD.'S FRCP 26(a)(1) INITIAL DISCLOSURES** |

Pursuant to FRCP[1] 26(a)(1), plaintiff Fremont Emergency Services (Mandavia), Ltd., ("Plaintiff" or "Fremont"), hereby submits its initial disclosures.

[1] While Plaintiff submits these initial disclosures under the Federal Rules of Civil Procedure, Plaintiff reserves all rights with respect to its arguments asserted in the Motion to Remand (ECF No. 5). Plaintiff does not submit to the jurisdiction of the Federal Court and intends to continue to pursue the arguments raised in its Motion to Remand.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

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## I. INDIVIDUALS LIKELY TO HAVE DISCOVERABLE INFORMATION.

1. Based on information to date, Plaintiff identifies the individuals listed below as likely to have discoverable information under FRCP 26(b).

| Name | Contact Information | General Subject Matter |
|---|---|---|
| Kent Bristow | 265 Brookview Centre Way<br>Suite 400<br>Knoxville, TN 37919<br><br>This witness may only be contacted through counsel of record:<br>Pat Lundvall<br>Kristen T. Gallagher<br>McDonald Carano LLP<br>2300 W. Sahara Ave.,<br>Suite 1200<br>Las Vegas, NV 89102 | This witness is expected to have knowledge relating to the facts and circumstances surrounding the claims and defenses in this litigation, particularly Defendant's[2] underpayment of covered emergency medicine services provided by Plaintiff to Defendant's insureds; the course of conduct that existed between Plaintiff and Defendant prior to Defendant's decision to unilaterally reduce payments due to Plaintiff; Plaintiff's damages; and Defendant's conduct in its negotiations with Plaintiff. |
| Paula Dearolf | 265 Brookview Centre Way<br>Suite 400<br>Knoxville, TN 37919<br><br>This witness may only be contacted through counsel of record:<br>Pat Lundvall<br>Kristen T. Gallagher<br>McDonald Carano LLP<br>2300 W. Sahara Ave.,<br>Suite 1200<br>Las Vegas, NV 89102 | This witness is expected to have knowledge relating to the facts and circumstances surrounding the claims and defenses in this litigation, particularly Defendant's underpayment of covered emergency medicine services provided by Plaintiff to Defendant's insureds; the course of conduct that existed between Plaintiff and Defendant prior to Defendant's decision to unilaterally reduce payments due to Plaintiff; and Plaintiff's damages. |
| Greg Dosedel | c/o<br>D. Lee Roberts, Jr.<br>Colby L. Balkenbush<br>Josephine E. Groh<br>Weinberg, Wheeler,<br>Hudgins, Gunn & Dial, LLC<br>6385 South Rainbow Blvd.<br>Suite 400<br>Las Vegas, NV 89118 | This witness is expected to have knowledge relating to the facts and circumstances surrounding the claims and defenses in this litigation, particularly Defendant's underpayment of covered emergency medicine services provided by Plaintiff to Defendant's insureds; the course of conduct that existed between Plaintiff and Defendant prior to Defendant's decision to unilaterally |

[2] United Healthcare Insurance Company, United Health Care Services Inc., d/b/a Unitedhealthcare, UMR, Inc., d/b/a United Medical Resources, Oxford Health Plans, Inc., Sierra Health and Life Insurance Company, Inc., Sierra Health-Care Options, Inc. and Health Plan of Nevada, Inc. shall collectively be referred to herein as the "Defendant."

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

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| Name | Contact Information | General Subject Matter |
|---|---|---|
| | | reduce payments due to Plaintiff; Plaintiff's damages; and Defendant's conduct in its negotiations with Plaintiff. |
| David Greenberg | 1643 NW 136th Ave.<br>Building H, Suite 100<br>Sunrise, FL 33323<br><br>This witness may only be contacted through counsel of record:<br>Pat Lundvall<br>Kristen T. Gallagher<br>McDonald Carano LLP<br>2300 W. Sahara Ave.,<br>Suite 1200<br>Las Vegas, NV 89102 | This witness is expected to have knowledge relating to the facts and circumstances surrounding the claims and defenses in this litigation, particularly Defendant's underpayment of covered emergency medicine services provided by Plaintiff to Defendant's insureds; the course of conduct that existed between Plaintiff and Defendant prior to Defendant's decision to unilaterally reduce payments due to Plaintiff; Plaintiff's damages; Defendant's conduct in its negotiations with Plaintiff; and Data iSight's representations made to Plaintiff with respect to the amount to be paid for covered emergency medicine services provided by Plaintiff to Defendant's insureds. |
| John Haben | c/o<br>D. Lee Roberts, Jr.<br>Colby L. Balkenbush<br>Josephine E. Groh<br>Weinberg, Wheeler,<br>Hudgins, Gunn & Dial, LLC<br>6385 South Rainbow Blvd.<br>Suite 400<br>Las Vegas, NV 89118 | This witness is expected to have knowledge relating to the facts and circumstances surrounding the claims and defenses in this litigation, particularly Defendant's underpayment of covered emergency medicine services provided by Plaintiff to Defendant's insureds; the course of conduct that existed between Plaintiff and Defendant prior to Defendant's decision to unilaterally reduce payments due to Plaintiff; Plaintiff's damages; and Defendant's conduct in its negotiations with Plaintiff. |
| Rena Harris | 8511 Fallbrook Ave.<br>Suite 120<br>West Hills, CA 91304<br><br>This witness may only be contacted through counsel of record:<br>Pat Lundvall<br>Kristen T. Gallagher<br>McDonald Carano LLP<br>2300 W. Sahara Ave., | This witness is expected to have knowledge relating to the facts and circumstances surrounding the claims and defenses in this litigation, particularly Defendant's underpayment of covered emergency medicine services provided by Plaintiff to Defendant's insureds; the course of conduct that existed between Plaintiff and Defendant prior to |

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2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

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| Name | Contact Information | General Subject Matter |
|---|---|---|
| | Suite 1200<br>Las Vegas, NV 89102 | Defendant's decision to unilaterally reduce payments due to Plaintiff; Plaintiff's damages; and Defendant's conduct in its negotiations with Plaintiff. |
| Jacy Jefferson | c/o<br>D. Lee Roberts, Jr.<br>Colby L. Balkenbush<br>Josephine E. Groh<br>Weinberg, Wheeler,<br>Hudgins, Gunn & Dial, LLC<br>6385 South Rainbow Blvd.<br>Suite 400<br>Las Vegas, NV 89118 | This witness is expected to have knowledge relating to the facts and circumstances surrounding the claims and defenses in this litigation, particularly Defendant's underpayment of covered emergency medicine services provided by Plaintiff to Defendant's insureds; the course of conduct that existed between Plaintiff and Defendant prior to Defendant's decision to unilaterally reduce payments due to Plaintiff; Plaintiff's damages; and Defendant's conduct in its negotiations with Plaintiff. |
| Custodian of Records for National Care Network, LLC | 211 E. 7th Street, Suite 620<br>Austin, TX 78701 | This witness is expected to have knowledge relating to the facts and circumstances surrounding the claims and defenses in this litigation, particularly Defendant's underpayment of covered emergency medicine services provided by Plaintiff to Defendant's insureds; Defendant's decision to unilaterally reduce payments due to Plaintiff; Plaintiff's damages; and the method for determining the payment made by Defendant to Plaintiff. |
| Angie Nierman | c/o<br>D. Lee Roberts, Jr.<br>Colby L. Balkenbush<br>Josephine E. Groh<br>Weinberg, Wheeler,<br>Hudgins, Gunn & Dial, LLC<br>6385 South Rainbow Blvd.<br>Suite 400<br>Las Vegas, NV 89118 | This witness is expected to have knowledge relating to the facts and circumstances surrounding the claims and defenses in this litigation, particularly Defendant's underpayment of covered emergency medicine services provided by Plaintiff to Defendant's insureds; the course of conduct that existed between Plaintiff and Defendant prior to Defendant's decision to unilaterally reduce payments due to Plaintiff; Plaintiff's damages; and Defendant's conduct in its negotiations with Plaintiff. |

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

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| Name | Contact Information | General Subject Matter |
|---|---|---|
| Dan Rosenthal | c/o<br>D. Lee Roberts, Jr.<br>Colby L. Balkenbush<br>Josephine E. Groh<br>Weinberg, Wheeler,<br>Hudgins, Gunn & Dial, LLC<br>6385 South Rainbow Blvd.<br>Suite 400<br>Las Vegas, NV 89118 | This witness is expected to have knowledge relating to the facts and circumstances surrounding the claims and defenses in this litigation, particularly Defendant's underpayment of covered emergency medicine services provided by Plaintiff to Defendant's insureds; the course of conduct that existed between Plaintiff and Defendant prior to Defendant's decision to unilaterally reduce payments due to Plaintiff; Plaintiff's damages; and Defendant's conduct in its negotiations with Plaintiff. |
| Dan Schumacher | c/o<br>D. Lee Roberts, Jr.<br>Colby L. Balkenbush<br>Josephine E. Groh<br>Weinberg, Wheeler,<br>Hudgins, Gunn & Dial, LLC<br>6385 South Rainbow Blvd.<br>Suite 400<br>Las Vegas, NV 89118 | This witness is expected to have knowledge relating to the facts and circumstances surrounding the claims and defenses in this litigation, particularly Defendant's underpayment of covered emergency medicine services provided by Plaintiff to Defendant's insureds; the course of conduct that existed between Plaintiff and Defendant prior to Defendant's decision to unilaterally reduce payments due to Plaintiff; Plaintiff's damages; and Defendant's conduct in its negotiations with Plaintiff. |
| Jennifer Shrader | 265 Brookview Centre Way, Suite 400<br>Knoxville, TN 37919<br><br>This witness may only be contacted through counsel of record:<br>Pat Lundvall<br>Kristen T. Gallagher.<br>McDonald Carano LLP<br>2300 W. Sahara Ave.,<br>Suite 1200<br>Las Vegas, NV 89102 | This witness is expected to have knowledge relating to the facts and circumstances surrounding the claims and defenses in this litigation, particularly Defendant's underpayment of covered emergency medicine services provided by Plaintiff to Defendant's insureds; the course of conduct that existed between Plaintiff and Defendant prior to Defendant's decision to unilaterally reduce payments due to Plaintiff; Plaintiff's damages; and Defendant's conduct in its negotiations with Plaintiff. |

2. Any and all persons and entities identified by Defendant regarding this matter.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

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## II. DOCUMENTS.

1. Fremont discloses the following documents[3] in support of its claims, defenses, and denials asserted in the Complaint:

| Bates Start | Bates End | Document Description |
|---|---|---|
| FESM00001 | FESM00003 | July 2, 2019 letter re Provider Dispute Reconsideration/Appeal for the Physician Practices |
| FESM00004 | FESM00004 | Confidential and withheld pending entry of a protective order |
| FESM00005 | FESM00007 | July 2, 2019 letter re Provider Dispute Reconsideration/Appeal for the Physician Practices |
| FESM00008 | FESM00008 | Confidential and withheld pending entry of a protective order |
| FESM00009 | FESM00009 | Confidential and withheld pending entry of a protective order |
| FESM00010 | FESM00010 | Confidential and withheld pending entry of a protective order |
| FESM00011 | FESM00011 | Confidential and withheld pending entry of a protective order |
| FESM00012 | FESM00018 | March 19, 2019 letter re UHG Surprise Billing Chairmen Letter |
| FESM00019 | FESM00104 | Health Plan of Nevada, Inc. – Medicaid/Nevada Check-up Consulting Provider Agreement |
| FESM00105 | FESM00107 | Health Plan of Nevada, Inc. Consulting Provider Amendment |
| FESM00108 | FESM00108 | March 1, 2019 letter re Health Plan of Nevada and Fremont Emergency Services Termination Confirmation |
| FESM00109 | FESM00117 | September 10, 2018 letter re Request to Renegotiate or Terminate Intention |
| FESM00118 | FESM00120 | Sierra Health & Life Insurance Company, Inc. Amendment to Individual/Group Provider Agreement |
| FESM00121 | FESM00200 | Sierra Health & Life Insurance Company, Inc. Individual/Group Provider Agreement |
| FESM00201 | FESM00203 | Sierra Health & Life Insurance Company, Inc. Amendment to Individual/Group Provider Agreement |
| FESM00204 | FESM00219 | Sierra Health & Life Insurance Company, Inc. Individual/Group Provider Agreement |
| FESM00220 | FESM00220 | March 1, 2019 letter re Sierra Healthcare Options (Sierra Health and Life) and Fremont Emergency Services Termination Confirmation |

[3] Documents bates-labeled FESM00001-FESM00341 (other than those withheld as confidential) were previously produced in Fremont's Response to Defendants' First Set of Requests for Production of Documents to Fremont dated July 29, 2019.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

| Bates Start | Bates End | Document Description |
|---|---|---|
| FESM00221 | FESM00223 | Amendment to Medical Group Participation Agreement MGA Commercial Rate Increase |
| FESM00224 | FESM00224 | June 30, 2017 letter re United Healthcare and Fremont Emergency Services Termination Notification |
| FESM00225 | FESM00255 | December 19, 2014 letter re Executed Participation Agreement/Notice of Effective Date |
| FESM00256 | FESM00256 | March 9, 2017 letter |
| FESM00257 | FESM00287 | December 19, 2014 letter re Executed Participation Agreement/Notice of Effective Date |
| FESM00288 | FESM00334 | Complaint filed in Middle District of Pennsylvania against United Healthcare |
| FESM00256 | FESM00341 | Information on Payment of Out-of-Network Benefits |

2. All documents or other evidence identified in any pleadings or papers filed by any party in this matter or during discovery.

**III. DAMAGES COMPUTATION.**

Fremont provides the following calculation of damages:

Plaintiff seeks damages described in the Complaint. Specifically, Plaintiff's damages for its claims for relief are to be determined as (i) the difference between the lesser of (a) amounts Plaintiff charged and (b) the reasonable value or usual and customary rate for its professional emergency medicine services and the amount Defendant unilaterally allowed as payable for the claims at issue in the litigation plus (ii) the Plaintiff's loss of use of those funds. In addition, Plaintiff seeks damages based on the statutory penalties for late-paid and partially paid claims as set forth in the Nevada Insurance Code under its claim for violation of Nevada's prompt pay statutes. Plaintiff also seeks to recover treble damages and all profits derived from Defendant's knowing and willful violation of Nevada's consumer fraud and deceptive trade practices statutes.

The reasonable value of and/or usual and customary rate for Plaintiff's emergency medicine services in the marketplace will be determined by the finder of fact at trial. Plaintiff will continue to gather information concerning those calculations and their total amount of damages, which will also be the subject of expert testimony. Plaintiff's damages continue to accrue and will be amended, adjusted and supplemented as necessary during the course of this litigation as additional claims are adjudicated and paid by Defendant. Plaintiff also seeks punitive damages, attorneys' fees, costs and

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2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

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interest under each of the claims asserted in this action. Plaintiff seeks equitable relief for which a calculation of damages is not required by the Nevada Rules of Civil Procedure; however, Plaintiff seeks special damages under this claim.

Subject to the foregoing, Plaintiff will provide Defendant with a spreadsheet providing the details for each of the claims at issue in this litigation regarding the services provided, the billed charges for the services provided and the amount Defendant adjudicated as payable, among other information. For the claims with dates of services through April 30, 2019, the difference between the Plaintiff's billed charges and the amounts allowed by Defendant as payable is approximately $11,037,700.25 prior to any calculation of interest due thereon.

**IV. INSURANCE AGREEMENTS.**

Plaintiff is not currently aware of any relevant insurance agreements.

Plaintiff's investigation and discovery concerning this case is continuing, and, if additional information is obtained after the date of these disclosures, Plaintiff will supplement these disclosures.

DATED this 2nd day of October, 2019.

McDONALD CARANO LLP

By: /s/*Amanda Perach*

Pat Lundvall (NSBN 3761)
Kristen T. Gallagher (NSBN 9561)
Amanda M. Perach (NSBN 12399)
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
Telephone: (702) 873-4100
plundvall@mcdonaldcarano.com
kgallagher@mcdonaldcarano.com
aperach@mcdonaldcarano.com

*Attorneys for Plaintiff Fremont Emergency Services (Mandavia), Ltd.*

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on this 2nd day of October, 2019, I caused a true and correct copy of the foregoing **PLAINTIFF FREMONT EMERGENCY SERVICES (MANDAVIA), LTD.'S FED. R. CIV. P. 26(a) INITIAL DISCLOSURES** to be served via U.S. Mail, postage prepaid upon the following:

D. Lee Roberts, Jr.
Colby L. Balkenbush
Josephine E. Groh
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
Telephone: (702) 938-3838
lroberts@wwhgd.corn
cbalkenbush@wwhgd.corn
jgroh@wwhgdcorn

*Attorneys for Defendants UnitedHealthcare Insurance Company, United HealthCare Services, Inc., UMR, Inc., Oxford Health Plans Inc., Sierra Health and Life Insurance Co., Inc. Sierra Health-Care Options, Inc., and Health Plan of Nevada, Inc.*

/s/ *Kimberly Kirn*
An employee of McDonald Carano LLP

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

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9/29/2021 9:57 AM
Steven D. Grierson
CLERK OF THE COURT

**OML**
Pat Lundvall (NSBN 3761)
Kristen T. Gallagher (NSBN 9561)
Amanda M. Perach (NSBN 12399)
McDONALD CARANO LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
Telephone: (702) 873-4100
plundvall@mcdonaldcarano.com
kgallagher@mcdonaldcarano.com
aperach@mcdonaldcarano.com

Justin C. Fineberg (admitted *pro hac vice*)
Martin B. Goldberg (admitted *pro hac vice)*
Rachel H. LeBlanc (admitted *pro hac vice*)
Jonathan E. Feuer (admitted *pro hac vice*)
Jonathan E. Siegelaub (admitted *pro hac vice*)
David R. Ruffner (admitted *pro hac vice*)
Emily L. Pincow (admitted *pro hac vice*)
Ashley Singrossi (admitted *pro hac vice*)
Lash & Goldberg LLP
Weston Corporate Centre I
2500 Weston Road Suite 220
Fort Lauderdale, Florida 33331
Telephone: (954) 384-2500
jfineberg@lashgoldberg.com
mgoldberg@lashgoldberg.com
rleblanc@lashgoldberg.com
jfeuer@lashgoldberg.com
jsiegelaub@lashgoldberg.com
druffner@lashgoldberg.com
epincow@lashgoldberg.com
asingrossi@lashgoldberg.com

Joseph Y. Ahmad (admitted *pro hac vice*)
John Zavitsanos (admitted *pro hac vice*)
Jason S. McManis (admitted *pro hac vice*)
Michael Killingsworth (admitted *pro hac vice*)
Louis Liao (admitted *pro hac vice)*
Jane L. Robinson (admitted *pro hac vice*)
P. Kevin Leyendecker (admitted *pro hac vice*)
Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing, P.C.
1221 McKinney Street, Suite 2500
Houston, Texas 77010
Telephone: 713-600-4901
joeahmad@azalaw.com
jzavitsanos@azalaw.com
jmcmanis@azalaw.com
mkillingsworth@azalaw.com
lliao@azalaw.com
jrobinson@azalaw.com
kleyendecker@azalaw.com

*Attorneys for Plaintiffs*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Plaintiffs,

vs.

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

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

**PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION IN LIMINE NO. 24 TO PRECLUDE PLAINTIFFS FROM REFERRING TO THEMSELVES AS HEALTHCARE PROFESSIONALS**

Hearing Date: October 14, 2021
Hearing Time: 1:30 p.m.



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

Defendants.

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 "Plaintiffs" or "Health Care Providers") submit their opposition to defendants UnitedHealth Group, Inc.; UnitedHealthcare Insurance Company; United HealthCare Services, Inc.; UMR, Inc.; Oxford Health Plans, Inc.; Sierra Health and Life Insurance Co., Inc.; Sierra Health-Care Options, Inc.; and Health Plan of Nevada, Inc. (collectively, "United") Motion in Limine No. 24 to Preclude Plaintiffs from Referring to Themselves as Healthcare Professionals ("MIL No. 24").

MIL No. 24 is another thinly veiled attempt by United to seek reconsideration of several clear orders of this Court. In multiple orders, this Court has consistently and repeatedly determined that the Health Care Providers' corporate structure is not relevant to any of the issues in this case. *See* February 4, 2021 Order; April 26, 2021 Order, August 9, 2021 Order (R&R #2); August 9, 2021 Order (R&R #3); September 16, 2021 Order (R&R #6), September 16, 2021 (R&R #9). Despite the clear directive of these orders, United now unabashedly requests that this Court not only **prohibit** the Health Care Providers from referring to themselves as "medical doctors, emergency medicine physicians, or healthcare providers," but "**authorize** [United] to refer to [the] Plaintiffs as 'TeamHealth Plaintiffs[,]' a name that is factually aligned with their true **corporate identity**." MIL No. 24, 7: 6-10 (emphasis added). Granting such relief would eviscerate numerous Court orders, result in the admission of the very corporate structure evidence that this Court previously found to be irrelevant and not the proper subject of discovery, and

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966



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ignore the admissible evidence in this case that Plaintiffs are, in fact, healthcare providers.

This Opposition is based upon the record in this matter, the points and authorities that follow, the pleadings and papers on file in this action, and any argument of counsel entertained by the Court.

Dated this 29th day of September, 2021.

McDONALD CARANO LLP

By: */s/ Kristen T. Gallagher*

Pat Lundvall (NSBN 3761)
Kristen T. Gallagher (NSBN 9561)
Amanda M. Perach (NSBN 12399)
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
plundvall@mcdonaldcarano.com
kgallagher@mcdonaldcarano.com
aperach@mcdonaldcarano.com

*Attorneys for Plaintiffs*

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. FACTS RELEVANT TO THIS MOTION

This Court has already addressed the issues raised in MIL No. 24. In no uncertain terms, this Court has held that the Health Care Providers' "corporate structure . . . ***[is] not relevant to the claims or defenses in this case***" and that no corporate structure "information sought by United . . . will lead to the discovery of relevant information" (February 4, 2021 Order, at ¶ 11, emphasis added). Yet, in MIL No. 24, United leads with its chin and argues that the Health Care Providers' corporate structure should dictate not only how they refer to themselves at trial, but also how Defendants should be able to refer to them as well. United raises absolutely no reason why this Court should revisit its clear rulings either on the merits or through an ill-conceived motion in limine. Moreover, the underlying premise of MIL No. 24 is simply wrong: the Health Care Providers are, in fact, providers of emergency medical services, and it is United's unlawful practices and underpayment for the very emergency medical services that the Health Care Providers rendered to United's members that are at issue in this case. So, while it is inevitable that the introduction of TeamHealth and its relation to the Health Care Providers is evidence that



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will be part of the case, it does not follow that the Health Care Providers should be prohibited from referring to themselves truthfully. Nor does it follow that Defendants should be permitted to cast aspersions by referring to the Health Care Providers as the "TeamHealth Plaintiffs." The facts of TeamHealth and its relationship to the Health Care Providers can be presented without re-naming the Health Care Providers something that they are not. The Court should deny United's motion.

## II. LEGAL ARGUMENT

Motions in limine are the proper vehicle to **exclude** inadmissible or inappropriate evidence in advance of trial. EDCR 2.47. A motion in limine allows the trial court to rule prior to trial on the admissibility and relevance of evidence that parties may later offer at trial. *See Luce v. United States*, 469 U.S. 38, 41 n. 4 (1984). This "decision to admit or exclude testimony is within the sound discretion of the trial court and will not be disturbed unless it is manifestly wrong." *Hall v. SSF, Inc*., 112 Nev. 1384, 1392-93, 930 P.2d 94, 99 (1996).

Through its MIL No. 24, United seeks to turn the recognized purpose of motions in limine on its head. Rather than seeking to exclude inadmissible or inappropriate evidence, United seeks an order permitting it to disparagingly introduce the very corporate structure evidence the Court has already deemed irrelevant and, therefore, inadmissible. *See* February 4, 2021 Order; April 26, 2021 Order, August 9, 2021 Order (R&R #2); August 9, 2021 Order (R&R #3); September 16, 2021 Order (R&R #6), September 16, 2021 (R&R #9). Nothing has changed since the entry of the numerous orders finding the Health Care Providers' corporate structure to be irrelevant. And, irrelevant evidence is always inadmissible. NRS 48.025(2).

United similarly perverts the recognized purpose of motions in limine by seeking an order precluding the Health Care Providers from introducing admissible evidence. Specifically, United seeks an order precluding the Health Care Providers from referring to themselves as medical doctors, emergency medicine physicians, or healthcare providers. MIL No. 24, 7: 6-10. United supports its preclusion argument by relying upon Plaintiffs' **inadmissible** corporate structure and engaging in rank speculation as to how the Health Care Providers will disseminate payment of damages awarded in this litigation. *See* MIL No. 24, 6:16-21. But, what happens to any damage

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966



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award in this case is irrelevant because it is not probative of any disputed issue. This illustrates what United seeks to accomplish by disparagingly renaming the Health Care Providers: United hopes to distract from the dispute about underpayment of the claims at issue and instead engage in a sideshow minitrial about who may receive a damages award if the Health Care Providers prevail. This is unfairly prejudicial, confusing and misleading, and would unduly delay the trial by wasting time on irrelevant evidence. It is precisely the type of evidence that should be excluded under NRS 48.025 and NRS 48.035.

Relatedly, MIL No. 24 also ignores the actual facts in this case: real emergency medicine doctors performed real emergency medical services for United's members, and United deemed these emergency medical services to be medically appropriate, covered, and **payable to these Health Care Providers**. Through its MIL No. 24, United (1) requests that the Court ignore that the Health Care Providers named in this litigation are the ones who performed the emergency medicine services, who billed for the services, and whom United underpaid for their services, and (2) seeks an order that would prevent the jury from learning these very foundational facts. *See, e.g.*, **Exhibit 1**, Deposition of Dr. Scott Sherr at 27:7-11 (testifying that Fremont Emergency Services, Mandavia is the payor of his paycheck); *see also Id*., at 33:16 – 34:2 (testifying that, if someone went to Sunrise Hospital in June 2019 and received services from a Fremont emergency room staff physician, the physician providing the emergency services, who is paid through Fremont Emergency Services, would be entitled to payment for the emergency services provided). Prohibiting the Health Care Providers from referring to themselves as medical doctors, emergency medicine physicians, or healthcare providers would not only cause confusion for the jury, it would be nonsensical and disingenuous.

## III. CONCLUSION

In sum, in its MIL No. 24, United impermissibly seeks through the back door what this Court has clearly shut down through the front door – to present inadmissible corporate structure evidence through an order permitting it to refer to the Health Care Providers as "TeamHealth Plaintiffs." The factual nature of the relationship between TeamHealth and the Health Care Providers can be introduced without disparagingly renaming the Health Care Providers to

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966



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something they are not. Conversely, United seeks to preclude the Health Care Providers from referring to themselves as medical doctors, emergency medicine physicians, or healthcare providers – all references that are supported by admissible evidence. For all of the foregoing reasons, including those set forth in the February 4, 2021 Order; April 26, 2021 Order, August 9, 2021 Order (R&R #2); August 9, 2021 Order (R&R #3); September 16, 2021 Order (R&R #6), September 16, 2021 (R&R #9), Plaintiffs respectfully request that United's MIL No. 24 be DENIED.

Dated this 29th day of September, 2021.

McDONALD CARANO LLP

By: */s/ Kristen T. Gallagher*

Pat Lundvall (NSBN 3761)
Kristen T. Gallagher (NSBN 9561)
Amanda M. Perach (NSBN 12399)
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
plundvall@mcdonaldcarano.com
kgallagher@mcdonaldcarano.com
aperach@mcdonaldcarano.com

*Attorneys for Plaintiffs*

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on this 29th day of September, 2021, I caused a true and correct copy of the foregoing **OPPOSITION TO DEFENDANTS' MOTION IN LIMINE NO. 24 TO PRECLUDE PLAINTIFFS FROM REFERRING TO THEMSELVES AS HEALTHCARE PROFESSIONALS** to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

D. Lee Roberts, Jr., Esq.
Colby L. Balkenbush, Esq.
Brittany M. Llewellyn, Esq.
Phillip N. Smith, Jr., Esq.
Marjan Hajimirzaee, Esq.
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
lroberts@wwhgd.com
cbalkenbush@wwhgd.com
bllewellyn@wwhgd.com
psmithjr@wwhgd.com
mhajimirzaee@wwhgd.com

Paul J. Wooten, Esq. (admitted *pro hac vice*)
Amanda Genovese, Esq. (admitted *pro hac vice*)
Philip E. Legendy, Esq. (admitted *pro hac vice*)
O'Melveny & Myers LLP
Times Square Tower,
Seven Times Square,
New York, New York 10036
pwooten@omm.com
agenovese@omm.com
plegendy@omm.com

Dimitri Portnoi, Esq. (admitted *pro hac vice*)
Jason A. Orr, Esq. (admitted *pro hac vice*)
Adam G. Levine, Esq. (admitted *pro hac vice*)
Hannah Dunham, Esq. (admitted *pro hac vice*)
Nadia L. Farjood, Esq. (admitted *pro hac vice*)
O'MELVENY & MYERS LLP
400 South Hope Street, 18th Floor
Los Angeles, CA 90071-2899
dportnoi@omm.com
jorr@omm.com
alevine@omm.com
hdunham@omm.com
nfarjood@omm.com

Daniel F. Polsenberg, Esq.
Joel D. Henriod, Esq.
Abraham G. Smith, Esq.
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
dpolsenberg@lewisroca.com
jhenriod@lewisroca.com
asmith@lewisroca.com

*Attorneys for Defendants*

K. Lee Blalack, II, Esq. (admitted *pro hac vice*)
Jeffrey E. Gordon, Esq. (admitted *pro hac vice*)
Kevin D. Feder, Esq. (admitted *pro hac vice*)
Jason Yan, Esq. (*pro hac vice* pending)
O'Melveny & Myers LLP
1625 I Street, N.W.
Washington, D.C. 20006
Telephone: (202) 383-5374
lblalack@omm.com
jgordon@omm.com
kfeder@omm.com

*Attorneys for Defendants*

Judge David Wall, Special Master
Attention: Mara Satterthwaite & Michelle Samaniego
JAMS
3800 Howard Hughes Parkway, 11th Floor
Las Vegas, NV 89123
msatterthwaite@jamsadr.com
msamaniego@jamsadr.com

/s/ *Beau Nelson*
An employee of McDonald Carano LLP



McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

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# EXHIBIT 1

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

CASE NO: A-19-792978-B

DEPT NO: 27

***ATTORNEYS' EYES ONLY***

VIDEOTAPED DEPOSITION OF DR. SCOTT SCHERR

TUESDAY, MAY 18, 2021

REPORTED BY: BRITTANY CASTREJON, RPR, CRR, NV CCR #926

JOB NO.: 760293

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VIDEOTAPED DEPOSITION OF DR. SCOTT SCHERR, held at Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC, 6385 South Rainbow Boulevard, Suite 400, Las Vegas, Nevada 89118, on TUESDAY, MAY 18, 2021, at 9:01 a.m., before Brittany Castrejon, Certified Court Reporter, in and for the State of Nevada.

APPEARANCES:

For Plaintiffs:

LASH & GOLDBERG LLP
BY: JONATHAN FEUER, ESQ. (Via Zoom)
2500 Weston Road
Suite 220
Fort Lauderdale, Florida 33331
305-347-4040
jfeuer@lashgoldberg.com

--AND--

MCDONALD CARANO
BY: AMANDA PERACH, ESQ.
2300 West Sahara Avenue
Suite 1200
Las Vegas, Nevada 89102
702-873-4100
aperach@mcdonaldcarano.com

For Defendants:

WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
BY: D. LEE ROBERTS, JR., ESQ.
6385 South Rainbow Boulevard
Suite 400
Las Vegas, Nevada 89118
702-938-3838
lroberts@wwhgd.com

Also Present: Terrell Holloway, Videographer



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INDEX OF EXAMINATION

WITNESS: DR. SCOTT SCHERR



INDEX OF EXHIBITS



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A. Yes.

**Q. Are you employed by Fremont or some other entity, as you sit here today?**

MS. PERACH: Objection. Compound.

THE WITNESS: TeamHealth.

BY MR. ROBERTS:

**Q. Any specific TeamHealth entity? Do you know the name of the formal company that's on your paycheck?**

MS. PERACH: Objection. Vague. Compound.

THE WITNESS: Fremont Emergency Services, I believe, Mandavia.

BY MR. ROBERTS:

**Q. Do you consider Fremont Emergency Services Mandavia to be essentially the same thing as TeamHealth today?**

MS. PERACH: Objection. The court has already ruled that corporate structure is outside the scope of this case and is not discoverable. That's going to the corporate structure.

And on that basis, I'm going to instruct the witness not to respond pursuant to this court's February 4th -- the court's February 4, 2021, order and the March 29, 2021, report and recommendation.

BY MR. ROBERTS:

**Q. Have your duties, responsibilities, or titles**



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it's pursuing. How could that not be relevant?

MS. PERACH: There's no question -- you're not asking who billed for the claims. You're asking who the employees are employees of.

MR. ROBERTS: I'm asking who performed the services and who is entitled to the payment that's being sought in this lawsuit.

MS. PERACH: You didn't ask who was entitled to the payment. You never once asked who was entitled to the payment.

MR. ROBERTS: I hadn't gotten there yet.

MS. PERACH: Well -- proceed with that question, but the question you just asked related to corporate structure.

BY MR. ROBERTS:

**Q. So, Dr. Scherr, someone goes to the emergency room at Sunrise Hospital in, let's say, June of 2019, and they receive services from a Fremont emergency room staff physician. You with me so far?**

A. (Nods head.)

**Q. Who is entitled to payment for those services?**

MS. PERACH: Objection. Lacks foundation. You may proceed.

THE WITNESS: Well, number one, the -- the physician providing the emergency service, which is paid



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through Fremont Emergency Services.

BY MR. ROBERTS:

**Q. Okay. Fremont Emergency Services Mandavia, Fremont Emergency Services Scherr, or some other company?**

MS. PERACH: Objection. Compound.

THE WITNESS: Depends on the timing. The -- I think my name was only put on it just recently because Mandavia, was a senior vice president, no longer works for us. So they changed my name over to it.

BY MR. ROBERTS:

**Q. So is Fremont Emergency Services Scherr, Ltd., simply a name change from Fremont Emergency Services Mandavia, or is it a separate entity?**

MS. PERACH: Objection to the extent it calls for information relating to the corporate structure of the plaintiffs in this case. I'm going to instruct the witness not to respond.

If it does not call for any information relating to the corporate structure, you may respond, Dr. Scherr.

THE WITNESS: I believe it was just a name change.

BY MR. ROBERTS:

**Q. Are you an owner of Fremont Emergency Services**



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STATE OF NEVADA )
) SS:
COUNTY OF CLARK )

CERTIFICATE OF REPORTER

I, Brittany J. Castrejon, a Certified Court Reporter licensed by the State of Nevada, do hereby certify: That I reported the VIDEOTAPED DEPOSITION OF DR. SCOTT SCHERR, on TUESDAY, MAY 18, 2021, at 9:01 a.m.;

That prior to being deposed, the witness was duly sworn by me to testify to the truth. That I thereafter transcribed my said stenographic notes into written form, and that the typewritten transcript is a complete, true and accurate transcription of my said stenographic notes. That the reading and signing of the transcript was requested.

I further certify that I am not a relative, employee or independent contractor of counsel or of any of the parties involved in the proceeding; nor a person financially interested in the proceeding; nor do I have any other relationship that may reasonably cause my impartiality to be questioned.

IN WITNESS WHEREOF, I have set my hand in my office in the County of Clark, State of Nevada, this 25th day of May, 2021.

Brittany J. Castrejon

Brittany J. Castrejon, RPR, CRR, CCR #926



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CLERK OF THE COURT

**OST**

Pat Lundvall (NSBN 3761)
Kristen T. Gallagher (NSBN 9561)
Amanda M. Perach (NSBN 12399)
McDONALD CARANO LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
Telephone: (702) 873-4100
plundvall@mcdonaldcarano.com
kgallagher@mcdonaldcarano.com
aperach@mcdonaldcarano.com

Justin C. Fineberg (admitted *pro hac vice*)
Martin B. Goldberg (admitted *pro hac vice)*
Rachel H. LeBlanc (admitted *pro hac vice*)
Lash & Goldberg LLP
Weston Corporate Centre I
2500 Weston Road Suite 220
Fort Lauderdale, Florida 33331
Telephone: (954) 384-2500
jfineberg@lashgoldberg.com
mgoldberg@lashgoldberg.com
rleblanc@lashgoldberg.com

Joseph Y. Ahmad (admitted *pro hac vice*)
John Zavitsanos (admitted *pro hac vice*)
Jason S. McManis (admitted *pro hac vice*)
Michael Killingsworth (admitted *pro hac vice*)
Louis Liao (admitted *pro hac vice)*
Jane L. Robinson (admitted *pro hac vice*)
P. Kevin Leyendecker (admitted *pro hac vice*)
Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing, P.C.
1221 McKinney Street, Suite 2500
Houston, Texas 77010
Telephone: 713-600-4901
joeahmad@azalaw.com
jzavitsanos@azalaw.com
jmcmanis@azalaw.com
mkillingsworth@azalaw.com
lliao@azalaw.com
jrobinson@azalaw.com
kleyendecker@azalaw.com

*Attorneys for Plaintiffs*

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Plaintiffs,

vs.

UNITEDHEALTH GROUP, INC., a Delaware corporation; UNITED HEALTHCARE INSURANCE COMPANY, a Connecticut corporation; UNITED HEALTH CARE SERVICES INC., dba UNITEDHEALTHCARE, a Minnesota corporation; UMR, INC., dba UNITED MEDICAL RESOURCES, a Delaware corporation; OXFORD HEALTH PLANS, INC., a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., a Nevada corporation; SIERRA HEALTH-CARE OPTIONS, INC., a

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

**PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT ON ORDER SHORTENING TIME**

**HEARING REQUESTED**
**(Relief Requested by October 6, 2021)**

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Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20,

Defendants

Plaintiffs Fremont Emergency Services (Mandavia), Ltd.; Team Physicians of Nevada-Mandavia, P.C.; Crum, Stefanko and Jones, Ltd. dba Ruby Crest Emergency Medicine move for leave to file a second amended complaint ("SAC"), a copy of which is attached hereto as Exhibit 1 in accord with EDCR 2.30.

Plaintiffs have conferred with Defendants about the relief requested and Defendants have consented to the requested relief, including to Plaintiffs' request that the parties and causes of action being dropped as reflected in the Second Amended Complaint be dismissed ***without*** prejudice. In support of that consent, Defendants have agreed to file a Notice of Non-Opposition to the Motion within one business day of the filing of this motion. Finally, in exchange for Defendants consenting to the relief requested, the Plaintiffs agreed that Defendants may file a General Denial in response to the Second Amended Complaint.

Therefore, Plaintiffs respectfully seek leave from the Court, pursuant to NRCP 15(a)(2), to file its proposed SAC, for entry of an order that dismisses without prejudice the parties and causes of action being dropped in that SAC and for resolution of this matter on shortened time.

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This Motion and request for an order shortening time for resolution is based upon the record in this matter, the declaration of P. Kevin Leyendecker that follows, the pleadings and papers on file in this action, and any argument of counsel entertained by the Court at hearing of this Motion.

Dated this 4th day of October, 2021.

AHMAD, ZAVITSANOS, ANAIPAKOS, ALAVI & MENSING, P.C

By: */s/ P. Kevin Leyendecker*

P. Kevin Leyendecker (admitted pro hac vice)
John Zavitsanos (admitted pro hac vice)
Joseph Y. Ahmad (admitted pro hac vice)
Jason S. McManis (admitted pro hac vice)
Michael Killingsworth (admitted pro hac vice)
Louis Liao (admitted pro hac vice)
Jane L. Robinson (admitted pro hac vice)
Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing, P.C
1221 McKinney Street, Suite 2500
Houston, Texas 77010
kleyendecker@azalaw.com
joeahmad@azalaw.com
jzavitsanos@azalaw.com
jmcmanis@azalaw.com
mkillingsworth@azalaw.com
lliao@azalaw.com
jrobinson@azalaw.com

Justin C. Fineberg (admitted pro hac vice)
Martin B. Goldberg (admitted pro hac vice)
Rachel H. LeBlanc (admitted pro hac vice)
Lash & Goldberg LLP
Weston Corporate Centre I
2500 Weston Road Suite 220
Fort Lauderdale, Florida 33331
jfineberg@lashgoldberg.com
mgoldberg@lashgoldberg.com
rleblanc@lashgoldberg.com

Pat Lundvall (NSBN 3761)
Kristen T. Gallagher (NSBN 9561)
Amanda M. Perach (NSBN 12399)
McDonald Carano LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102



005172
005172
005172

plundvall@mcdonaldcarano.com
kgallagher@mcdonaldcarano.com
aperach@mcdonaldcarano.com

*Attorneys for Plaintiffs*

**DECLARATION OF P. KEVIN LEYENDECKER IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT ON ORDER SHORTENING TIME**

I, P. Kevin Leyendecker, declare as follows:

1. I am an attorney admitted *pro hac vice* to practice law in the State of Nevada and am a partner in the law firm of Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing, P.C., counsel for 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.

2. Prior to filing the Motion for Leave, Plaintiffs conferred with Defendants about the relief requested and Defendants consented to the requested relief, including to Plaintiffs' request that the parties and causes of action being dropped as reflected in the Second Amended Complaint be dismissed ***without*** prejudice. In support of that consent, Defendants also agreed to file a Notice of Non-Opposition to the Motion within one business day of the filing of this motion. Finally, in exchange for Defendants consenting to the relief requested, the Plaintiffs agreed that Defendants may file a General Denial in response to the Second Amended Complaint

3. In light of the upcoming trial date and volume of pretrial motions filed by the parties, good cause exists for deciding the motion as soon as possible and outside the normal course of time because doing so will streamline and simplify the pre-trial process. For example, the Second Amended Complaint drops some parties and causes of action that are the subject of Defendants' Motion for Summary Judgment and in that regard, will substantially reduce the matters otherwise put in controversy by that Summary Judgment Motion.

4. This declaration is submitted in support of Plaintiffs Motion For Leave To File Second Amended Complaint On Order Shortening Time and is made of my own personal knowledge. I am over 18 years of age, and I am competent to testify as to same.



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

Executed: October 4, 2021.

/s/ *P. Kevin Leyendecker*
P. Kevin Leyendecker



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**ORDER SHORTENING TIME**

It appearing to the satisfaction of the Court and good cause appearing therefor,

IT IS HEREBY ORDERED that the hearing on **PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT ON ORDER SHORTENING TIME**, shall be shortened and heard before the above-entitled Court on the 6th day of October, 2021 at 11 a.m./~~p.m.~~, or as soon thereafter as counsel may be heard.

Dated this 4th day of October, 2021

Nancy L Allf

DISTRICT COURT JUDGE

TW

719 35D 95BA EB19
Nancy Allf
District Court Judge

Respectfully submitted by:

AHMAD, ZAVITSANOS, ANAIPAKOS, ALAVI & MENSING, P.C

By: */s/ P. Kevin Leyendecker*

P. Kevin Leyendecker (admitted pro hac vice)
John Zavitsanos (admitted pro hac vice)
Joseph Y. Ahmad (admitted pro hac vice)
Jason S. McManis (admitted pro hac vice)
Michael Killingsworth (admitted pro hac vice)
Louis Liao (admitted pro hac vice)
Jane L. Robinson (admitted pro hac vice)
Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing, P.C
1221 McKinney Street, Suite 2500
Houston, Texas 77010
kleyendecker@azalaw.com
joeahmad@azalaw.com
jzavitsanos@azalaw.com
jmcmanis@azalaw.com
mkillingsworth@azalaw.com
lliao@azalaw.com
jrobinson@azalaw.com

Justin C. Fineberg (admitted pro hac vice)
Martin B. Goldberg (admitted pro hac vice)
Rachel H. LeBlanc (admitted pro hac vice)
Lash & Goldberg LLP
Weston Corporate Centre I
2500 Weston Road Suite 220
Fort Lauderdale, Florida 33331
jfineberg@lashgoldberg.com
mgoldberg@lashgoldberg.com
rleblanc@lashgoldberg.com



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005175
005175

Pat Lundvall (NSBN 3761)
Kristen T. Gallagher (NSBN 9561)
Amanda M. Perach (NSBN 12399)
McDONALD CARANO LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
plundvall@mcdonaldcarano.com
kgallagher@mcdonaldcarano.com
aperach@mcdonaldcarano.com

*Attorneys for Plaintiffs*

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on this 4th day of October, 2021, I caused a true and correct copy of the foregoing to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

D. Lee Roberts, Jr., Esq.
Colby L. Balkenbush, Esq.
Brittany M. Llewellyn, Esq.
Phillip N. Smith, Jr., Esq.
Marjan Hajimirzaee, Esq.
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
lroberts@wwhgd.com
cbalkenbush@wwhgd.com
bllewellyn@wwhgd.com
psmithjr@wwhgd.com
mhajimirzaee@wwhgd.com

Paul J. Wooten, Esq. (admitted *pro hac vice*)
Amanda Genovese, Esq. (admitted *pro hac vice*)
Philip E. Legendy, Esq. (admitted *pro hac vice*)
O'Melveny & Myers LLP
Times Square Tower,
Seven Times Square,
New York, New York 10036
pwooten@omm.com
agenovese@omm.com
plegendy@omm.com

Dimitri Portnoi, Esq. (admitted *pro hac vice*)
Jason A. Orr, Esq. (admitted *pro hac vice*)
Adam G. Levine, Esq. (admitted *pro hac vice*)
Hannah Dunham, Esq. (admitted *pro hac vice*)
Nadia L. Farjood, Esq. (admitted *pro hac vice*)
O'MELVENY & MYERS LLP
400 South Hope Street, 18th Floor
Los Angeles, CA 90071-2899
dportnoi@omm.com
jorr@omm.com
alevine@omm.com
hdunham@omm.com
nfarjood@omm.com

Daniel F. Polsenberg, Esq.
Joel D. Henriod, Esq.
Abraham G. Smith, Esq.
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
dpolsenberg@lewisroca.com
jhenriod@lewisroca.com
asmith@lewisroca.com

*Attorneys for Defendants*

K. Lee Blalack, II, Esq. (admitted *pro hac vice*)
Jeffrey E. Gordon, Esq. (admitted *pro hac vice*)
Kevin D. Feder, Esq. (admitted *pro hac vice*)
Jason Yan, Esq. (*pro hac vice* pending)
O'Melveny & Myers LLP
1625 I Street, N.W.
Washington, D.C. 20006
Telephone: (202) 383-5374
lblalack@omm.com
jgordon@omm.com
kfeder@omm.com

*Attorneys for Defendants*

Judge David Wall, Special Master
Attention: Mara Satterthwaite & Michelle Samaniego
JAMS
3800 Howard Hughes Parkway, 11th Floor
Las Vegas, NV 89123
msatterthwaite@jamsadr.com
msamaniego@jamsadr.com

/s/ *Beau Nelson*
An employee of McDonald Carano LLP



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# EXHIBIT 1

**SACOM**
Pat Lundvall (NSBN 3761)
Kristen T. Gallagher (NSBN 9561)
Amanda M. Perach (NSBN 12399)
McDONALD CARANO LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
Telephone: (702) 873-4100
plundvall@mcdonaldcarano.com
kgallagher@mcdonaldcarano.com
aperach@mcdonaldcarano.com

Justin C. Fineberg (admitted *pro hac vice*)
Martin B. Goldberg (admitted *pro hac vice)*
Rachel H. LeBlanc (admitted *pro hac vice*)
Lash & Goldberg LLP
Weston Corporate Centre I
2500 Weston Road Suite 220
Fort Lauderdale, Florida 33331
Telephone: (954) 384-2500
jfineberg@lashgoldberg.com
mgoldberg@lashgoldberg.com
rleblanc@lashgoldberg.com

Joseph Y. Ahmad (admitted *pro hac vice*)
John Zavitsanos (admitted *pro hac vice*)
Jason S. McManis (admitted *pro hac vice*)
Michael Killingsworth (admitted *pro hac vice*)
Louis Liao (admitted *pro hac vice)*
Jane L. Robinson (admitted *pro hac vice*)
P. Kevin Leyendecker (admitted *pro hac vice*)
Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing, P.C.
1221 McKinney Street, Suite 2500
Houston, Texas 77010
Telephone: 713-600-4901
joeahmad@azalaw.com
jzavitsanos@azalaw.com
jmcmanis@azalaw.com
mkillingsworth@azalaw.com
lliao@azalaw.com
jrobinson@azalaw.com
kleyendecker@azalaw.com

*Attorneys for Plaintiffs*

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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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.

Defendants

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

**SECOND AMENDED COMPLAINT**

**Jury Trial Demanded**

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") as and for their First Amended Complaint against defendants United Healthcare Insurance Company ("UHCIC") United Health Care Services Inc. dba UnitedHealthcare ("UHC Services"); UMR, Inc. dba United Medical Resources ("UMR"); (together with UHC Services and UMR, and with UHCIC, the "UH Parties"); Sierra Health and Life Insurance Company, Inc. ("Sierra Health"); Health Plan of Nevada, Inc. ("HPN") (collectively "Defendants") hereby complain and allege as follows:

**NATURE OF THIS ACTION**

1. This action arises out of a dispute concerning the rate at which Defendants reimburse the Health Care Providers for the emergency medicine services they have already provided, and continue to provide, to patients covered under the health plans underwritten, operated, and/or administered by Defendants (the "Health Plans") (Health Plan beneficiaries for whom the Health Care Providers performed covered services that were not reimbursed correctly shall be referred to as "Patients" or "Members").[1] Collectively, Defendants have manipulated ad are continuing to manipulate their third party payment rates to deny them reasonable payment for their services. Defendants have reaped millions of dollars from their illegal, coercive, unfair, fraudulent conduct and will reap millions more if their conduct is not stopped.

**PARTIES**

2. Plaintiff Fremont Emergency Services (Mandavia), Ltd. ("Fremont") is a professional emergency medicine services group practice that staffs the emergency departments at ER at Aliante; ER at The Lakes; Mountainview Hospital; Dignity Health – St. Rose

[1] The Health Care Providers do not assert any causes of action with respect to any Patient whose health insurance was issued under Medicare Part C (Medicare Advantage) or is provided under the Federal Employee Health Benefits Act (FEHBA). The Health Care Providers also do not assert any claims relating to Defendants' managed Medicaid business or with respect to the right to payment under any ERISA plan. Finally, the Health Care Providers do not assert claims that are dependent on the existence of an assignment of benefits ("AOB") from any of Defendants' Members. Thus, there is – and was – no basis to remove this lawsuit to federal court under federal question jurisdiction.



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Dominican Hospitals, Rose de Lima Campus; Dignity Health – St. Rose Dominican Hospitals, San Martin Campus; Dignity Health – St. Rose Dominican Hospitals, Siena Campus; Southern Hills Hospital and Medical Center; and Sunrise Hospital and Medical Center located throughout Clark County, Nevada. Fremont is part of the TeamHealth Holdings, Inc. ("TeamHealth") organization.

3. Plaintiff Team Physicians of Nevada-Mandavia, P.C. ("Team Physicians") is a professional emergency medicine services group practice that staffs the emergency department at Banner Churchill Community Hospital in Fallon, Nevada.

4. Plaintiff Crum, Stefanko And Jones, Ltd. dba Ruby Crest Emergency Medicine ("Ruby Crest") is a professional emergency medicine services group practice that staffs the emergency department at Northeastern Nevada Regional Hospital in Elko, Nevada.

5. Defendant United HealthCare Insurance Company ("UHCIC") is a Connecticut corporation with its principal place of business in Connecticut. UHCIC is responsible for administering and/or paying for certain emergency medical services at issue in the litigation. On information and belief, United HealthCare Insurance Company is a licensed Nevada health and life insurance company.

6. Defendant United HealthCare Services, Inc. dba UnitedHealthcare ("UHC Services") is a Minnesota corporation with its principal place of business in Connecticut and affiliate of UHCIC. UHC Services is responsible for administering and/or paying for certain emergency medical services at issue in the litigation. On information and belief, United HealthCare Services, Inc. is a licensed Nevada health insurance company.

7. Defendant UMR, Inc. dba United Medical Resources ("UMR") is a Delaware corporation with its principal place of business in Connecticut and affiliate of UHCIC. UMR is responsible for administering and/or paying for certain emergency medical services at issue in the litigation. On information and belief, UMR is a licensed Nevada health insurance company.

8. Defendant Sierra Health and Life Insurance Company, Inc. is a Nevada corporation and affiliate of UHCIC. Sierra Health is responsible for administering and/or paying for certain emergency medical services at issue in the litigation. On information and



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belief, Sierra Health is a licensed Nevada health insurance company.

9. Defendant Health Plan of Nevada, Inc. ("HPN") is a Nevada corporation and affiliate of UHCIC. HPN is responsible for administering and/or paying for certain emergency medical services at issue in the litigation. On information and belief, HPN is a licensed Nevada Health Maintenance Organization ("HMO").

**JURISDICTION AND VENUE**

10. The amount in controversy exceeds the sum of fifteen thousand dollars ($15,000.00), exclusive of interest, attorneys' fees and costs.

11. The Eighth Judicial District Court, Clark County, has subject matter jurisdiction over the matters alleged herein since only state law claims have been asserted and no diversity of citizenship exists. Venue is proper in Clark County, Nevada.

**FACTS COMMON TO ALL CAUSES OF ACTION**

***The Health Care Providers Provide Necessary Emergency Care to Patients***

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12. The Health Care Providers are professional practice groups of emergency medicine physicians and healthcare providers that provides emergency medicine services 24 hours per day, 7 days per week to patients presenting to the emergency departments at hospitals and other facilities in Nevada staffed by the Health Care Providers. The Health Care Providers provide emergency department services throughout the State of Nevada.

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13. The Health Care Providers and the hospitals whose emergency departments they staff are obligated by both federal and Nevada law to examine any individual visiting the emergency department and to provide stabilizing treatment to any such individual with an emergency medical condition, regardless of the individual's insurance coverage or ability to pay. *See* Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd; NRS 439B.410. The Health Care Providers fulfill this obligation for the hospitals which they staff. In this role, the Health Care Providers' physicians provide emergency medicine services to all patients, regardless of insurance coverage or ability to pay, including to Patients with insurance coverage issued, administered and/or underwritten by Defendants.

14. Upon information and belief, Defendants operate as an HMO under NRS Chapter



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695C, and is an insurer under NRS Chapters 679A, 689A (Individual Health Insurance), 689B (Group and Blanket Health Insurance), 689C (Health Insurance for Small Employers) and 695G (Managed Care Organization). Defendants provide, either directly or through arrangements with providers such as hospitals and the Health Care Providers, healthcare benefits to its members.

15. There is no written agreement between Defendants and the Health Care Providers for the healthcare claims at issue in this litigation; the Health Care Providers are therefore designated as a "non-participating" or "out-of-network" provider for all of the claims at issue.

16. Because federal and state law requires that emergency services be provided to individuals by the Health Care Providers without regard to insurance status or ability to pay, the law protects emergency service providers -- like Fremont here -- from the kind of conduct in which Defendants have engaged leading to this dispute. If the law did not do so, emergency service providers would be at the mercy of such payors. the Health Care Providers would be forced to accept payment at any rate dictated by insurers under threat of receiving no payment,. The Health Care Providers are protected by law, which requires that for the claims at issue, the insurer must reimburse the Health Care Providers at a reasonable rate or the usual and customary rate for services they provide.

17. The Health Care Providers regularly provide emergency services to Defendants' Patients.

18. Defendants are contractually and legally responsible for ensuring that Patients receive emergency services without obtaining prior approval and without regard to the "in network" or "out-of-network" status of the emergency services provider.

19. Relevant to this action:

a. From July 1, 2017 through the present, Fremont has provided emergency medicine services to Defendants' Members as an out-of-network provider of emergency services as follows: ER at Aliante (approximately July 2017-present); ER at The Lakes (approximately July 2017-present); Mountainview Hospital (approximately July 2017-present); Dignity Health – St. Rose Dominican Hospitals, Rose de Lima Campus (approximately July 2017-October 2018); Dignity Health – St. Rose Dominican Hospitals, San Martin Campus approximately (July 2017-

October 2018); Dignity Health – St. Rose Dominican Hospitals, Siena Campus (approximately July 2017-October 2018); Southern Hills Hospital and Medical Center (approximately July 2017-present); and Sunrise Hospital and Medical Center (approximately July 2017-present).

b. At all times relevant hereto, Team Physicians and Ruby Crest have provided emergency medicine services to Defendants' Members as out-of-network providers of emergency services at Banner Churchill Community Hospital in Fallon, Nevada and Northeastern Nevada Regional Hospital in Elko, Nevada, respectively.

20. Defendants have generally adjudicated and paid claims with dates of service through July 31, 2019. As the claims continue to accrue, so do the Health Care Providers' damages. For each of the claims for which the Health Care Providers seek damages, Defendants have already determined the claim was covered and payable.

***The Relationship Between the Health Care Providers and Defendants***

21. Defendants provide health insurance to their members (*i.e.*, their insureds).

22. In exchange for premiums, fees, and/or other compensation, Defendants are responsible for paying for health care services rendered to members covered by their health plans.

23. In addition, Defendants provide services to their Members, such as building participating provider networks and negotiating rates with providers who join their networks.

24. Defendants offer a range of health insurance plans. Plans generally fall into one of two categories.

25. "Fully Funded" plans are plans in which Defendants collect premiums directly from their members (or from third parties on behalf of their members) and pay claims directly from the pool of funds created by those premiums.

26. "Employer Funded" plans are plans in which Defendants provide administrative services to their employer clients, including processing, analysis, approval, and payment of health care claims, using the funds of the claimant's employer.

27. Defendants provide coverage for emergency medical services under both types of plans.



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28. Defendants are contractually and legally responsible for ensuring that their members can receive such services (a) without obtaining prior approval and (b) without regard to the "in network" or "out-of-network" status of the emergency services provider.

29. Defendants highlight such coverage in marketing their insurance products.

30. For all claims at issue in this lawsuit, the Health Care Providers were non-participating providers, meaning they did not have an express contract with Defendants.

31. Specifically, the reimbursement claims within the scope of this action are (a) non-participating commercial claims (including for patients covered by Affordable Care Act Exchange products), (b) that were adjudicated as covered, and allowed as payable by Defendants, (c) at rates below the reasonable payment for the services rendered, (d) as measured by the community where they were performed and by the person who provided them. These claims are collectively referred to herein as the "Non-Participating Claims."

32. The Non-Participating Claims involve only commercial and Exchange Products operated, insured, or administered by the insurance company Defendants. They do not involve Medicare Advantage or Medicaid products.

33. Further, the Non-Participating Claims at issue do not involve coverage determinations under any health plan that may be subject to the federal Employee Retirement Income Security Act of 1974, or claims for benefits based on assignment of benefits.[2]

34. Those counts concern the *rate* of payment to which the Health Care Providers are entitled, not whether a *right* to receive payment exists.

35. Defendants bear responsibility for paying for emergency medical care provided to their members regardless of whether the treating physician is an in-network or out-of-network provider.

36. Defendants understand and expressly acknowledge that their members will seek emergency treatment from non-participating providers and that Defendants are obligated to pay for those services.

[2] The Health Care Providers understand, in any event, that Defendants do not require or rely upon assignments from their members in order to pay claims for services provided by the Health Care Providers to their members.



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***Defendants Paid the Health Care Providers Unreasonable Rates***

37. Defendants bear responsibility for paying for emergency medical care provided to their Members regardless of whether the treating physician is an in-network or out-of-network provider.

38. Defendants expressly acknowledge that their Members will seek emergency treatment from non-participating providers and that they are obligated to pay for those services.

39. In emergency situations, individuals go to the nearest hospital for care, particularly if they are transported by ambulance. Patients facing an emergency situation are unlikely to have the opportunity to determine in advance which hospitals and physicians are in-network under their health plan. Defendants are obligated to reimburse the Health Care Providers at the reasonable value of the services provided.

40. Defendants' Members received a wide variety of emergency services (in some instances, life-saving services) from the Health Care Providers' physicians: treatment of conditions ranging from cardiac arrest, to broken limbs, to burns, to diabetic ketoacidosis and shock, to gastric and/or obstetrical distress.

41. As alleged herein, the Health Care Providers provided treatment on an out-of-network basis for emergency services to thousands of Patients who were Members in Defendants' Health Plans. The total underpayment amount for these related claims is in excess of $15,000.00 and continues to grow. Defendants have likewise failed to attempt in good faith to effectuate a prompt, fair, and equitable settlement of these claims.

42. Defendants paid claims at a significantly reduced rate which is demonstrative of an arbitrary and selective program and motive or intent to unjustifiably reduce the overall amount Defendants pay to the Health Care Providers. Defendants implemented this program to influence and leverage the Health Care Providers as well as to unfairly and illegally profit from a manipulation of payment rates.

43. Defendants failed to attempt in good faith to effectuate a prompt, fair, and equitable settlement of the subject claims as legally required.

44. The Health Care Providers contested the unsatisfactory rate of payment received



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from Defendants in connection with the claims that are the subject of this action.

45. All conditions precedent to the institution and maintenance of this action have been performed, waived, or otherwise satisfied.

46. The Health Care Providers bring this action to compel Defendants to pay it the reasonable value of the professional emergency medical services for the emergency services that it provided and will continue to provide Patients and to stop Defendants from profiting from their manipulation of payment rate data.

***Defendants' Prior Manipulation of Reimbursement Rates***

47. Defendants have a history of manipulating their reimbursement rates for non-participating providers to maximize their own profits at the expense of others, including their own Members.

48. In 2009, UnitedHealth Group, Inc. was investigated by the New York Attorney General for allegedly using its wholly-owned subsidiary, Ingenix, to illegally manipulate reimbursements to non-participating providers.

49. The investigation revealed that Ingenix maintained a database of health care billing information that intentionally skewed reimbursement rates downward through faulty data collection, poor pooling procedures, and lack of audits.

50. UnitedHealth Group, Inc. ultimately paid a $50 million settlement to fund an independent nonprofit organization known as FAIR Health to operate a new database to serve as a transparent reimbursement benchmark.

51. In a press release announcing the settlement, the New York Attorney General noted that: "For the past ten years, American patients have suffered from unfair reimbursements for critical medical services due to a conflict-ridden system that has been owned, operated, and manipulated by the health insurance industry."

52. Also in 2009, for the same conduct, UnitedHealth Group, Inc. and Defendants United HealthCare Insurance Co., and United HealthCare Services, Inc. paid $350 million to settle class action claims alleging that they underpaid non-participating providers for services in *The American Medical Association, et al. v. United Healthcare Corp., et al.*, Civil Action No.



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00-2800 (S.D.N.Y.).

53. Since its inception, FAIR Health's benchmark databases have been used by state government agencies, medical societies, and other organizations to set reimbursement for non-participating providers.

54. For example, the State of Connecticut uses FAIR Health's database to determine reimbursement for non-participating providers' emergency services under the state's consumer protection law.

55. Defendants tout the use of FAIR Health and its benchmark databases to determine non-participating, out-of-network payment amounts on its website.

56. While Defendants give the appearance of remitting reimbursement to non-participating providers that meet the reasonable value of services based on geography that is measured from independent benchmark services such as the FAIR Health database, Defendants have found other ways to manipulate the reimbursement rate downward from a reasonable rate in order to maximize profits at the expense of the Health Care Providers.

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57. During the relevant time, Defendants imposed significant cuts to the Health Care Providers' reimbursement rate for out-of-network claims under Defendants' fully funded plans, without rationale or justification.

58. Defendants pay claims under fully funded plans out of their own pool of funds, so every dollar that is not paid to the Health Care Providers is a dollar retained by Defendants for their own use.

59. Defendants' detrimental approach to payments for members in fully funded plans continues today,

60. As a result of these deep cuts in payments for services provided to Members of fully funded plans, Defendants have not paid the Health Care Providers a reasonable rate for those services.

61. In so doing, Defendants have illegally retained those funds.



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**FIRST CLAIM FOR RELIEF**

**(Breach of Implied-in-Fact Contract)**

62. The Health Care Providers incorporate herein by reference the allegations set forth in the preceding paragraphs as if fully set forth herein.

63. At all material times, the Health Care Providers were obligated under federal and Nevada law to provide emergency medicine services to all patients presenting at the emergency departments they staff, including Defendants' Patients.

64. At all material times, Defendants were obligated to provide coverage for emergency medicine services to all of its Members.

65. At all material times, Defendants knew that the Health Care Providers were non-participating emergency medicine groups that provided emergency medicine services to Patients.

66. From July 1, 2017 to the present, Fremont has undertaken to provide emergency medicine services to UH Parties' Patients, and the UH Parties have undertaken to pay for such services provided to UH Parties' Patients.

67. From approximately March 1, 2019 to the present Fremont has undertaken to provide emergency medicine services to the patients of Sierra and HPN, and Sierra and HPN have undertaken to pay for such services provided to their Patients.

68. At all material times, Defendants were aware that the Health Care Providers were entitled to and expected to be paid at rates in accordance with the standards established under Nevada law.

69. At all material times, Defendants have received the Health Care Providers' bills for the emergency medicine services the Health Care Providers have provided and continue to provide to Defendants' Patients, and Defendants have consistently adjudicated and paid, and continue to adjudicate and pay, the Health Care Providers directly for the non-participating claims.

70. Through the parties' conduct and respective undertaking of obligations concerning emergency medicine services provided by the Health Care Providers to Defendants'





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Patients, the parties implicitly agreed, and the Health Care Providers had a reasonable expectation and understanding, that Defendants would reimburse the Health Care Providers for non-participating claims at rates in accordance with the standards acceptable under Nevada law.

71. Under Nevada common law, including the doctrine of quantum meruit, the Defendants, by undertaking responsibility for payment to the Health Care Providers for the services rendered to Defendants' Patients, impliedly agreed to reimburse the Health Care Providers at the reasonable value of the professional emergency medical services provided by the Health Care Providers.

72. Defendants, by undertaking responsibility for payment to the Health Care Providers for the services rendered to the Defendants' Patients, impliedly agreed to reimburse the Health Care Providers at the reasonable value of the professional emergency medical services provided by the Health Care Providers.

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73. In breach of its implied contract with the Health Care Providers, Defendants have and continue to unreasonably and systemically adjudicate the non-participating claims at rates substantially below the reasonable value of the professional emergency medical services provided by the Health Care Providers to the Defendants' Patients.

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74. The Health Care Providers have performed all obligations under the implied contract with the Defendants concerning emergency medical services to be performed for Patients.

75. At all material times, all conditions precedent have occurred that were necessary for Defendants to perform their obligations under their implied contract to pay the Health Care Providers for the non-participating claims, at a minimum, based upon the reasonable value of the Health Care Providers' professional emergency medicine services

76. The Health Care Providers did not agree that the lower reimbursement rates paid by Defendants were reasonable or sufficient to compensate the Health Care Providers for the emergency medical services provided to Patients.

77. The Health Care Providers have suffered damages in an amount equal to the difference between the amounts paid by Defendants and the reasonable value of their



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professional emergency medicine services, that remain unpaid by the Defendants through the date of trial, plus the Health Care Providers' loss of use of that money.

78. As a result of the Defendants' breach of the implied contract to pay the Health Care Providers for the non-participating claims at the rates required by Nevada law, the Health Care Providers have suffered injury and is entitled to monetary damages from Defendants to compensate them for that injury in an amount in excess of $15,000.00, exclusive of interest, costs and attorneys' fees, the exact amount of which will be proven at the time of trial.

79. The Health Care Providers have been forced to retain counsel to prosecute this action and is entitled to receive their costs and attorneys' fees incurred herein.

**SECOND CLAIM FOR RELIEF**

**(Alternative Claim for Unjust Enrichment)**

80. The Health Care Providers rendered valuable emergency services to the Patients.

81. Defendants received the benefit of having their healthcare obligations to their plan members discharged and their members received the benefit of the emergency care provided to them by the Health Care Providers.

82. As insurers or plan administrators, Defendants were reasonably notified that emergency medicine service providers such as the Health Care Providers would expect to be paid by Defendants for the emergency services provided to Patients.

83. Defendants accepted and retained the benefit of the services provided by the Health Care Providers at the request of the members of its Health Plans, knowing that the Health Care Providers expected to be paid the reasonable value of services provided, for the medically necessary, covered emergency medicine services it performed for Defendants' Patients.

84. Defendants have received a benefit from the Health Care Providers' provision of services to its Patients and the resulting discharge of their healthcare obligations owed to their Patients.

85. Under the circumstances set forth above, it is unjust and inequitable for Defendants to retain the benefit they received without paying the value of that benefit; i.e., by paying the Health Care Providers at the reasonable value of services provided, for the claims that



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are the subject of this action and for all emergency medicine services that the Health Care Providers will continue to provide to Defendants' Members.

86. The Health Care Providers seek compensatory damages in an amount which will continue to accrue through the date of trial as a result of Defendants' continuing unjust enrichment.

87. As a result of the Defendants' actions, the Health Care Providers have been damaged in an amount in excess of $15,000.00, exclusive of interest, costs and attorneys' fees, the exact amount of which will be proven at the time of trial.

88. The Health Care Providers sue for the damages caused by the Defendants' conduct and is entitled to recover the difference between the amount the Defendants' paid for emergency care the Health Care Providers rendered to its members and the reasonable value of the service that the Health Care Providers rendered to Defendants by discharging their obligations to their plan members.

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89. As a direct result of the Defendants' acts and omissions complained of herein, it has been necessary for the Health Care Providers to retain legal counsel and others to prosecute their claims. The Health Care Providers are thus entitled to an award of attorneys' fees and costs of suit incurred herein.

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**THIRD CLAIM FOR RELIEF**

**(Violation of NRS 686A.020 and 686A.310)**

90. The Health Care Providers incorporate herein by reference the allegations set forth in the preceding paragraphs as if fully set forth herein.

91. The Nevada Insurance Code prohibits an insurer from engaging in an unfair settlement practices. NRS 686A.020, 686A.310.

92. One prohibited unfair claim settlement practice is "[f]ailing to effectuate prompt, fair and equitable settlements of claims in which liability of the insurer has become reasonably clear." NRS 686A.310(1)(e).

93. As detailed above, Defendants have failed to comply with NRS 686A.310(1)(e) by failing to pay the Health Care Providers' medical professionals the usual and customary rate



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for emergency care provided to Defendants' members. By failing to pay the Health Care Providers' medical professionals the usual and customary rate Defendants have violated NRS 686A.310(1)(e) and committed an unfair settlement practice.

94. The Health Care Providers are therefore entitled to recover the difference between the amount Defendants paid for emergency care the Health Care Providers rendered to their members and the usual and customary rate, plus court costs and attorneys' fees.

95. The Health Care Providers are entitled to damages in an amount in excess of $15,000.00, exclusive of interest, costs and attorneys' fees, the exact amount of which will be proven at the time of trial.

96. Defendants have acted in bad faith regarding their obligation to pay the usual and customary fee; therefore, the Health Care Providers are entitled to recover punitive damages against Defendants.

97. As a direct result of Defendants' acts and omissions complained of herein, it has been necessary for the Health Care Providers to retain legal counsel and others to prosecute their claims. The Health Care Providers are thus entitled to an award of attorneys' fees and costs of suit incurred herein.

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**FOURTH CLAIM FOR RELIEF**

**(Violations of Nevada Prompt Pay Statutes & Regulations)**

98. The Health Care Providers incorporate herein by reference the allegations set forth in the preceding paragraphs as if fully set forth herein.

99. The Nevada Insurance Code requires an HMO, MCO or other health insurer to pay a healthcare provider's claim within 30 days of receipt of a claim. NRS 683A.0879 (third party administrator), NRS 689A.410 (Individual Health Insurance), NRS 689B.255 (Group and Blanket Health Insurance), NRS 689C.485 (Health Insurance for Small Employers), NRS 695C.185 (HMO), NAC 686A.675 (all insurers) (collectively, the "NV Prompt Pay Laws"). Thus, for all submitted claims, Defendants were obligated to pay the Health Care Providers the usual and customary rate within 30 days of receipt of the claim.

100. Despite this obligation, as alleged herein, Defendants have failed to reimburse the



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Health Care Providers at the usual and customary rate within 30 days of the submission of the claim. Indeed, Defendants failed to reimburse the Health Care Providers at the usual and customary rate at all. Because Defendants have failed to reimburse the Health Care Providers at the usual and customary rate within 30 days of submission of the claims as the Nevada Insurance Code requires, Defendants are liable to the Health Care Providers for statutory penalties.

101. For all claims payable by plans that Defendants insure wherein it failed to pay at the usual and customary fee within 30 days, Defendants are liable to the Health Care Providers for penalties as provided for in the Nevada Insurance Code.

102. Additionally, Defendants have violated NV Prompt Pay Laws, by among things, only paying part of the subject claims that have been approved and are fully payable.

103. The Health Care Providers seek penalties payable to it for late-paid and partially paid claims under the NV Prompt Pay Laws.

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104. The Health Care Providers are entitled to damages in an amount in excess of $15,000.00 to be determined at trial, including for its loss of the use of the money and its attorneys' fees.

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105. Under the Nevada Insurance Code and NV Prompt Pay Laws, the Health Care Providers are also entitled to recover their reasonable attorneys' fees and costs.

**REQUEST FOR RELIEF**

WHEREFORE, the Health Care Providers request the following relief:

A. For awards of general and special damages in amounts in excess of $15,000.00, the exact amounts of which will be proven at trial;

B. Judgment in their favor on the Second Amended Complaint;

C. Awards of actual, consequential, general, and special damages in an amount in excess of $15,000.00, the exact amounts of which will be proven at trial;

D. An award of punitive damages, the exact amount of which will be proven at trial;

E. The Health Care Providers costs and reasonable attorneys' fees pursuant to NRS 207.470;



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F. Reasonable attorneys' fees and court costs;

G. Pre-judgment and post-judgment interest at the highest rates permitted by law; and

H. Such other and further relief as the Court may deem just and proper.

**JURY DEMAND**

The Health Care Providers hereby demand trial by jury on all issues so triable.

DATED this 4th day of October, 2021.

AHMAD, ZAVITSANOS, ANAIPAKOS, ALAVI & MENSING, P.C

By: */s/ P. Kevin Leyendecker*

P. Kevin Leyendecker (admitted pro hac vice)
John Zavitsanos (admitted pro hac vice)
Joseph Y. Ahmad (admitted pro hac vice)
Jason S. McManis (admitted pro hac vice)
Michael Killingsworth (admitted pro hac vice)
Louis Liao (admitted pro hac vice)
Jane L. Robinson (admitted pro hac vice)
Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing, P.C
1221 McKinney Street, Suite 2500
Houston, Texas 77010
kleyendecker@azalaw.com
joeahmad@azalaw.com
jzavitsanos@azalaw.com
jmcmanis@azalaw.com
mkillingsworth@azalaw.com
lliao@azalaw.com
jrobinson@azalaw.com

Justin C. Fineberg (admitted pro hac vice)
Martin B. Goldberg (admitted pro hac vice)
Rachel H. LeBlanc (admitted pro hac vice)
Lash & Goldberg LLP
Weston Corporate Centre I
2500 Weston Road Suite 220
Fort Lauderdale, Florida 33331
Telephone: (954) 384-2500
jfineberg@lashgoldberg.com
mgoldberg@lashgoldberg.com
rleblanc@lashgoldberg.com

Pat Lundvall (NSBN 3761)
Kristen T. Gallagher (NSBN 9561)



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Amanda M. Perach (NSBN 12399)
McDONALD CARANO LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
plundvall@mcdonaldcarano.com
kgallagher@mcdonaldcarano.com
aperach@mcdonaldcarano.com

*Attorneys for Plaintiffs Fremont Emergency Services (Mandavia), Ltd., Team Physicians of Nevada-Mandavia, P.C. & Crum, Stefanko and Jones, Ltd. dba Ruby Crest Emergency Medicine*

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on this 4th day of October, 2021, I caused a true and correct copy of the foregoing to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

D. Lee Roberts, Jr., Esq.
Colby L. Balkenbush, Esq.
Brittany M. Llewellyn, Esq.
Phillip N. Smith, Jr., Esq.
Marjan Hajimirzaee, Esq.
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
lroberts@wwhgd.com
cbalkenbush@wwhgd.com
bllewellyn@wwhgd.com
psmithjr@wwhgd.com
mhajimirzaee@wwhgd.com

Paul J. Wooten, Esq. (admitted *pro hac vice*)
Amanda Genovese, Esq. (admitted *pro hac vice*)
Philip E. Legendy, Esq. (admitted *pro hac vice*)
O'Melveny & Myers LLP
Times Square Tower,
Seven Times Square,
New York, New York 10036
pwooten@omm.com
agenovese@omm.com
plegendy@omm.com

Dimitri Portnoi, Esq. (admitted *pro hac vice*)
Jason A. Orr, Esq. (admitted *pro hac vice*)
Adam G. Levine, Esq. (admitted *pro hac vice*)
Hannah Dunham, Esq. (admitted *pro hac vice*)
Nadia L. Farjood, Esq. (admitted *pro hac vice*)
O'MELVENY & MYERS LLP
400 South Hope Street, 18th Floor
Los Angeles, CA 90071-2899
dportnoi@omm.com
jorr@omm.com
alevine@omm.com
hdunham@omm.com
nfarjood@omm.com

Daniel F. Polsenberg, Esq.
Joel D. Henriod, Esq.
Abraham G. Smith, Esq.
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
dpolsenberg@lewisroca.com
jhenriod@lewisroca.com
asmith@lewisroca.com

*Attorneys for Defendants*

K. Lee Blalack, II, Esq. (admitted *pro hac vice*)
Jeffrey E. Gordon, Esq. (admitted *pro hac vice*)
Kevin D. Feder, Esq. (admitted *pro hac vice*)
Jason Yan, Esq. (*pro hac vice* pending)
O'Melveny & Myers LLP
1625 I Street, N.W.
Washington, D.C. 20006
Telephone: (202) 383-5374
lblalack@omm.com
jgordon@omm.com
kfeder@omm.com

*Attorneys for Defendants*

Judge David Wall, Special Master
Attention: Mara Satterthwaite & Michelle Samaniego
JAMS
3800 Howard Hughes Parkway, 11th Floor
Las Vegas, NV 89123
msatterthwaite@jamsadr.com
msamaniego@jamsadr.com

/s/ *Beau Nelson*
An employee of McDonald Carano LLP



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**CSERV**

DISTRICT COURT
CLARK COUNTY, NEVADA

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

**AUTOMATED CERTIFICATE OF SERVICE**

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

Service Date: 10/4/2021

| | |
|---|---|
| Michael Infuso | minfuso@greeneinfusolaw.com |
| Frances Ritchie | fritchie@greeneinfusolaw.com |
| Greene Infuso, LLP | filing@greeneinfusolaw.com |
| Audra Bonney | abonney@wwhgd.com |
| Cindy Bowman | cbowman@wwhgd.com |
| D. Lee Roberts | lroberts@wwhgd.com |
| Pat Lundvall | plundvall@mcdonaldcarano.com |
| Kristen Gallagher | kgallagher@mcdonaldcarano.com |
| Amanda Perach | aperach@mcdonaldcarano.com |
| Beau Nelson | bnelson@mcdonaldcarano.com |

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| | |
|---|---|
| Marianne Carter | mcarter@mcdonaldcarano.com |
| Karen Surowiec | ksurowiec@mcdonaldcarano.com |
| Raiza Anne Torrenueva | rtorrenueva@wwhgd.com |
| Colby Balkenbush | cbalkenbush@wwhgd.com |
| Daniel Polsenberg | dpolsenberg@lewisroca.com |
| Joel Henriod | jhenriod@lewisroca.com |
| Abraham Smith | asmith@lewisroca.com |
| Brittany Llewellyn | bllewellyn@wwhgd.com |
| Justin Fineberg | jfineberg@lashgoldberg.com |
| Yvette Yzquierdo | yyzquierdo@lashgoldberg.com |
| Virginia Boies | vboies@lashgoldberg.com |
| Martin Goldberg | mgoldberg@lashgoldberg.com |
| Rachel LeBlanc | rleblanc@lashgoldberg.com |
| Jonathan Feuer | jfeuer@lashgoldberg.com |
| Jason Orr | jorr@omm.com |
| Adam Levine | alevine@omm.com |
| Jeff Gordon | jgordon@omm.com |
| Hannah Dunham | hdunham@omm.com |
| Paul Wooten | pwooten@omm.com |
| Dimitri Portnoi | dportnoi@omm.com |
| Lee Blalack | lblalack@omm.com |
| David Ruffner | druffner@lashgoldberg.com |
| Kimberly Kirn | kkirn@mcdonaldcarano.com |

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| | |
|---|---|
| Phillip Smith, Jr. | psmithjr@wwhgd.com |
| Flor Gonzalez-Pacheco | FGonzalez-Pacheco@wwhgd.com |
| Kelly Gaez | kgaez@wwhgd.com |
| Marjan Hajimirzaee | mhajimirzaee@wwhgd.com |
| Jessica Helm | jhelm@lewisroca.com |
| Cynthia Kelley | ckelley@lewisroca.com |
| Emily Kapolnai | ekapolnai@lewisroca.com |
| Maxine Rosenberg | Mrosenberg@wwhgd.com |
| Mara Satterthwaite | msatterthwaite@jamsadr.com |
| Emily Pincow | epincow@lashgoldberg.com |
| Cheryl Johnston | Cheryl.Johnston@phelps.com |
| Ashley Singrossi | asingrossi@lashgoldberg.com |
| Jonathan Siegelaub | jsiegelaub@lashgoldberg.com |
| Philip Legendy | plegendy@omm.com |
| Andrew Eveleth | aeveleth@omm.com |
| Kevin Feder | kfeder@omm.com |
| Nadia Farjood | nfarjood@omm.com |
| Jason Yan | jyan@omm.com |
| AZAlaw AZAlaw | TMH010@azalaw.com |
| Beau Nelson | beaunelsonmc@gmail.com |
| Marianne Carter | mcarter.mc2021@gmail.com |
| Dexter Pagdilao | dpagdilao@omm.com |
| Hollis Donovan | hdonovan@omm.com |

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| | |
|---|---|
| Amanda Genovese | agenovese@omm.com |
| Tara Teegarden | tteegarden@mcdonaldcarano.com |
| Errol KIng | errol.King@phelps.com |

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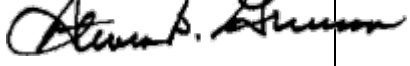

**TRAN**

DISTRICT COURT

CLARK COUNTY, NEVADA

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

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE
WEDNESDAY, OCTOBER 6, 2021

**TRANSCRIPT OF PROCEEDINGS**
**RE: MOTIONS (Via Blue Jeans)**

FOR PLAINTIFF(S):
PATRICIA K. LUNDVALL, ESQ. (In person)
KRISTEN T. GALLAGHER, ESQ. (Blue Jeans)
AMANDA PERACH, ESQ. (Blue Jeans)
JOHN ZAVITSANOS, ESQ. (In person)
JANE ROBINSON, ESQ. (Blue Jeans)

FOR DEFENDANT(S):
D. LEE ROBERTS, JR., ESQ. (Blue Jeans)
COLBY BALKENBUSH, ESQ. (Blue Jeans)
K. LEE BLALACK, ESQ. (Blue Jeans)
DANIEL F. POLSENBERG, ESQ. (Blue Jeans)

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



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**LAS VEGAS, CLARK COUNTY, NEVADA**

**WEDNESDAY, OCTOBER 6, 2021 11:43 a.m.**

*** * * * ***

THE COURT: Our last matter for today is Fremont versus United.

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

MS. LUNDVALL: Good morning, Your Honor. Pat Lundvall, from McDonald Carano, here on behalf of the plaintiffs.

THE COURT: Thank you.

MR. ZAVITSANOS: Good morning, Judge. John Zavitsanos and Jane Robinson, from AZA, on behalf of the plaintiff.

THE COURT: Thank you.

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

THE COURT: Thank you.

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

THE COURT: Thank you.

And for the defendants, please.

MR. BLALACK: Lee Blalack --

MR. ROBERTS: Good morning, Your Honor. Lee Roberts,



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appearing for the defendants.

THE COURT: Thank you.

MR. BLALACK: And Your Honor, Lee Blalack, appearing on behalf of the defendants as well.

THE COURT: Thank you.

MR. POLSENBERG: And Dan Polsenberg, for defendants, Your Honor.

THE COURT: Thank you.

MR. BALKENBUSH: And good morning, Your Honor. Colby Balkenbush, also appearing on behalf of the defendant.

THE COURT: Thank you.

Does that exhaust the appearances?

All right. So the first matter, which I think we can resolve easily, is a motion for leave to file *Motions in Limine* under seal. Any objection?

MS. LUNDVALL: No objection, Your Honor.

THE COURT: Okay. We have the motion to amend complaint, which if there is no opposition, it will be granted.

We have then a motion to quash out-of-state subpoenas.

Let's hear that very briefly.

I am sorry, guys, I'm in trial at 1 o'clock, and I need to give them a lunch. I'm moving this along as fast as I can.

MR. ZAVITSANOS: Your Honor, did you receive our

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response that was filed this morning?

THE COURT: I've been on the bench since 9:00.

MR. ZAVITSANOS: Okay.

THE COURT: So the motion to quash the out-of-state subpoenas, please.

MR. ROBERTS: Thank you, Your Honor. Lee Roberts for the defendants. I'll be handling this motion.

THE COURT: Thank you.

MR. ROBERTS: We -- I suggest that maybe the easiest way for the Court to deal with this is based simply on the personal service issue, because you don't get to any of the other issues once the Court determines that these subpoenas were not personally served.

The contention is that service upon counsel for the defendant, my law office in particular, by hand delivery of a letter in the subpoenas was proper service because we had listed the witnesses care of our law office on 16.1 disclosures.

Frankly, Your Honor, there's a big difference between listing a witness who you want contacted through your office because they're an employee or former employee and representing that that witness can be personally served by counsel.

These witnesses did not authorize this firm to accept trial subpoenas on their behalf. And we don't think that that

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can be presumed from the simple listing of that person on a 16.1, which requires that you identify witnesses with information, not that you provide addresses where that witness can be served.

We direct the Court's attention to *Consolidated Generator* Nevada 114 Nev. 1304 at page 1312, where the Court noted that the District Court did not abuse its discretion in granting motions to quash subpoenas naming out-of-state employees and officers of the parties who had been served upon counsel for the parties, because Nevada Rule 45(c) requires a subpoena to be personally served.

And so there's simply no way they could argue that service of a letter on counsel for a party is personal service on employees and former employees of the party. And we suggest that that, in itself, is sufficient.

The other thing that I would like to sort of point out, based on their opposition that the claim is that was adequate because they were listed on 16.1s is the Exhibit 1 to our motion has a copy of the letters which notes that mileage is served. But that's nonsensical, under NRS 15.225, a witness gets mileage from traveling to and from the place of residence to the courthouse.

And even if our law office is issued as the place to contact the witnesses, certainly no one had a good faith belief these out-of-state witnesses resided in our law office,

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and, therefore, they haven't been given proper mileage to come to the courthouse. The witnesses all reside out of state -- some on the East Coast, over 2,000 miles away. The undue burden of these witnesses being compelled to come and appear here is another thing that the Court can consider, but you don't get to that issue unless you deal with the fact that these are out-of-state witnesses.

And again, based on the -- this argument that they're not out-of-state witnesses for the purposes of this *Quinn* decision because they were listed on 16.1 disclosures, we would note that there's a footnote to the *Quinn* decision, Footnote 2, which says: For the purpose of this opinion, out of state means a nonresident who is located outside of the state. Therefore, the opinion applies to all of these witnesses because they're clearly nonresidents regardless of whether a law office was listed as an address where they could be contacted.

The other thing the opposition raises is that the *Quinn* decision only applies to nonparties, with the allegation that these are -- it doesn't apply because these are party-affiliated witnesses, because they are employees and former employees of parties.

Once again, we dispute that, Your Honor, under the decision and under Nevada law, you're either a party or you're not. None of these witnesses are listed in the caption of the

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case. None of them are parties to the case.

Now, certainly they could -- you know, there are things where the Nevada rules do say, for example, in the rule regarding the reading of depositions, where an adverse party may use for the purposes of deposition a party or anyone who when deposed was a party's officer, director, or managing agent.

Again, this rule doesn't say that employees, even if they're an officer, director, or managing agent, are a party. It says you can read the deposition of a party or an officer or a director. Certainly, the rules could have made officers, directors, and managing agents parties. For the purpose of these rules, officer director, managing agent shall be considered a party. It doesn't do that, because they are not parties. They are clearly nonparties to which the *Quinn* decision applies.

Next, I would like to get to the argument with regard to the particular language of Rule 45. And again, you only get to this language if there's personal service. The opposition brief points out that Nevada changed the Federal Rule, when it adopted 45(c)(3)(A)(ii) to add the exception: Unless the person is commanded to attend the trial within Nevada, and somehow arguing that that expands the subpoena power of this Court for a trial subpoena to anyone in the United States without limitation.

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I would suggest that that simply cannot be read from the rule, because it has to be read in context. And you go back to 45(b)(2), which says, Service in Nevada, subject to the provisions of Rule 45(c)(3)(A)(ii), a subpoena may be served at any place within the state. So you only get to 45(c)(3)(A)(ii) if the person has been served within the state of Nevada.

And because personal service was required on these nonresidents, this exception simply allows someone personally served in Nevada to appear and attend a trial within Nevada, and it is not meant to apply to an out-of-state service which is referenced in 45(b)(3). Therefore, we think that you have to read those together.

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And I would apologize, I just saw this argument this morning when the brief was filed, but I would refer the Court to *Iorio v. Allianz Life Insurance Company of North America, 2009 WL 3415689*, at page 3, from the Southern District of California, where the Court found that you have to read the equivalent federal rule in the context of 45(b)(2) and that it did not expand 45(b)(2) as it was then written in the federal rule.

Applying that analogy to the state rule, you could not claim that this expanded the subpoena power of the Court to people who were served or should have been served in another state.

And again, it all comes down to residents, Your Honor. Are these nonresidents or are they not nonresidents? The fact that our office is listed could not be credibly deemed to have led them to believe that these people resided in our law firm commercial offices, Your Honor.

And I know you're on a short schedule, so I'll end there.

THE COURT: Thank you.

And the opposition, please, Mr. Zavitsanos.

MR. ZAVITSANOS: Yes, Your Honor.

So first of all, I want to thank the Court very much for granting us the privilege to appear *pro hac vice* here.

I can say, Your Honor, that this is probably the single most important issue, from our standpoint, so far. And I can explain why in just a little bit.

I want to apologize to the Court that we worked very late last night to get this response together. I do very much appreciate the Court setting this quickly, because it is a material issue. I will ask Your Honor if Your Honor would like an opportunity perhaps to review our response.

THE COURT: I did. I just did.

MR. ZAVITSANOS: And we are here, so we can come back.

THE COURT: I did. I have the ability to listen and scan.

I think my biggest question for you is what about the

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four people who are no longer employed?

MR. ZAVITSANOS: Okay. So may I proceed, Your Honor?

THE COURT: Please.

MR. ZAVITSANOS: Okay. All right. So here's the issue on that -- and I'm just going to address the Court's question, because if you read our response, I don't want to -- I've been sitting in here, and I don't want to parrot what we've already read. Okay? The rules -- the federal rule --

THE COURT: All of you guys, I save the best for last. So --

MR. ZAVITSANOS: Okay. So here's the issue, Judge. I cannot underscore how important this case is beyond these two parties. The entire healthcare industry is watching this case. This is the tip of the spear. It really is. And everybody is monitoring this case, because it is going to decide something that has been swirling for a while all across the country.

Now, here's what they did not do. What they did not do was admit -- submit any evidence that these so-called former employees don't have consulting agreements that require cooperation.

I mean, one of these gentleman, Mr. Haben, who was the architect of this plan to basically drive down these reimbursements, he has over 20 years of institutional knowledge. And mysteriously, he just retired in August, right

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before this case gets called? I will bet dollars to doughnuts that he has some kind of a consulting agreement that requires his cooperation -- and the same is true of the others. And --

THE COURT: Did he testify as the 30(b)6 witness?

MR. ZAVITSANOS: He did, Your Honor. He did.

And the other thing is this, Your Honor, so United has these sister companies. Okay? That is technically -- that are technically not parties in this case, and they are kind of seamless in terms of the way that they operate. I don't know whether any of these former employees work for these sister companies or not.

Because what United is doing all across the country -- not just here in Nevada -- is basically putting all of these pieces together, to essentially drive down reimbursements to these minimum wage levels to basically jack up their profits. Okay.

Now, the only case that they cite -- and because, listen, I will admit there is no case that directly addresses this issue. And the Court should be guided by three things, because ultimately, this comes down to hardship. That's really what Your Honor is going to have to decide. And the reason you have to decide it is because we get past the first issue for three reasons.

United alone decided to identify where these people are. They decided that. Not us. And in fact, there's e-mail

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correspondence where United's counsel says, When you want to serve them, you serve us, okay, for the depositions. Now, they changed the address right after we served them. Okay? So they elected to list them here.

Now, why is that important? Because if these people truly are former employees, I would be permitted to contact some of them and to talk them if they're not in the control group. I can't do that. I can only contact them at the address that is identified in the disclosure; right? So they're trying to have their cake and eat it too here; right?

Second, the trial testimony of Mr. Haben and Ms. Paradise -- that's going to be a show. Okay? Because these people were so evasive during their deposition, and we were faced with a choice. We could either file a motion to compel, or we could sit back and rely on what they did so that we can cross-examine them here at trial. We chose B.

And these depositions are utterly worthless, utterly worthless. They got asked the ultimate issue repeatedly, and what we got was the old rope-a-dope, that just evading with these little canned speeches. And this was all preplanned; right? And so now all of a sudden they're not going to be here.

Okay. Third, the only case that they cite, the only case that they cite that addresses this issue is the *Big Lots* case out of Louisiana; right? And what does that Court say?

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It specifically says they are in the minority -- that the ruling in *Big Lots* is the minority view. Okay. It's the minority view. And it's a much different situation.

The issue is whether or not these are party witnesses or nonparty witnesses. And that -- and Your Honor, in the *Quinn* case, which counsel just talked about, if you go to page 33, that's the issue, is whether they're a party or a nonparty. All right?

Now, finally, before I get to the hardship, every single one of these people is on their trial list, on the will call list. Okay? Excuse me -- some of them are on the may call; some of them are on the will call; right? So I want to be able to call them adverse. We want to be able to ask them the very questions that they evaded. And if they are evasive in trial, the way they were in the deposition, well, Your Honor, I've been watching some of the trials Your Honor has been doing, and you know this better than anybody, the jury will punish them for that, okay, when they evade. And that's part of the trial strategy that goes into it. I want to be able to do that live.

Finally, Your Honor, the difference in the rules. The rules are different. The Nevada legislature most clearly eliminated the issue about -- so we've got two things going on: Where were they served? And where do they live? Those are not the same thing. And counsel is conflating the two.

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They were -- they identified these witnesses as being located through their lawyers in the disclosures, and that's where we served them. You've got to separate the two; right?

So now we get to the issue of hardship -- we get to the issue of hardship. All right. These witnesses, most of them are current employees.

I will tell you, Your Honor, that there was probably, between both sides, way more spent in attorney's fees than is a issue in this case. And the reason for that --

THE COURT: Hang on.

Someone needs to unmute -- or needs to mute. Sorry.

Go ahead.

MR. ZAVITSANOS: And the reason for that is because the importance of the issue in this case.

There's all kinds of stuff going on in the background on Capitol Hill, that, you know, with the lobbyists and with lawsuits across the country. And the -- I mean, I don't want to overdramatize this, but the future of healthcare, particularly emergency medicine, is right here in this courtroom. And they know that.

And that's why -- look, and we've got a bunch of lawyers too; right? They hired the second best law firm in Las Vegas. Okay? Pat. We got the best one. They've hired excellent, excellent counsel, national counsel from offices all over the country, to say that this is a hardship when they

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have them on their will call list -- a company that has a market cap in the scores of billions of dollars. That's just -- this is not some widow on the prairie that we're trying to hail into Court.

THE COURT: Well, no, you know what, there's an equal protection clause. You -- everybody walks in equal. I know this is big business against big business --

MR. ZAVITSANOS: Yes, yes.

THE COURT: -- so argue your case.

MR. ZAVITSANOS: So, Judge, all I'm saying is that the rule -- the rule must mean something when they eliminated the additional requirement -- the federal requirement about not being able to hail them more than a hundred miles. If they were served within the state, they were served within the state properly -- and we contend it was proper because they elected to identify it in the way that they did -- then Your Honor has the discretion to order them, unless there's a hardship.

And let me add one last thing, Judge. They did the same thing with us. Okay? We actually -- we had care of counsel as well. They served us. We're not contesting it. Now, the difference between us and them is we changed it to put down their addresses before we were served, they did not. But we're not going to contest it. We're not going to contest it.

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So we would ask Your Honor to deny the motion to quash to compel these party witnesses to be here. And at the very least, for the ones that they claim are former employees, to make an inquiry -- because there is no evidence right now -- as to whether or not any of these individuals have any kind of a cooperation contractual obligation as part of a consulting agreement or a severance or anything like that, because if they do, they should come.

And finally, they've listed them on their trial witness list.

That's all I have, Your Honor.

THE COURT: Thank you.

And the reply, please.

MR. ROBERTS: Yes, Your Honor. Just getting off of mute.

First of all, as an initial rebuttal, it doesn't really matter whether they are employees or former employees. It doesn't matter whether there is a consulting agreement. Because the issue of control of a witness is nowhere in the rules or in the decisions. In fact, the *Quinn* case specifically applied to current employees of the parties. And they said personal service is not service on the attorney for the party. And there's nothing in this case that would cause this Court to not follow that binding Nevada Supreme Court precedent.

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With regard to the issue of our pretrial order, I think counsel may have inadvertently overstated his case there. The 16.1(a)(3) is attached as Exhibit 5 to their opposition.

At page 3, we list witnesses that we expect to call, not will call. And it's prefaced by the statement, Inclusion of any witness below is not a representation that defendant will call a given witness. But even if you look through that list of expect to call, there are only 2 of the 10 names, John Haben and Scott Ziemer.

The other thing I would point out to the Court is, at page 8 of Exhibit 5, there is a list of the persons that defendants may present by deposition. And on that list is every single one of the witnesses that they have -- that we have sought to quash in this motion. So every one of these witnesses we have reserved the right to present by deposition, because every single one of them has been deposed.

And there's a big difference between our office getting permission and agreeing to accept subpoenas for depositions to be taken in their state of residence or where they normally work versus a presumption that they have agreed that we can accept personal service for the attendance of a trial proceeding in Nevada. And that can't be presumed.

Finally, dealing with the discussion of undue burden, which is -- it's stated undue burden in Rule 45, that's burden

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on the witness, not on the party. And there's very little out there on what undue burden is. But I would draw the Court's attention to *Planned Parenthood v. Casey, 505 U.S. 833*, where a concurring opinion by Justice John Paul Stevens discussed the fact that undue burden can be undue either because it's too severe or because it lacks a legitimate rational justification.

So I would suggest that undue burden doesn't just mean the severity of traveling from New York to Nevada for trial, but also what it is that we're trying to accomplish. What's the rational reason why plaintiffs have to have these people appear here in their case in chief?

And really, Your Honor, there is no rational reason why they have to do that because every single one of these witnesses was not only deposed, but they have already designated and provided to us portions of their deposition transcript which they intend to read.

These people are unavailable. Their depositions have been taken. If they chose not to follow up on questions at their deposition or chose not to compel further answers from this Court, I don't think it's reasonable for them to say they did that, because they assumed they could compel the attendance of out-of-state witnesses in Nevada for trial, and therefore, did not have to take an adequate deposition when we made these witnesses available for depositions at out-of-state

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locations.

Unless this Court has any questions, I'll conclude and submit.

THE COURT: Thank you.

This is the defendant's motion to quash out-of-state subpoenas for trial.

The motion will be denied for the reason that the plaintiff was led to be able to rely on the availability of those witnesses in Nevada. The subpoenas were served at the address given. And so the motion is denied.

Now, Mr. Roberts, if you have a witness who you have no relationship with and no sister company has a relationship with, who fails to cooperate, then you may seek relief. But you would have to have a lot of detail there. So --

MR. ROBERTS: Thank you, Your Honor.

And I have one additional request. Mr. Polsenberg is here. It's my understanding that the client has authorized him to writ this issue in the event the Court denied our motion.

Would the Court be willing to add a stay on this, pending a decision from the Supreme Court?

THE COURT: No.

MR. ROBERTS: Or a Court of Appeals?

THE COURT: No. First, I don't consider oral motions unless it is a different situation. And it just doesn't give

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fair notice to the other side.

So certainly, if you need an order shortening time, I always grant them.

MR. ROBERTS: Thank you, Your Honor.

THE COURT: Now, let's talk about this motion to continue a hearing.

I am supposed to start another trial on the 18th. I'm not sure it's going to go. But my trial for next week settled, and that's the only reason I could give you those hearings next week.

So who on the defense side is arguing?

MR. BALKENBUSH: Your Honor, this is Colby Balkenbush.

THE COURT: Yeah.

MR. BALKENBUSH: I'll be addressing the motion to continue for the defendants.

THE COURT: You can have five --

MR. BALKENBUSH: Certainly your --

THE COURT: Five minutes.

MR. BALKENBUSH: Okay.

THE COURT: You can have five minutes.

MR. BALKENBUSH: Thank you, Your Honor. I'll stick to that.

I think what I want to say is first of all if the only time the Court has is the hearing for these hearings on the Partial Motion for Summary Judgment and the *Motions in Limine*

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is next week, then we will make that work. We understand that.

The purpose of this motion is really to give the Court and the parties sufficient time to consider the issues. And we believe that the *Motions in Limine* and the Partial Motion for Summary Judgment are some of the most important motions that the Court is going to hear in this case.

And you just heard Mr. Zavitsanos talk about the importance of this case. He referred to it as -- and he said the future of emergency medicine in this country is on the line and that this is the tip of the spear and that the entire industry is watching this case.

Well, if that is the case, Your Honor, in our view it -- it is appropriate for both the parties and the Court to have sufficient time to consider what are likely to be the most important motions that will be decided in this case.

We pointed out in our motion, Your Honor, that our reply brief, the Motion for Summary Judgment is due on the 12th. The hearing on the Motion for Summary Judgment is set for the 13th. So for that reason we ask that we be given -- the Court be given, essentially, a little extra time to consider our brief.

The plaintiffs pointed out in their opposition that this point is essentially moot because they noted that the Court had initially moved the hearing on the Motion for

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Summary Judgment to today. But yesterday, Your Honor, your clerk changed the hearing date back to the 13th, so that issue is no longer moot.

And then second, the issue of having some time to consider the Court's ruling on the Motion for Summary Judgment and its impact on the *Motions in Limine.* You know, previously, the Court had moved the hearing to today on a Motion for Summary Judgment, but now it's back to the 13th. So the Motion for Summary Judgment is going to be decided one day before all of the parties' *Motions in Limine* are heard. You know, we think it would be appropriate to have a few days between those hearings so that the Court and the parties can consider the impact on the ruling on the Motion for Summary Judgment on the *Motions in Limine*.

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And you know, finally, Your Honor, I want to point out what I think is actually the most important reason that these hearings should be continued, if possible, if they can fit into the Court's schedule. And that's something that was not addressed in our motion.

The first thing the Court did today was grant the plaintiff's unopposed Motion for Leave to Amend their Complaint, and grant them leave to file the Second Amended Complaint. The Second Amended Complaint completely changes this litigation, Your Honor. The First Amended Complaint was 46 pages long and had 273 separate paragraphs.



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THE COURT: So Mr. Balkenbush, don't --

MR. BALKENBUSH: The Second Amended Complaint cuts that in half.

THE COURT: Mr. Balkenbush don't argue an oral motion to continue trial. If you're going to move to continue trial, argue that -- move and argue that separately.

MR. BALKENBUSH: Oh, and I -- we are not moving to continue the trial, Your Honor -- just to continue the hearings on -- the hearing on the *Motions in Limine* and the Motion for Summary Judgment of one week. And the reason for that, Your Honor, was -- what I was getting to was to give the parties sufficient time to consider the impact of the amendment to the complaint on the *Motions in Limine* that were filed prior to that amendment.

When we filed our *Motions in Limine*, we were not aware that they were going to dismiss the RICO claim, the tortious breach claim, and all of the allegations related to Data iSight and MultiPlan. All of that is now gone from their new complaint.

So for that reason, Your Honor -- for those reasons, we believe it would be appropriate to give the parties a little more time. But we understand if that's not possible, given that we have a trial set for the 18th, then we'll take what we can get.

THE COURT: Yeah. And I also should tell you that I'm

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in a jury trial now that we know is going to bleed into Monday. So --

All right, Ms. Lundvall, opposition, please.

MS. LUNDVALL: Your Honor, very briefly. Mr. Balkenbush began by saying in light of the Court's comment that they understood why the Court would hold hearings on the Motion for Summary Judgment on October 13th, when you scheduled it; and why you wouldn't want to hold hearings on the *Motions in Limine* on October 14th, when you scheduled it. So I thought that he was withdrawing his motion. But then he went on to argue his motion.

And so very briefly, we do not believe that the foundation or any good cause has been demonstrated to move either of those hearings, whether it be on the 13th or the 14th, particularly the *Motions in Limine* on the 14th, and for all the reasons that we had stated in our opposition.

But probably the most important thing is this, this is the third time -- the third time that they've tried to push these *Motions in Limine* until within a couple days before the start of trial. They tried it in June; the Court rejected it. They tried it in August; the Court rejected it. And so therefore, with all due respect, we would ask the Court then to reject their effort to try to move it again.

Thank you, Your Honor.

THE COURT: Thank you.

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And the reply, please.

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

Just briefly to respond to that. Again, when we had requested that hearings be set on these motions for certain dates, you know, that was before the Court had ever set hearings on the Motion for Summary Judgment and *Motions in Limine*. So we did not know what dates the Court was going to select when we filed those motions. Now we do. And that's why we're requesting that you move it out one week.

Again, though, as Ms. Lundvall noted, if the Court doesn't have availability to hear these motions the week of the 18th, then certainly, we'll -- we're amenable to appearing on the 13th and 14th.

THE COURT: Well, I can't guarantee that the trial on the 18th is going to go off. But I just don't see any other time in my schedule.

And let -- so I'm going to deny the motion to continue these hearings, but when we start on the 13th at 10:30, you are the last thing of the day. We will take a lunch hour, because I -- the staff has to have -- they're entitled to that. The parties, when we start on the 14th at 11:00, you have the whole day. And then we have Friday available on the 15th, if you need it. But I'm going to require the parties to stipulate to an order -- the order of the arguing of the motions, and to get that to me by the end of business on

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Monday.

Now, let's talk about how long do you need for trial? I can't recall how long we thought. So let's talk about that.

Plaintiff and then the defendant.

MR. ZAVITSANOS: I'm sorry, Your Honor?

THE COURT: I need to -- how long do you think you need for trial?

MR. ZAVITSANOS: Your Honor, I don't want to be evasive, but I think that's going to depend entirely on the Court's rulings on the *limine* motions.

THE COURT: Oh.

MR. ZAVITSANOS: There is -- we have a healthy disagreement about the relevance of certain evidence in this case. And so -- so it could be -- I can give you a range.

THE COURT: Yeah.

MR. ZAVITSANOS: Anywhere from two to four weeks. We believe -- the plaintiffs believe it's probably closer to two weeks.

THE COURT: Okay. And who is -- who is going to be lead trial counsel for the defendants?

MR. BLALACK: I will, Your Honor. This is Lee Blalack.

THE COURT: Okay. And your estimate of how long you think the case will take?

MR. BLALACK: Your Honor, I generally agree with my

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colleague. I think it's more likely three to four. But I think we could do on the absolute short end, that's assuming the judge -- that Your Honor granted every single exclusionary argument they requested -- I think we would still go at least two weeks, and probably four if -- you know, on the outside.

THE COURT: Okay. So that you know, I have requested jury selection for the 25th of October. That has not yet been granted, so that you know that.

How long do you need to choose a jury?

MR. ZAVITSANOS: So Your Honor, I was actually speaking with Ms. Lundvall about this. I don't know if this is still true, but one of the documents in the case makes a reference that something like 75 percent of the people in Clark County who have commercial insurance have United Insurance as their insurer -- or one of the United companies as their insurer. So I don't think that's an automatic disqualification, obviously. But they're going to have opinions.

So I do believe because this is somewhat of an extraordinary case, we're going to need a much larger pool than -- than perhaps typically is warranted.

Now, I did have the privilege of being escorted by Ms. Lundvall for jury selection in your current trial, so I did see how you do it, and I get it. Given that, I think for us, I think I'm going to need at least a day and a half.

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THE COURT: Okay. And Mr. Blalack.

MR. BLALACK: Your Honor, I think we're -- I would expect jury selection to at least take that first week. My understanding is that Friday is a holiday that week.

THE COURT: That's correct.

MR. BLALACK: I believe so --

THE COURT: Yes. Nevada observes Halloween as Nevada Day.

MR. BLALACK: Okay. So I'm -- I have -- and I think the estimate Mr. Zavitsanos just provided is unreasonable. And assuming roughly equal time, I would expect us to at least occupy those four days before we go to swear a jury. But, you know, we'll have to see how the *voir dire* process goes, but I think that's a reasonable estimate.

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THE COURT: And your estimate of trial, does it include jury selection, yes or no?

MR. ZAVITSANOS: No.

MR. BLALACK: It did, Your Honor.

THE COURT: It did?

MR. BLALACK: Oh, I'm sorry.

MR. ZAVITSANOS: Not [indiscernible].

THE COURT: Okay. All right.

MR. BLALACK: It did for us, Your Honor.

THE COURT: All right. The last thing I'm going to say is that without revealing anything, are there any



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settlement negotiations pending?

MR. ZAVITSANOS: No, Your Honor. This is -- Judge, and I respect the Court asking that question. I don't want to sound melodramatic here, but this is about so much more, and so, no. I don't -- I think it'll snow here in Las Vegas before this case settles --

THE COURT: Okay.

MR. ZAVITSANOS: -- so I don't foresee that. And so I want to be up front with the Court. I don't want to go through the futile exercise of, you know, going through the motions, then come back and report to you. I don't believe so, Your Honor.

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THE COURT: Thank you.

Mr. Blalack.

MR. BLALACK: I agree with that, Your Honor.

THE COURT: All right.

MR. BLALACK: Without regard to those meteorological predictions, I agreement with that statement generally.

THE COURT: All right. So then I guess I'll see you guys on the 25th. I -- to warn you we don't have a lot of senior coverage available. I have to do my calendars on Wednesday morning and Thursday morning. You won't start -- you'll get full days on Monday, Tuesday, and Friday, unless there's a holiday, but only half days on Wednesdays and Thursdays.

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And that four weeks take you to the week before Thanksgiving.

MR. ZAVITSANOS: Well, Your Honor, may I --

THE COURT: And there's also another holiday.

Sorry. Go ahead.

MR. ZAVITSANOS: May I raise a couple of other housekeeping issues?

THE COURT: Sure.

MR. ZAVITSANOS: I've spoken with Mr. Blalack -- the two sides have spoken. And if the Court is amenable to it, if Your Honor is amenable to it, we have agreed to provide lunch for the jurors, court staff, and counsel, so that there's less of a break or less of an inconvenience. The Court would -- you know, we would not expect the Court to tell them who is providing lunch. But I just thought that might be a nice touch given the length of the trial. I don't know if Your Honor has -- no pun intended -- an appetite for that.

THE COURT: Let me hear from Mr. Blalack first.

MR. ZAVITSANOS: Okay.

MR. BLALACK: That's correct, Your Honor. We are amenable to that arrangement. And we've been discussing other -- a host of other trial logistical issues that we could propose to the Court, and we intend to itemize in the final pretrial memorandum -- pretrial joint pretrial memorandum, but that's one of them.

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THE COURT: Yeah. You know, in this courtroom on Fridays, sometimes cookies miraculously appear, because I like cookies, so everybody gets one. We are under a mandate, an administrative order that requires everyone, the whole time they're in the courtroom, have the mask covering their nose and mouth. So take a look at that. I'm duty bound to enforce the administrative order.

MR. ZAVITSANOS: Yes, Your Honor.

THE COURT: I don't think it's going to change in the next month.

MR. ZAVITSANOS: Okay.

THE COURT: Now, if you wanted to provide boxed lunches that they could eat at their leisure and take a shorter lunch --

MR. ZAVITSANOS: Yes.

THE COURT: -- that might be another option.

MR. ZAVITSANOS: Okay.

THE COURT: I'm sure you guys are very resourceful. And then if you have other pretrial issues, you're here next Wednesday.

MR. ZAVITSANOS: Yeah.

THE COURT: So make a list of things. You know, using a modified Arizona method, I'll have to request a larger courtroom. Think about how many jurors you want. Monday and Tuesday are jury selection for criminal cases, so they have to

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bring in more jurors. They can't guarantee that I'll have enough on the 25th, which is why they haven't assigned that date and time to me. The Chief Justice does those calculations. So knowing that your case is definitely going to go, I'll have to -- I will adjust as necessary.

Ms. Lundvall, do you have something to add?

MS. LUNDVALL: When, in fact, that you're discussing with the Chief Judge and the Jury Commissioner, the number of panel members by which to bring in, typically I know that it's between 40 and 50. And we would respectfully suggest it's probably going to need to be 75 to 80.

THE COURT: And Mr. Blalack?

MR. BLALACK: That sounds about right, Your Honor. We will confirm on our side a little bit further, and then we'll confer with plaintiff's counsel and try to submit something to Your Honor with a recommendation, but that sounds about right.

THE COURT: We have to bring in panels of jury -- jurors on the hour, on jury selection days because of COVID.

So all right. Then I'll get to work on my end. You guys take care. Stay safe and healthy.

MR. ZAVITSANOS: Thank you, Your Honor.

THE COURT: The Court's in recess now.

[Proceeding adjourned at 12:26 p.m.]

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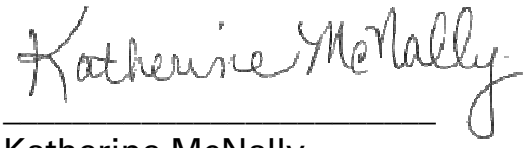
ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Katherine McNally
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**NEOJ**

Pat Lundvall (NSBN 3761)
Kristen T. Gallagher (NSBN 9561)
Amanda M. Perach (NSBN 12399)
McDONALD CARANO LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
Telephone: (702) 873-4100
plundvall@mcdonaldcarano.com
kgallagher@mcdonaldcarano.com
aperach@mcdonaldcarano.com

Justin C. Fineberg (admitted *pro hac vice*)
Martin B. Goldberg (admitted *pro hac vice)*
Rachel H. LeBlanc (admitted *pro hac vice*)
Jonathan E. Feuer (admitted *pro hac vice*)
Jonathan E. Siegelaub (admitted *pro hac vice*)
David R. Ruffner (admitted *pro hac vice*)
Emily L. Pincow (admitted *pro hac vice*)
Ashley Singrossi (admitted *pro hac vice*)
Lash & Goldberg LLP
Weston Corporate Centre I
2500 Weston Road Suite 220
Fort Lauderdale, Florida 33331
Telephone: (954) 384-2500
jfineberg@lashgoldberg.com
mgoldberg@lashgoldberg.com
rleblanc@lashgoldberg.com
jfeuer@lashgoldberg.com
jsiegelaub@lashgoldberg.com
druffner@lashgoldberg.com
epincow@lashgoldberg.com
asingrossi@lashgoldberg.com

Joseph Y. Ahmad (admitted *pro hac vice*)
John Zavitsanos (admitted *pro hac vice*)
Jason S. McManis (admitted *pro hac vice*)
Michael Killingsworth (admitted *pro hac vice*)
Louis Liao (admitted *pro hac vice)*
Jane L. Robinson (admitted *pro hac vice*)
P. Kevin Leyendecker (admitted *pro hac vice*)
Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing, P.C
1221 McKinney Street, Suite 2500
Houston, Texas 77010
Telephone: 713-600-4901
joeahmad@azalaw.com
jzavitsanos@azalaw.com
jmcmanis@azalaw.com
mkillingsworth@azalaw.com
lliao@azalaw.com
jrobinson@azalaw.com
kleyendecker@azalaw.com

*Attorneys for Plaintiffs*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Plaintiffs,

vs.

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

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

**NOTICE OF ENTRY OF ORDER GRANTING PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT ON ORDER SHORTENING TIME**



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

Defendants.

PLEASE TAKE NOTICE that an Order Granting Plaintiffs' Motion for Leave to File Second Amended Complaint on Order Shortening Time was entered on October 7, 2021, a copy of which is attached hereto.

Dated this 7th day of October, 2021.

McDONALD CARANO LLP

By: */s/ Kristen T. Gallagher*
Pat Lundvall (NSBN 3761)
Kristen T. Gallagher (NSBN 9561)
Amanda M. Perach (NSBN 12399)
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
plundvall@mcdonaldcarano.com
kgallagher@mcdonaldcarano.com
aperach@mcdonaldcarano.com

*Attorneys for Plaintiffs*

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

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**CERTIFICATE OF SERVICE**

I certify that I am an employee of McDonald Carano LLP, and that on this 7th day of October, 2021, I caused a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT ON ORDER SHORTENING TIME** to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

D. Lee Roberts, Jr., Esq.
Colby L. Balkenbush, Esq.
Brittany M. Llewellyn, Esq.
Phillip N. Smith, Jr., Esq.
Marjan Hajimirzaee, Esq.
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
lroberts@wwhgd.com
cbalkenbush@wwhgd.com
bllewellyn@wwhgd.com
psmithjr@wwhgd.com
mhajimirzaee@wwhgd.com

Paul J. Wooten, Esq. (admitted *pro hac vice*)
Amanda Genovese, Esq. (admitted *pro hac vice*)
Philip E. Legendy, Esq. (admitted *pro hac vice*)
O'Melveny & Myers LLP
Times Square Tower,
Seven Times Square,
New York, New York 10036
pwooten@omm.com
agenovese@omm.com
plegendy@omm.com

Dimitri Portnoi, Esq. (admitted *pro hac vice*)
Jason A. Orr, Esq. (admitted *pro hac vice*)
Adam G. Levine, Esq. (admitted *pro hac vice*)
Hannah Dunham, Esq. (admitted *pro hac vice*)
Nadia L. Farjood, Esq. (admitted *pro hac vice*)
O'MELVENY & MYERS LLP
400 South Hope Street, 18th Floor
Los Angeles, CA 90071-2899
dportnoi@omm.com
jorr@omm.com
alevine@omm.com
hdunham@omm.com
nfarjood@omm.com

Daniel F. Polsenberg, Esq.
Joel D. Henriod, Esq.
Abraham G. Smith, Esq.
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
dpolsenberg@lewisroca.com
jhenriod@lewisroca.com
asmith@lewisroca.com

*Attorneys for Defendants*

K. Lee Blalack, II, Esq. (admitted *pro hac vice*)
Jeffrey E. Gordon, Esq. (admitted *pro hac vice*)
Kevin D. Feder, Esq. (admitted *pro hac vice*)
Jason Yan, Esq. (*pro hac vice* pending)
O'Melveny & Myers LLP
1625 I Street, N.W.
Washington, D.C. 20006
Telephone: (202) 383-5374
lblalack@omm.com
jgordon@omm.com
kfeder@omm.com

*Attorneys for Defendants*

Judge David Wall, Special Master
Attention: Mara Satterthwaite & Michelle Samaniego
JAMS
3800 Howard Hughes Parkway, 11th Floor
Las Vegas, NV 89123
msatterthwaite@jamsadr.com
msamaniego@jamsadr.com

/s/ *Marianne Carter*
An employee of McDonald Carano LLP



McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

005237
005237
005237

**OGM**

Pat Lundvall (NSBN 3761)
Kristen T. Gallagher (NSBN 9561)
Amanda M. Perach (NSBN 12399)
McDONALD CARANO LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
Telephone: (702) 873-4100
plundvall@mcdonaldcarano.com
kgallagher@mcdonaldcarano.com
aperach@mcdonaldcarano.com

Justin C. Fineberg (admitted *pro hac vice*)
Martin B. Goldberg (admitted *pro hac vice)*
Rachel H. LeBlanc (admitted *pro hac vice*)
Jonathan E. Feuer (admitted *pro hac vice*)
Jonathan E. Siegelaub (admitted *pro hac vice*)
David R. Ruffner (admitted *pro hac vice*)
Emily L. Pincow (admitted *pro hac vice*)
Ashley Singrossi (admitted *pro hac vice*)
Lash & Goldberg LLP
Weston Corporate Centre I
2500 Weston Road Suite 220
Fort Lauderdale, Florida 33331
Telephone: (954) 384-2500
jfineberg@lashgoldberg.com
mgoldberg@lashgoldberg.com
rleblanc@lashgoldberg.com
jfeuer@lashgoldberg.com
jsiegelaub@lashgoldberg.com
druffner@lashgoldberg.com
epincow@lashgoldberg.com
asingrossi@lashgoldberg.com

Joseph Y. Ahmad (admitted *pro hac vice*)
John Zavitsanos (admitted *pro hac vice*)
Jason S. McManis (admitted *pro hac vice*)
Michael Killingsworth (admitted *pro hac vice*)
Louis Liao (admitted *pro hac vice)*
Jane L. Robinson (admitted *pro hac vice*)
P. Kevin Leyendecker (admitted *pro hac vice*)
Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing, P.C.
1221 McKinney Street, Suite 2500
Houston, Texas 77010
Telephone: 713-600-4901
joeahmad@azalaw.com
jzavitsanos@azalaw.com
jmcmanis@azalaw.com
mkillingsworth@azalaw.com
lliao@azalaw.com
jrobinson@azalaw.com
kleyendecker@azalaw.com

*Attorneys for Plaintiffs*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Plaintiffs,

vs.

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

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

**ORDER GRANTING PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT ON ORDER SHORTENING TIME**

Hearing Date: October 6, 2021
Hearing Time: 11:00 a.m.



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

Defendants.

This matter came before the Court on October 6, 2021 on plaintiffs Fremont Emergency Services (Mandavia), Ltd. ("Fremont"); Team Physicians of Nevada-Mandavia, P.C. ("Team Physicians"); Crum, Stefanko and Jones, Ltd. dba Ruby Crest Emergency Medicine's ("Ruby Crest" and collectively the "Health Care Providers") Motion for Leave to File Second Amended Complaint on Order Shortening Time (the "Motion"). Pat Lundvall, Kristen T. Gallagher and Amanda M. Perach, McDonald Carano LLP; and John Zavitsanos and Jane Robinson, Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing, P.C., appeared on behalf of the Health Care Providers. D. Lee Roberts, Colby Balkenbush, Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC; Lee Blalock, O'Melveny & Myers LLP; and Dan Polsenberg, Lewis Roca Rothgerber Christie LLP appeared on behalf of UnitedHealth Group, Inc.; UnitedHealthcare Insurance Company; United HealthCare Services, Inc.; UMR, Inc.; Oxford Health Plans, Inc.; Sierra Health and Life Insurance Co., Inc.; Sierra Health-Care Options, Inc.; and Health Plan of Nevada, Inc.'s (collectively, "United").

The Court considered the Motion and United's notice of non-opposition to the Motion. Good cause appearing,

IT IS HEREBY ORDERED that the Health Care Provider's Motion for Leave to File Second Amended Complaint is GRANTED.

IT IS HEREBY FURTHER ORDERED that the Health Care Providers shall file the Second Amended Complaint as soon as practicable after notice of entry of this Order.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966



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IT IS HEREBY FURTHER ORDERED that, upon the Health Care Providers' filing of the Second Amended Complaint, the following parties are dismissed from this action without prejudice: UnitedHealth Group, Inc., Oxford Health Plans, Inc., and Sierra Health-Care Options, Inc.

IT IS HEREBY FURTHER ORDERED that, upon the Health Care Providers' filing of the Second Amended Complaint, the following claims are dismissed from this action without prejudice: (1) tortious breach of the implied covenant of good faith and fair dealing, (2) violation of the Nevada Consumer Fraud Statute And Deceptive Trade Practices Act, (3) declaratory judgment and (4) violation of NRS 207.350, *et seq.*

IT IS HEREBY FURTHER ORDERED that UnitedHealthcare Insurance Company; United HealthCare Services, Inc.; UMR, Inc.; Sierra Health and Life Insurance Co., Inc.; and Health Plan of Nevada, Inc. may file a General Denial in response to the Second Amended Complaint within two calendar days after the filing of the Second Amended Complaint.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

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October 7, 2021

**Dated this 7th day of October, 2021**

Nancy L Allf

TW

**708 2D2 26A3 86E4**
**Nancy Allf**
**District Court Judge**

Respectfully submitted by:

AHMAD, ZAVITSANOS, ANAIPAKOS, ALAVI & MENSING, P.C

*/s/ P. Kevin Leyendecker*
P. Kevin Leyendecker (admitted pro hac vice)
John Zavitsanos (admitted pro hac vice)
Joseph Y. Ahmad (admitted pro hac vice)
Jason S. McManis (admitted pro hac vice)
Michael Killingsworth (admitted pro hac vice)
Louis Liao (admitted pro hac vice)
Jane L. Robinson (admitted pro hac vice)
Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing, P.C
1221 McKinney Street, Suite 2500
Houston, Texas 77010



005240

kleyendecker@azalaw.com
joeahmad@azalaw.com
jzavitsanos@azalaw.com
jmcmanis@azalaw.com
mkillingsworth@azalaw.com
lliao@azalaw.com
jrobinson@azalaw.com

Justin C. Fineberg (admitted pro hac vice)
Martin B. Goldberg (admitted pro hac vice)
Rachel H. LeBlanc (admitted pro hac vice)
Lash & Goldberg LLP
Weston Corporate Centre I
2500 Weston Road Suite 220
Fort Lauderdale, Florida 33331
jfineberg@lashgoldberg.com
mgoldberg@lashgoldberg.com
rleblanc@lashgoldberg.com

Pat Lundvall (NSBN 3761)
Kristen T. Gallagher (NSBN 9561)
Amanda M. Perach (NSBN 12399)
McDonald Carano LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
plundvall@mcdonaldcarano.com
kgallagher@mcdonaldcarano.com
aperach@mcdonaldcarano.com

*Attorneys for Plaintiffs*

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

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**CSERV**

DISTRICT COURT
CLARK COUNTY, NEVADA

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

**AUTOMATED CERTIFICATE OF SERVICE**

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

Service Date: 10/7/2021

| | |
|---|---|
| Michael Infuso | minfuso@greeneinfusolaw.com |
| Frances Ritchie | fritchie@greeneinfusolaw.com |
| Greene Infuso, LLP | filing@greeneinfusolaw.com |
| Audra Bonney | abonney@wwhgd.com |
| Cindy Bowman | cbowman@wwhgd.com |
| D. Lee Roberts | lroberts@wwhgd.com |
| Pat Lundvall | plundvall@mcdonaldcarano.com |
| Kristen Gallagher | kgallagher@mcdonaldcarano.com |
| Amanda Perach | aperach@mcdonaldcarano.com |
| Beau Nelson | bnelson@mcdonaldcarano.com |

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005242

| | |
|---|---|
| Marianne Carter | mcarter@mcdonaldcarano.com |
| Karen Surowiec | ksurowiec@mcdonaldcarano.com |
| Raiza Anne Torrenueva | rtorrenueva@wwhgd.com |
| Colby Balkenbush | cbalkenbush@wwhgd.com |
| Daniel Polsenberg | dpolsenberg@lewisroca.com |
| Joel Henriod | jhenriod@lewisroca.com |
| Abraham Smith | asmith@lewisroca.com |
| Brittany Llewellyn | bllewellyn@wwhgd.com |
| Justin Fineberg | jfineberg@lashgoldberg.com |
| Yvette Yzquierdo | yyzquierdo@lashgoldberg.com |
| Virginia Boies | vboies@lashgoldberg.com |
| Martin Goldberg | mgoldberg@lashgoldberg.com |
| Rachel LeBlanc | rleblanc@lashgoldberg.com |
| Jonathan Feuer | jfeuer@lashgoldberg.com |
| Jason Orr | jorr@omm.com |
| Adam Levine | alevine@omm.com |
| Jeff Gordon | jgordon@omm.com |
| Hannah Dunham | hdunham@omm.com |
| Paul Wooten | pwooten@omm.com |
| Dimitri Portnoi | dportnoi@omm.com |
| Lee Blalack | lblalack@omm.com |
| David Ruffner | druffner@lashgoldberg.com |
| Kimberly Kirn | kkirn@mcdonaldcarano.com |

005243

005243

| | |
|---|---|
| Phillip Smith, Jr. | psmithjr@wwhgd.com |
| Flor Gonzalez-Pacheco | FGonzalez-Pacheco@wwhgd.com |
| Kelly Gaez | kgaez@wwhgd.com |
| Marjan Hajimirzaee | mhajimirzaee@wwhgd.com |
| Jessica Helm | jhelm@lewisroca.com |
| Cynthia Kelley | ckelley@lewisroca.com |
| Emily Kapolnai | ekapolnai@lewisroca.com |
| Maxine Rosenberg | Mrosenberg@wwhgd.com |
| Mara Satterthwaite | msatterthwaite@jamsadr.com |
| Emily Pincow | epincow@lashgoldberg.com |
| Cheryl Johnston | Cheryl.Johnston@phelps.com |
| Ashley Singrossi | asingrossi@lashgoldberg.com |
| Jonathan Siegelaub | jsiegelaub@lashgoldberg.com |
| Philip Legendy | plegendy@omm.com |
| Andrew Eveleth | aeveleth@omm.com |
| Kevin Feder | kfeder@omm.com |
| Nadia Farjood | nfarjood@omm.com |
| Jason Yan | jyan@omm.com |
| AZAlaw AZAlaw | TMH010@azalaw.com |
| Beau Nelson | beaunelsonmc@gmail.com |
| Marianne Carter | mcarter.mc2021@gmail.com |
| Dexter Pagdilao | dpagdilao@omm.com |
| Hollis Donovan | hdonovan@omm.com |

005244

005244

| | |
|---|---|
| Amanda Genovese | agenovese@omm.com |
| Tara Teegarden | tteegarden@mcdonaldcarano.com |
| Errol KIng | errol.King@phelps.com |

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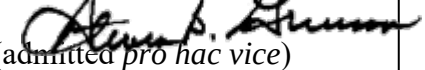

**SACOM**
Pat Lundvall (NSBN 3761)
Kristen T. Gallagher (NSBN 9561)
Amanda M. Perach (NSBN 12399)
McDONALD CARANO LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
Telephone: (702) 873-4100
plundvall@mcdonaldcarano.com
kgallagher@mcdonaldcarano.com
aperach@mcdonaldcarano.com

Justin C. Fineberg (admitted *pro hac vice*)
Martin B. Goldberg (admitted *pro hac vice)*
Rachel H. LeBlanc (admitted *pro hac vice*)
Lash & Goldberg LLP
Weston Corporate Centre I
2500 Weston Road Suite 220
Fort Lauderdale, Florida 33331
Telephone: (954) 384-2500
jfineberg@lashgoldberg.com
mgoldberg@lashgoldberg.com
rleblanc@lashgoldberg.com

Joseph Y. Ahmad (admitted *pro hac vice*)
John Zavitsanos (admitted *pro hac vice*)
Jason S. McManis (admitted *pro hac vice*)
Michael Killingsworth (admitted *pro hac vice*)
Louis Liao (admitted *pro hac vice)*
Jane L. Robinson (admitted *pro hac vice*)
P. Kevin Leyendecker (admitted *pro hac vice*)
Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing, P.C.
1221 McKinney Street, Suite 2500
Houston, Texas 77010
Telephone: 713-600-4901
joeahmad@azalaw.com
jzavitsanos@azalaw.com
jmcmanis@azalaw.com
mkillingsworth@azalaw.com
lliao@azalaw.com
jrobinson@azalaw.com
kleyendecker@azalaw.com

*Attorneys for Plaintiffs*

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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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.

Defendants

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

**SECOND AMENDED COMPLAINT**

**Jury Trial Demanded**

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") as and for their First Amended Complaint against defendants United Healthcare Insurance Company ("UHCIC") United Health Care Services Inc. dba UnitedHealthcare ("UHC Services"); UMR, Inc. dba United Medical Resources ("UMR"); (together with UHC Services and UMR, and with UHCIC, the "UH Parties"); Sierra Health and Life Insurance Company, Inc. ("Sierra Health"); Health Plan of Nevada, Inc. ("HPN") (collectively "Defendants") hereby complain and allege as follows:

**NATURE OF THIS ACTION**

1. This action arises out of a dispute concerning the rate at which Defendants reimburse the Health Care Providers for the emergency medicine services they have already provided, and continue to provide, to patients covered under the health plans underwritten, operated, and/or administered by Defendants (the "Health Plans") (Health Plan beneficiaries for whom the Health Care Providers performed covered services that were not reimbursed correctly shall be referred to as "Patients" or "Members").[1] Collectively, Defendants have manipulated ad are continuing to manipulate their third party payment rates to deny them reasonable payment for their services. Defendants have reaped millions of dollars from their illegal, coercive, unfair, fraudulent conduct and will reap millions more if their conduct is not stopped.

**PARTIES**

2. Plaintiff Fremont Emergency Services (Mandavia), Ltd. ("Fremont") is a professional emergency medicine services group practice that staffs the emergency departments at ER at Aliante; ER at The Lakes; Mountainview Hospital; Dignity Health – St. Rose

[1] The Health Care Providers do not assert any causes of action with respect to any Patient whose health insurance was issued under Medicare Part C (Medicare Advantage) or is provided under the Federal Employee Health Benefits Act (FEHBA). The Health Care Providers also do not assert any claims relating to Defendants' managed Medicaid business or with respect to the right to payment under any ERISA plan. Finally, the Health Care Providers do not assert claims that are dependent on the existence of an assignment of benefits ("AOB") from any of Defendants' Members. Thus, there is – and was – no basis to remove this lawsuit to federal court under federal question jurisdiction.



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Dominican Hospitals, Rose de Lima Campus; Dignity Health – St. Rose Dominican Hospitals, San Martin Campus; Dignity Health – St. Rose Dominican Hospitals, Siena Campus; Southern Hills Hospital and Medical Center; and Sunrise Hospital and Medical Center located throughout Clark County, Nevada. Fremont is part of the TeamHealth Holdings, Inc. ("TeamHealth") organization.

3. Plaintiff Team Physicians of Nevada-Mandavia, P.C. ("Team Physicians") is a professional emergency medicine services group practice that staffs the emergency department at Banner Churchill Community Hospital in Fallon, Nevada.

4. Plaintiff Crum, Stefanko And Jones, Ltd. dba Ruby Crest Emergency Medicine ("Ruby Crest") is a professional emergency medicine services group practice that staffs the emergency department at Northeastern Nevada Regional Hospital in Elko, Nevada.

5. Defendant United HealthCare Insurance Company ("UHCIC") is a Connecticut corporation with its principal place of business in Connecticut. UHCIC is responsible for administering and/or paying for certain emergency medical services at issue in the litigation. On information and belief, United HealthCare Insurance Company is a licensed Nevada health and life insurance company.

6. Defendant United HealthCare Services, Inc. dba UnitedHealthcare ("UHC Services") is a Minnesota corporation with its principal place of business in Connecticut and affiliate of UHCIC. UHC Services is responsible for administering and/or paying for certain emergency medical services at issue in the litigation. On information and belief, United HealthCare Services, Inc. is a licensed Nevada health insurance company.

7. Defendant UMR, Inc. dba United Medical Resources ("UMR") is a Delaware corporation with its principal place of business in Connecticut and affiliate of UHCIC. UMR is responsible for administering and/or paying for certain emergency medical services at issue in the litigation. On information and belief, UMR is a licensed Nevada health insurance company.

8. Defendant Sierra Health and Life Insurance Company, Inc. is a Nevada corporation and affiliate of UHCIC. Sierra Health is responsible for administering and/or paying for certain emergency medical services at issue in the litigation. On information and



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belief, Sierra Health is a licensed Nevada health insurance company.

9. Defendant Health Plan of Nevada, Inc. ("HPN") is a Nevada corporation and affiliate of UHCIC. HPN is responsible for administering and/or paying for certain emergency medical services at issue in the litigation. On information and belief, HPN is a licensed Nevada Health Maintenance Organization ("HMO").

**JURISDICTION AND VENUE**

10. The amount in controversy exceeds the sum of fifteen thousand dollars ($15,000.00), exclusive of interest, attorneys' fees and costs.

11. The Eighth Judicial District Court, Clark County, has subject matter jurisdiction over the matters alleged herein since only state law claims have been asserted and no diversity of citizenship exists. Venue is proper in Clark County, Nevada.

**FACTS COMMON TO ALL CAUSES OF ACTION**

***The Health Care Providers Provide Necessary Emergency Care to Patients***

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12. The Health Care Providers are professional practice groups of emergency medicine physicians and healthcare providers that provides emergency medicine services 24 hours per day, 7 days per week to patients presenting to the emergency departments at hospitals and other facilities in Nevada staffed by the Health Care Providers. The Health Care Providers provide emergency department services throughout the State of Nevada.

13. The Health Care Providers and the hospitals whose emergency departments they staff are obligated by both federal and Nevada law to examine any individual visiting the emergency department and to provide stabilizing treatment to any such individual with an emergency medical condition, regardless of the individual's insurance coverage or ability to pay. *See* Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd; NRS 439B.410. The Health Care Providers fulfill this obligation for the hospitals which they staff. In this role, the Health Care Providers' physicians provide emergency medicine services to all patients, regardless of insurance coverage or ability to pay, including to Patients with insurance coverage issued, administered and/or underwritten by Defendants.

14. Upon information and belief, Defendants operate as an HMO under NRS Chapter



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695C, and is an insurer under NRS Chapters 679A, 689A (Individual Health Insurance), 689B (Group and Blanket Health Insurance), 689C (Health Insurance for Small Employers) and 695G (Managed Care Organization). Defendants provide, either directly or through arrangements with providers such as hospitals and the Health Care Providers, healthcare benefits to its members.

15. There is no written agreement between Defendants and the Health Care Providers for the healthcare claims at issue in this litigation; the Health Care Providers are therefore designated as a "non-participating" or "out-of-network" provider for all of the claims at issue.

16. Because federal and state law requires that emergency services be provided to individuals by the Health Care Providers without regard to insurance status or ability to pay, the law protects emergency service providers -- like Fremont here -- from the kind of conduct in which Defendants have engaged leading to this dispute. If the law did not do so, emergency service providers would be at the mercy of such payors. the Health Care Providers would be forced to accept payment at any rate dictated by insurers under threat of receiving no payment,. The Health Care Providers are protected by law, which requires that for the claims at issue, the insurer must reimburse the Health Care Providers at a reasonable rate or the usual and customary rate for services they provide.

17. The Health Care Providers regularly provide emergency services to Defendants' Patients.

18. Defendants are contractually and legally responsible for ensuring that Patients receive emergency services without obtaining prior approval and without regard to the "in network" or "out-of-network" status of the emergency services provider.

19. Relevant to this action:

a. From July 1, 2017 through the present, Fremont has provided emergency medicine services to Defendants' Members as an out-of-network provider of emergency services as follows: ER at Aliante (approximately July 2017-present); ER at The Lakes (approximately July 2017-present); Mountainview Hospital (approximately July 2017-present); Dignity Health – St. Rose Dominican Hospitals, Rose de Lima Campus (approximately July 2017-October 2018); Dignity Health – St. Rose Dominican Hospitals, San Martin Campus approximately (July 2017-