

Case No. _____

In the Supreme Court of Nevada

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

Petitioners,

vs.

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

Respondents,

and

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

Real Parties in Interest.

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**PETITION FOR WRIT OF MANDAMUS
OR, ALTERNATIVELY, PROHIBITION**

With Supporting Points and Authorities

District Court Case No. A-19-792978

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**PETITION FOR WRIT OF MANDAMUS
OR, ALTERNATIVELY, PROHIBITION**

Petitioners UnitedHealthcare Insurance Company; United HealthCare Services, Inc.; UMR, Inc.; Sierra Health and Life Insurance Company, Inc.; and Health Plan of Nevada, Inc. seek a writ of *mandamus* (1) directing the district court to vacate its orders denying petitioners' request to seal certain highly confidential trial documents and related excerpts from the trial transcripts; and (2) enjoining the district court and all parties from disseminating these highly confidential documents to the public. Alternatively, petitioners seek a writ of prohibition to prevent the district court from enforcing its unsealing orders.

Dated this 15th day of November, 2022.

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VERIFICATION

STATE OF NEVADA }
COUNTY OF CLARK }

Under penalty of perjury, I declare that I am counsel for the petitioners in the foregoing petition and know the contents thereof; that the pleading is true of my own knowledge, except as to those matters stated on information and belief; and that as to such matters I believe them to be true. I, rather than petitioners, make this verification because the relevant facts are procedural and thus within my knowledge as petitioners' attorney. This verification is made pursuant to NRS 15.010.

Dated this 15th day of November, 2022.

/s/ Daniel F. Polsenberg
DANIEL F. POLSENBERG

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

UnitedHealth Group Incorporated is the parent corporation of Petitioners UnitedHealthcare Insurance Company, United HealthCare Services, Inc., UMR, Inc., Sierra Health and Life Insurance Company, Inc., and Health Plan of Nevada, Inc. UnitedHealth Group Incorporated is a publicly held company and directly and/or indirectly owns 10% or more of these petitioners' stock.

Petitioners have been represented by attorneys at Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC; Lewis Roca Rothgerber Christie, LLP; and O'Melveny & Myers LLP.

Dated this 15th day of November, 2022.

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ROUTING STATEMENT

The Supreme Court should retain this petition because the case originated in business court. *See* NRAP 17(a)(9). In addition, the question of whether trade secrets and other confidential information subject to a protective order lose that protection once that information is introduced into evidence at trial—contrary to SRCR 3(4)(b) and (g)—is a question of statewide public importance. *See* NRAP 17(a)(12).

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INTRODUCTION

This petition arises out of a dispute over the lawful rates of reimbursement for medical services provided to members of employee health benefit plans insured and/or administered by affiliates of petitioner UnitedHealthcare Insurance Company (collectively, “United”). Such plans typically employ two mechanisms to cover or defray the costs of medical care for plan members. One mechanism is payment for services provided by “network” providers, i.e., providers who are subject to contractual agreements with United to provide specified services at specified rates to members of United-administered plans. The other mechanism is payment for services provided by “out-of-network” providers, i.e., providers that lack any contractual relationship with United. With respect to out-of-network providers, United’s customers select out-of-network reimbursement methodologies that are then implemented as part of the plans. The dispute underlying this appeal involves an effort by TeamHealth—a staffing entity that negotiates with plans on behalf of medical providers—to compel United to pay out-of-network providers more than what is required by the plans themselves.

This petition involves an issue ancillary to that underlying substantive dispute. During discovery, United was forced to produce to TeamHealth (sometimes only to its counsel) extensive, proprietary, highly-confidential trade secrets and other business information United generated and used to develop its provider networks and negotiate reimbursement rates around the country. The information was produced subject to a protective order that explicitly governed not just discovery, but also trial and the *post*-trial disposition of the material, to ensure that United's competitors and business partners (existing and potential) could not use United's data to gain a competitive edge or bargaining advantage over United.

Although the protective order expressly provided that all material within its scope would be returned or destroyed after trial, the district court reneged on that promise and refused to seal or redact many trial exhibits containing United's most valuable and confidential commercial information. The overwhelming majority of this information was not even shown to or discussed before the jury.

Under settled Nevada law, such commercially sensitive information should be redacted from the publicly disclosed record.

Nevada law provides clear and specific standards to govern the sealing of court records—including trial exhibits and testimony—as needed to preserve legitimate private interests while preserving the public interest in access to court proceedings. The district court’s post-trial sealing rulings often failed to apply those standards at all, on the stated—but demonstrably incorrect—premise that trial exhibits and testimony are categorically public record. And to the extent the court considered the sealing standards, it applied them incorrectly.

One of the key issues in the sealing inquiry was whether information—most of it not shown to the jury—constituted trade secrets, which are exempt from disclosure under Nevada rules governing disclosure of court records. SRCR 3(4)(g) (authorizing “sealing or redaction” when “necessary to protect intellectual proprietary or property interests such as trade secrets as defined in NRS 600A.030(5)”). In determining what information should remain protected as trade secret, the district court misconstrued the controlling standards in two respects. First, the court held that a business cannot claim trade secret status in a compilation of information gathered from public sources. This Court recently held exactly the opposite, *see*

Nevada Indep. v. Whitley, 138 Nev., Adv. Op. 15, 506 P.3d 1037, 1045 (2022), as have many courts in other jurisdictions, *see infra* at Section II.C(2). Second, the district court rejected trade secret status for some information based solely on the age of the data, without analyzing whether the information had continuing value, as the law unambiguously requires. This Court should either grant the writ and apply the proper trade secret standards, or correct the district court's misunderstanding of those standards and direct the district court to conduct a proper review of the exhibits.

In addition to ignoring or misapplying settled trade secret law, the district court ignored or misapplied other recognized standards for protecting information from disclosure when the “public interest in privacy or safety interests . . . outweigh[s] the public interest in open court records.” SRCR 3(4). Under Nevada law, privacy interests prevail not only when information qualifies as a trade secret, but also when “(a) [t]he sealing or redaction is permitted or required by federal or state law,” or “(b) [t]he sealing or redaction furthers . . . a protective order entered under NRCP 26(c),” or “(h) [t]he sealing or redaction is justified or required by another identified compelling circumstance.”

SRCR 3(4). The district court here did not even consider the existing protective order, which United relied on in acquiescing to limited disclosures as needed to facilitate an orderly trial proceeding. Nor did the court properly consider whether United's interest in protecting commercially valuable information—regardless of its trade secret status—presented a compelling circumstance justifying redaction, especially given that the information at issue was not even shown to or discussed before the jury.

United obviously would be prejudiced by disclosure of its commercially sensitive information. Its competitors would be gifted a deep understanding of its business objectives and strategies for execution, allowing them to develop responses and counter-strategies. And business partners likewise could and would use United's information to increase their bargaining leverage in negotiations. Such severe and irreversible harm is precisely the reason Nevada law recognizes that the public interest in privacy sometimes outweighs the public interest in disclosure of court records. Especially where, as here, the information at issue actually had little if any relevance to the proceeding, the information can and should continue to be protected

from public disclosure.

United therefore requests that the Court issue a writ of mandamus or prohibition directing the district court to seal these confidential trial exhibits and enjoining the parties from publishing them. At a minimum, this Court should vacate the district court's order and direct the district court to apply the correct legal analysis to United's motion to seal.

PROCEDURAL HISTORY

A. TeamHealth Claims United Does Not Pay Reasonable Rates

Petitioners/defendants UnitedHealthcare Insurance Company; United HealthCare Services, Inc.; UMR, Inc.; Sierra Health and Life Insurance Company, Inc.; and Health Plan of Nevada, Inc. (collectively "United") are entities that insure and/or administer health benefit plans that cover all or part of plan members' medical expenses. Such plans generally provide one payment rate for medical care provided by "network" providers—i.e., providers that have contracted with United to provide care at specified rates—and a lower payment rate for care provided by "out-of-network" providers that have no contract with United.

Real parties-in-interest/plaintiffs Fremont Emergency Services (Mandavia), Ltd.; Team Physicians of Nevada-Mandavia, P.C.; and Crum Stefanko and Jones, Ltd. (collectively “TeamHealth”) are staffing companies that supply professional staffing to hospital emergency rooms in Nevada.

TeamHealth is not in United’s network, so the parties do not have agreed rates of reimbursement. Rather, United pays TeamHealth in accordance with the payment promised to plan members for out-of-network services. In the underlying litigation, TeamHealth claimed that United’s plan benefit for out-of-network services did not result in reasonable reimbursement to providers for their services, and that United owed providers the difference between the plan benefit and the amount deemed legally reasonable.

**B. Confidential Documents Were Disclosed
with a Protective Order Intended to Maintain
Confidentiality**

On June 24, 2020, the parties stipulated to, and the district court entered, a protective order to maintain the confidentiality of trade secrets and other business information during the litigation and discovery. (1 App. 1.) The protective order allowed the parties to

designate certain disclosed documents either “Confidential” or “Attorneys’ Eyes Only.”

1. “Confidential” Documents

Under the protective order, a party could designate a document as “Confidential” if that party

reasonably and in good faith believes [the document] contains or reflects: (a) proprietary, business sensitive, or confidential information; (b) information that should otherwise be subject to confidential treatment pursuant to applicable federal and/or state law; or (c) Protected Health Information, Patient Identifying Information, or other HIPAA-governed information.

(1 App. 5 at §2(a).)

Information designated “Confidential” may not be shared outside the litigation but may be shared with a party’s employees and officers.

(1 App. 11 at ¶ 10(c).)

2. “Attorneys’ Eyes Only” Documents

The protective order also allowed a party to designate documents as “Attorneys’ Eyes Only” (“AEO”) if it contained information the party

reasonably and in good faith believes contains trade secrets or is such highly competitive or commercially sensitive proprietary and non-public information that would significantly harm business advantages of [the party] ... and that disclosure of such information could reasonably be expected to be detrimental to the

[party's] interests.

(1 App. 6 at §2(b).)

Because “AEO” information is more sensitive, these documents can only be shared with a party’s outside lawyers and two specifically designated in-house counsel not involved in rate negotiations. (1 App. 11 at ¶ 11(d).) AEO information cannot even be shared with a party’s employees and officers. (*Id.*)

3. *The Process for Challenging Confidentiality Designations, Using Confidential Information at Trial, and Returning the Information after Trial*

The protective order sets forth a specific process for challenging confidentiality designations. (1 App. 9-10 at ¶ 9.)

Trial would not obviate this process. If unchallenged, confidential information would retain protection through trial. (1 App. 15-16 at ¶ 20.) In fact, jurors were “Qualified Persons” entitled to view the confidential information. (1 App. 11 at ¶ 12(a).) The order further authorized the district court to “take such measures, as it deems appropriate, to protect the claimed confidential nature of the document or information sought to be admitted and to protect the Confidential Information from disclosure.” (1 App. 15 at ¶ 20.)

Finally, the order provided that all such information must be returned to the producing party or destroyed at the end of the litigation. (1 App. 13-14 at ¶ 14.) Nowhere did the order state or contemplate that protected information instead would be freely disclosed to the public after trial, which would moot all efforts to protect the information during discovery and trial.

**C. TeamHealth Obtains United's
Highly Confidential Information**

In discovery, TeamHealth obtained United documents that contain highly sensitive, proprietary, and confidential information, including information not related to the parties' relationship or the parties' relationship in Nevada. Many of those documents were barely, if at all, relevant to TeamHealth's allegations, but happen to be crucial to United's overall business strategies. For example, TeamHealth obtained United's business plans, rate structures with other providers, revenue for all products, product strategy information, network negotiating strategies, and United's contracts with customers. (17 App. 3885, 3906–30.) These documents include large swaths of information that have little or no relevance to the core issue of this case—the reasonableness of United's reimbursement rates—but are among the

most sensitive confidential information United possesses. United has consistently maintained that public disclosure of such information advances no case-related interest and would irreparably harm their business interests.

As to the documents that are the focus of this petition, TeamHealth never invoked the established process for challenging United's confidentiality designations. United therefore understood that the procedures in the protective order for keeping its information confidential would be followed at trial.

D. TeamHealth Misuses United's Confidential Information During Trial

Just before trial, two media organizations requested to broadcast the trial. (1 App. 52–68.) United asserted a limited objection, requesting that the district court impose restrictions on media coverage to ensure that AEO information—the most sensitive information—was not disclosed to the public in violation of the protective order. (1 App. 69-104.) TeamHealth responded to the objection in favor of the media request, and proposed as a “practical and reasonable” alternative that TeamHealth would “not oppose any post-trial motions to seal the documentary evidence that comes into trial,” thereby “allow[ing] United

to maintain confidentiality over its documents while also protecting Nevada's open courts." (1 App. 112:18-22). Under TeamHealth's proposal, "testimony would be public," but "the documents themselves would not be, which would significantly mitigate any of United's alleged harm." TeamHealth did not want to interrupt the trial by sealing the courtroom. (1 App. 112:22-23.)

During a break from jury selection, while considering United's limited objection to the media request, the district court first suggested that it would not seal any evidence that was admitted in the trial: "I can tell you right now that I will not seal anything that's admitted. It's not going to happen." (1 App. 236:5-6.); (1 App. 237:17-18) ("I can tell you I won't seal any exhibit that gets admitted. I think I made that clear."); (1 App. 240:2-4 ("But if . . . it gets admitted it's in the public domain.")). Nonetheless, the court agreed to take AEO information on a "piecemeal basis." (1 App. 236:3-8; 239:12-13.) The court further ordered that the parties confer regarding the process for dealing with United's objections to AEO material at trial. (1 App. 239:10-13; 240:10.) The parties ultimately agreed that United could redact portions of AEO documents shown at trial and that the livestream would not broadcast when AEO

documents were referenced. The parties further agreed, so as not to delay or disrupt trial with argument about every AEO document, United could file a motion to seal after the trial. (5 App. 1017:2-24.)

TeamHealth later published 18 AEO admitted exhibits on its public website during the middle of trial. (5 App. 1017:2-24; 17 App. 3891.)

The ripple effect was immediate. Bonds of a third-party company Multiplan, Inc., which is a vendor that contracts with United, “tumbled” by 6.3 points after one of the documents revealed that United had considered terminating certain contracts with Multiplan by 2023. (17 App. 3932.) Barclays reported that “[b]ased on the [United] strategy document, the plan from [United] may be to exit the [Multiplan] contract” and “the potential loss of [United] as a customer would be a major negative for [Multiplan.]” (17 App. 3934.) The leaked document actually resulted in Barclays lowering its estimated value of Multiplan’s stock price. (17 App. 3934; *see also* 17 App. 3946 (showing a steep decline in Multiplan’s stock price around the date TeamHealth disclosed United’s protected AEO documents).)

When the district court learned that TeamHealth posted the AEO

documents on TeamHealth’s website, the district court ordered TeamHealth to “take them down” and explained that all exhibits and transcripts were “locked” during trial. (See e.g. 5 App. 1017:21; 7 App. 1693:20-22; 8 App. 1790:9-12.) The parties and district court clearly understood that United’s intent was to address confidentiality issues in a motion to seal after trial. (7 App. 1727:14-25; 1728:1-7.)

Following the district court’s ruling to take down the leaked documents, TeamHealth’s website now reads, “At the conclusion of the trial, the trial exhibits will be made available on this site subject to any limiting orders of the court.” *Protecting our Healthcare Heroes*, TEAMHealth (last visited November 4, 2022), <https://www.teamhealth.com/protectingourhealthcareheroes/nevada/?r=1>.

There is much more damage to be done if TeamHealth gets its wish to publish information contained within exhibits admitted at trial.

E. United Moves to Seal Confidential Documents Following Trial

The protective order, under which all of these documents were disclosed and later admitted at trial, contemplated that disclosed documents would be filed under seal. (1 App. 15–16 at ¶ 20.) Following

trial, and consistent with the protective order, United filed a Motion to Seal Certain Confidential Trial Exhibits on December 13, 2021. (17 App. 3883.) Still, cognizant of Nevada’s policy favoring public access to court records, United requested that the district court seal (or redact) only a limited subset of admitted exhibits that fell into two categories: strategic business plans and highly confidential information.

1. Strategic Business Plans

The first category, identified in Exhibit A to the motion to seal, includes strategic business plans, forecasts, and other confidential, trade secret, proprietary, and commercially sensitive information. (17 App. 3906–30.) Disclosure of this information would be a gift to United’s competitors, and would irreparably harm United if made public. These strategic-business-plans exhibits include a 2020 business plan for a core business division (PX 447), which reveals (1) a current financial plan¹ (P447.0004, P447.0021-25); (2) current strategic priorities (P447.0005); and (3) a current 3 to 5-year growth plan

¹ Although the district court partially granted the motion to seal the numbers included in the plan on page 4, the district court denied sealing various written descriptions of the plan.

(P447.0017)—crown jewels that any competitor, to United’s irreparable detriment, would benefit from seeing. (17 App. 3887, 29 App. 6998, 7001, 7002, 7014, 7018–22.) These documents also include a 2020 internal presentation disclosing United’s internal profit targets for that division for the years 2021-2026 (P273.0003). (17 App. 3887, 25 App. 6001, 6004, 26 App. 6187, 6195–97.)

In most instances, the jury was only shown a handful of pages of these strategic business plans. The public interest in open court proceedings has little if any application to the portions of these documents that were not even shown to the jury, and whatever public interest there is cannot possibly outweigh the impact their disclosure would have on United. *See In re Nat’l Consumer Mortg., LLC*, 512 B.R. 639, 641 (D. Nev. 2014) (in evaluating whether to keep exhibits under seal, distinguishing between exhibits published and not published to the jury). Accordingly, given the sensitivity of these exhibits, United moved the district court to seal the pages of the strategic business plans that were not shown to the jury, and to redact the financially sensitive information that was in fact shown to the jury.

2. *Highly Confidential Exhibits*

The second category of trial exhibits, identified in Exhibit B to the motion to seal, includes highly confidential, proprietary, and commercially sensitive financial figures and strategic information, as well as protected health information and personal identifiable information. (17 App. 3914–30.) For this category of confidential information, United sought a limited remedy of redacting only the discrete line items containing the confidential information. In various other documents, United did not argue that the entire document or page should remain sealed, but instead that specific numerical values that are highly sensitive be redacted before public disclosure.

F. The District Court Denies United’s Motion to Seal

Reneging on its prior commitments (1 App. 1), TeamHealth opposed United’s motion to seal and sought full public disclosure of all trial exhibits. (12 App. 2985.) The district court heard and orally denied United’s motion on January 12, 2022. Ignoring its own protective order, the Rules Governing Sealing and Redacting of Court Records (“SRCR”), and this Court’s precedent, the district court ordered disclosure of large swaths of sensitive propriety and other financial

information subject to the protective order. In large part, the district court followed the categorical position it announced earlier in the trial that any admitted exhibit—regardless of its contents, and regardless of confidentiality measures taken during trial—would become a public document after trial was over.

1. January 12, 2022 Oral Ruling

The district court’s brief oral ruling at the January 12, 2022 hearing can be read in full at 31 App. 7493:13–7495:7. The district court began by positing—without any supporting evidence—that the insurance industry is “highly regulated,” “very competitive,” “[t]he business models are all almost identical,” and “the defendant is a publicly-traded company.” (31 App. 7493:17-20.) The Court then declared that “[t]he strategies here for any business is to provide value for its customers and success for its shareholders” and that insurance companies “know a lot more about each other” and “[t]hey learn those metrics” and the business models and metrics are identical. (31 App. 7493:21-25.)

As for legal standards, the district court acknowledged Nevada’s policy in favor of “least restrictive means” and declared “I have to make

findings in order to seal or redact things.” (31 App. 7494:2-4.) The court went on to say, “And I can only do it for personal information, medical records, trade secrets, or when it’s justified – which gives me some discretion.” (31 App. 7494:4-6.)

The court denied “the motion in the most part” but did “grant it in a few areas.” (31 App. 7494:7-8.) The court went on to list categories in which the motion to seal was granted and categories in which the motion was denied. For example, the motion was “granted with regard to the [Mergers and Acquisitions] targets” and “individual medical data.” (31 App. 7494:9-14.) But was denied “with regard to reimbursement rates” and “anything that was publicly disclosed, which include[d] anything used in opening or closing or used at trial.” (31 App. 7494:15-21.)

After setting forth the rulings, which did not include any analysis or weighing of interests, the district court said, “that should give you some direction, but I assume there will be some question marks.” (31 App. 7495:2-4.) Over the next several months, the district court left it to the parties to glean its analysis from the January 12, 2022 hearing and attempt to apply its rulings to individual documents. ((31 App.

7495:3-6) (court discussing a follow-up hearing to “hash out specifics” after the parties have “a chance to digest all of it”).)

2. February 10, 2022 Hearing

The first substantive hearing following the oral ruling on the motion to seal was on February 10, 2022.² At that hearing, the district court denied United’s request for an evidentiary hearing to present testimony further establishing the trade secret and confidential nature of the exhibits the court would be addressing. (32 App. 7580–85.) At the hearing, the district court mostly refused to clarify or elaborate on its prior oral ruling. (*See* 32 App. 7629–39.) When the court did address a specific document, it primarily just said whether the motion to seal was either granted or denied without giving any explanation. On some occasions, however, the district court did state that it was denying the motion to seal because the information somehow related to a topic at trial. [*See, e.g.*, 32 App. 7651:1-2 (“denied for the reason that the jury

² The parties did attend hearings on January 20, 2022 and January 27, 2022 that involved sealing. (31 App. 7500, 7554.) The January 20, 2022 hearing was on the motion of a non-party (Multiplan) to seal, which overlapped with United’s motion to seal and also discussed compilations of data, staleness, and burden of proof.

saw this page”), 7662:22-23 (“all of this information came out during the trial”); 7665:1-2 (“all of this came up at the time of trial”).] This further underscored that the district court’s principal standard for unsealing documents was simply whether they were “used at trial.” (31 App. 7494:15-21.)

3. *February 16, 2022 Hearing*

The next hearing, on February 16, 2022, was similar. Almost all of the court’s ruling consisted of summary denials or grants. When the court occasionally did give a reason for denying a request, it was usually on the basis that the information was stale, or it was obtained from public data. (*See, e.g.*, 32 App. 7738:4-5 (“It’s just stale information”); 7762:20-23 (“I just don’t see where information from a consultant obtained from public data could be a trade secret.”), 7767:5-6 (“it is – really is a compilation of data”).]

4. *Disputes Following February Hearings*

The parties again worked together to attempt to apply the court’s rulings to specific documents, and, on March 4, 2022, submitted a joint status report detailing the remaining disputes. [Joint Status Report and Table Identifying the Redactions to Trial Exhibits That Remain in

Dispute.] The joint status report included written arguments from each party regarding disputed redactions.

5. *District Court's Written Order*

The district court entered its written order on October 10, 2022. (15 App. 3663.) The appendix attached to the written order includes a document-by-document and page-by-page breakdown of the court's rulings on the motion to seal. The district court stayed execution of the order for thirty days for United to seek review in this Court.

6. *District Court's Written Order Unsealing Trial Transcripts*

United also moved to redact ten numerical figures appearing on just five pages of the trial transcripts. (13 App. 3151.) Those figures identify internal operating income ("IOI"), which is highly sensitive and non-public financial data reflecting the performance of particular United programs and units. Two witnesses testified to IOI figures that were in documents that had been marked Attorneys' Eyes Only or Confidential when produced by United and that were subject to the motion to seal. (13 App. 3158.)

The former vice president for out-of-network programs testified

about a projection of the amount of money in the aggregate that United could save their self-insured employer clients by 2023. (17 App. 3821:6–3822:7.) Another witness testified via prior deposition testimony regarding IOI of shared savings programs from 2016 to 2019. (17 App. 3879:22–3881:7.) If these numbers are released to the public at large, they will place United at a disadvantage both in competition in the marketplace on affordability initiatives as well as in negotiations with clients, because United’s competitors and clients will be armed with knowledge of United’s internal financial data and projections.

The district court denied the motion to redact portions of the trial transcript, finding that the IOI figures were not entitled to protection under the court’s previous order granting in part and denying in part the defendants’ motion to seal certain confidential trial exhibits. (15 App. 3653–54.) The court stayed execution of the order for thirty days for United to seek review from this Court.

United appealed and moved to extend the stay. (13 App. 3177; Docket No. 85525, Doc. No. 22-33964.) This Court entered a temporary stay of the district court orders pending the completion of briefing on the stay motion and further order of this Court. (16 App. 3718A–B.)

LEGAL ARGUMENT

This is the quintessential civil business case for writ relief and the application of settled rules allowing courts to seal trial records.

TeamHealth proposed as trial exhibits some of United's most commercially sensitive documents, which included confidential plans for future business and commercial relationships, financial projections that could move markets, and other documents reflecting highly sensitive strategic decision-making. Despite admitting the entirety of these exhibits, TeamHealth only used a handful of pages during its witness examinations and therefore only published a limited number of pages to the jury. Some exhibits were never published during the trial presentation at all. If the otherwise-confidential information was not important enough to actually use at trial, there is no compelling reason for disclosing it as part of the public trial record now.

The fact that TeamHealth did not even rely on the information in the documents at trial shows that TeamHealth's efforts to unseal those documents has more to do with disrupting United's business than it does with preserving the record of a trial regarding rates of reimbursement. United's interest in keeping this extremely sensitive

information under seal greatly outweighs any possible public interest in its wholesale disclosure—and most certainly outweighs TeamHealth’s inappropriate private interest in harming United’s business. *See In re Nat’l Consumer Mortg., LLC*, 512 B.R. at 641 (holding that trial exhibits containing a proprietary algorithm should remain sealed as a trade secret, as “the public’s right to know this information as part of a court record is low”).

United satisfied the requirements for maintaining the confidentiality of these trial exhibits and has a compelling interest in maintaining the exhibits under seal. Nevada law provides multiple separate bases by which the district court should have granted these limited and targeted requests to seal the trial record:

First, a post-trial order to seal was proper to enforce the original protective order entered pursuant to NRCp 26(c). *See* SRCR 3(4)(b). Yet the district court’s ruling completely ignored the valid protective order as a ground for continued sealing. (*See* 31 App. 7494:2-6.)

Second, sealing (including redaction) is necessary to protect United’s property interests, such as trade secrets, as defined by NRS 600A.030(5). SRCR 3(4)(g). United’s strategic business plans, by their

very nature, contain highly competitive and commercially sensitive proprietary and non-public information that would significantly harm United's business advantages if made public. The district court misunderstood what a trade secret is, erroneously concluding that information became stale based solely on the year it was created, without acknowledging the continued need for confidentiality, and that compilations of publicly available information cannot constitute trade secrets as a matter of law.

And third, sealing (including redaction) is justified for the independent reason that TeamHealth has no legitimate need to disclose United's proprietary information. TeamHealth seeks to disclose this information solely to impact other similar cases in other states and to exert business pressure on defendants. SRCR 3(4)(h).³ The district

³ See e.g., *Emergency Care Services of Pennsylvania, P.C. et al. v. UnitedHealth Group, Inc., et al.*, No. 19-01195, ECF No. 1 (M.D.P.A. filed July 11, 2019); *Emergency Group of Arizona Prof'l Corp. v. United Healthcare Inc.*, No. 19-04687, ECF No. 18 (D. Az. filed Aug. 9, 2019); *Buffalo Emergency Associates, LLP, et al. v. UnitedHealth Group, Inc., et al.*, No. 19-01148, ECF No. 1 (W.D.N.Y. filed Aug. 26, 2019); *Florida Emergency Physicians et al. v. United Healthcare of Florida, Inc.*, No. 20-60757, ECF No. 27 (S.D.Fl. filed Mar. 3 2020); *United HealthCare Services, Inc. et al. v. Team Health Holdings, Inc. et al.*, No: 3:21-cv-00364, ECF No. 1 (E.D.TN., filed Oct. 27, 2021).

court abused its discretion by allowing the judicial processes of this State to be misused for such private, extrajudicial objectives.

United's proposed handling of these confidential documents struck the right balance between allowing public access to the trial record on the one hand and protecting sensitive commercial information on the other. United primarily urged the district court to seal or redact the portions of strategic business plans that were never shown to the jury or discussed with a witness. And for the few highly confidential exhibits that were actually discussed at trial and shown to the jury, United proposed that the redactions be limited to the discrete sensitive financial figures, strategy, personal health information, or personal identifiable information in the exhibit. The district court should have adopted that modest, balanced approach.

I.

WRIT RELIEF IS APPROPRIATE TO PROTECT CONFIDENTIAL INFORMATION

Writ relief is a proper remedy to preserve the confidentiality of documents that have been improperly ordered disclosed by a district court. *See, e.g., Valley Health System, LLC v. Eighth Judicial Dist.*

Court, 127 Nev. 167, 169, 252 P.3d 676, 677 (2011) (recognizing that “a writ petition is the proper mechanism to seek relief” under circumstances where “once information is produced, any privilege applicable to that information cannot be restored”). In the absence of the relief requested in this writ petition, United will be irreparably harmed by the disclosure of its most sensitive strategic business plans and confidential information into the public domain. *See Cotter v. Eighth Judicial Dist. Court*, 134 Nev. 247, 249, 416 P.3d 228, 231 (2018) (granting writ relief where “without writ relief, compelled disclosure . . . [would] occur and petitioner would have no effective remedy, even by subsequent appeal”). This petition also raises an issue of statewide importance, which is whether all highly confidential information within documents admitted at trial necessarily must be publicly disclosed after trial merely because the document was admitted into evidence. *See International Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 198, 179 P.3d 556, 559 (2008) (granting review when the “petition raises an important legal issue in need of clarification, involving public policy, of which this court’s review would promote sound judicial economy and administration”). United submits that no such categorical

disclosure rule does or should exist. Instead, the district court must weigh and balance the recognized factors governing the use of confidential information at trial. To permit otherwise could encourage litigants to exploit the Nevada court system to harm competitors by forcing disclosure of their sensitive business information without genuine public need or benefit.

Relief is appropriate when the district court “committed ‘clear and indisputable’ legal error . . . or an ‘arbitrary or capricious’ abuse of discretion.” *Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 819-20, 407 P.3d 702, 706 (2017) (internal quotations omitted). The district court here did both. It committed the inarguable legal error of holding that merely admitting a document at trial mandates public disclosure of its contents, no matter how sensitive. And it abused its discretion both by making that legal error and by failing to properly balance the factors that govern motions to seal confidential information. Because writ relief is the only remedy available to United to challenge the district court’s order,⁴ United asks this Court to grant it the

⁴ United filed a notice of appeal on October 12, 2022, which includes the sealing orders regarding trial exhibits and trial transcripts. (13 App. 3177.) *See* Docket No. 85525. United believes that the orders are

extraordinary remedy of a writ of mandamus, or in the alternative, prohibition.

II.

THE DISTRICT COURT ERRONEOUSLY UNSEALED HIGHLY SENSITIVE PROPRIETARY MATERIALS

Nevada law does not recognize a categorical rule that all trial exhibits automatically become public record. To the contrary, “[a]lthough public access is favored, it is not unfettered.” *Howard v. State*, 128 Nev. 736, 740, 291 P.3d 137, 140 (2012). In fact, the Nevada Rules for Sealing and Redacting Court Records set forth specific standards for determining when trial exhibits should be sealed. These rules would be meaningless if all exhibits were subject to automatic disclosure. *See* SRCR 3(4). The rules instead prescribe a balancing test, which requires a court to seal or redact trial exhibits when a competing interest outweighs the public interest in access to open court

appealable as they are incorporated into the final judgment, which itself became appealable only after the entry of the last order denying post-judgment relief. United nonetheless submits this petition for extraordinary relief out of an abundance of caution to ensure that the exhibits and transcripts are not unsealed to the public in the event that this Court dismisses United’s appeal.

records. *Id.* at 742, 291 P.3d at 141.

The rules describe how to weigh the public interest in privacy against the public interest in open access to court records. Under SRCR 3(4), a court may order that court records be redacted or sealed provided that “the court makes and enters written findings that the specific sealing or redaction is justified by identified compelling privacy or safety interests that outweigh the public interest in access to the court records.” SRCR 3(4). “The public interest in privacy or safety interests that outweigh the public interest in open court records include” when “(a) [t]he sealing or redaction is permitted or required by federal or state law,” or “(b) [t]he sealing or redaction furthers . . . a protective order entered under NRCR 26(c),” or “(g) [t]he sealing or redaction is necessary to protect intellectual proprietary or property interests such as trade secrets as defined in NRS 600A.030(5); or (h) [t]he sealing or redaction is justified or required by another identified compelling circumstance.” SRCR 3(4).

When a trial exhibit implicates such competing interests, courts must weigh the relevant interests to determine if disclosure is required. *See San Jose Mercury News, Inc. v. U.S. Dist. Ct.--N. Dist. (San Jose),*

187 F.3d 1096, 1102 (9th Cir. 1999). In *Valley Broadcasting*, for example, the Ninth Circuit addressed whether trial exhibits should be disclosed to a television station. *Valley Broad. Co. v. U.S. Dist. Ct. for Dist. of Nev.*, 798 F.2d 1289 (9th Cir. 1986). The court listed several factors “[c]ounseling against” public disclosure, noting in particular “the likelihood of improper use, ‘including the publication of scandalous, libelous, pornographic, or trade secret materials; infringement of fair trial rights of the defendants or third persons; and residual privacy rights.’” *Id.* at 1294 (citing *United States v. Criden*, 648 F.2d 814, 830 (3d Cir. 1981)); see also *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995) (“The factors relevant to a determination of whether the strong presumption of access is overcome include the ‘public interest in understanding the judicial process and whether disclosure of the material could result in improper use of the material for scandalous or libelous purposes or infringement upon trade secrets.’”) (citing *EEOC v. Erection Co., Inc.*, 900 F.2d 168, 170 (9th Cir. 1990)).

Each of United’s narrow requests to seal limited information fall within at least one of the categories enumerated in Nevada’s Rules Governing Sealing and Redacting Court Records. The district court

accordingly committed clear legal error and manifestly abused its discretion by mandating disclosure of the information without considering the competing privacy interest.

A. The District Court Erred by Unsealing Information Subject to a Protective Order, Even Though the Information Was Never Discussed in Court

“A district court abuses its record sealing discretion when it commits legal error.” *Matter of Tiffie*, 137 Nev. 224, 225, 485 P.3d 1249, 1251 (2021). Under the Rules Governing Sealing and Redacting Court Records, the public interest in privacy outweighs the public interest in access to a given document when sealing or redacting the document would further a protective order properly entered under NRCP 26(c). SRCR 3(4)(b). The district court abused its discretion and committed legal error by failing to properly consider SRCR 3(4)(b) as a ground for sealing United’s confidential information.

Every one of the documents in United’s motion to seal remained subject to the protective order at the time of trial. United produced its confidential documents before trial, and handled those documents at trial with the understanding that they remained subject to the protective order. (1 App. 5, at ¶ 1 (“The parties may, however, produce

certain Confidential Information subject to the terms of this agreement.”).) The protections afforded by the protective order were specifically intended to continue through trial to the conclusion of the matter, after which the protected documents would be destroyed in the normal course. (1 App. 15–16, at ¶ 20 (providing that at trial “[t]he Court may take such measures, as it deems appropriate, to protect the claimed confidential nature of the document or information sought to be admitted and to protect the Confidential Information from disclosure to persons other than those identified” in the protective order).) Indeed, the protective order explicitly included “jurors” as qualified persons to view confidential and attorneys’ only information, demonstrating that the protective order itself contemplated both that it would govern the use of information through trial and that such information would not be disclosed merely because jurors reviewed it. (1 App. 11:23.)

Maintaining the information at issue as confidential, as United requested in its motion to seal, would have adhered to the already-agreed-upon rules established by the protective order. Doing so also would have signaled more broadly that parties in other cases can properly rely on protective orders when they act in good faith to produce

extremely sensitive documents in litigation, knowing they may do so without fear that those documents will be exploited by the opposing party for private objectives unconnected to the merits of the case. *See Bhagat v. Diamond Info. Sys., LLC*, 84 Va. Cir. 233, 2012 WL 7827846 (Va. Cir. 2012) (sealing trial exhibits to further a protective order because trial exhibits contained “sensitive cost information that competitors could evaluate if made public available” and public disclosure would “benefit [defendant’s] competitors at its expense”).

Despite the strong privacy interests underlying the protective order, the district court effectively allowed TeamHealth to use the trial process to wash documents and information clean from the protective order, even when lacking probative value to the case. In fact, the majority of the information in the trial exhibits subject to the protective order was never presented to the jury or discussed in front of the jury.

As TeamHealth itself has asserted, the public interest in open access to court records is meant to help the public understand the jury’s verdict. (31 App. 7441:9-11, 7482:6-8.) *Cf., e.g., Associated Press v. State*, 888 A.2d 1236, 1244 (N.H. 2005) (recognizing the public interest in access to court documents because “court documents often provide

important, sometimes the only, bases or explanations for a court's decision") (quoting *Brown & Williamson Tobacco Corp. v F.T.C.*, 710 F.2d 1165, 1177 (6th Cir. 1983)). But when information within an exhibit is not actually presented in court or discussed before the jury, that information almost certainly had little or no relevance to the jury's verdict, especially when 7,285 pages of documents were introduced into evidence at trial. Even though the exhibit itself was deemed relevant and admissible because of information that *was* presented and discussed, the public has no meaningful interest in ancillary information within the document the proffering party did not deem worthy of emphasis. *Cf. e.g., Krueger v. Ameriprise Financial, Inc.*, 2014 WL 12597948 (D. Minn. 2014) (collecting cases for proposition that "only those documents that are relevant to and integrally involved in the resolution of the merits of a case are judicial records to which the presumption of public access attaches"). Simply put, if the information was not important enough for TeamHealth to discuss it with the jury, then it cannot be helpful to understand the jury's verdict.

Accordingly, the portions of exhibits that were not shown to the jury or discussed in open court should have been sealed in furtherance

of the protective order, because there is no meaningful competing public interest in the disclosure of information or pages of exhibits that were not actually shown to the jury at trial. *Cf. In re National Consumer Mortg., LLC*, 512 B.R. 639 (D. Nev. 2014) (Judge Phillip Pro) (sealing exhibits because they were trade secrets and irrelevant to the case, “and thus the public’s right to know this information as part of a court record is low”). Any minimal public interest in such information certainly did not outweigh the strong privacy interests underlying the protective order. As a result, this Court should direct the district court to seal any portion of any trial exhibit that was subject to the protective order and was not discussed with or shown to the jury at trial.

At a minimum, this Court should order the district court to conduct the proper legal analysis in the first instance. That is, the district court must consider whether United’s interest in furthering the protective order outweighs the public interest in access to information in trial exhibits when that information was not discussed with or shown to the jury at trial. The district court never performed this analysis. Instead, the district court’s oral ruling, which provides the court’s only purported reasoning in regard to the motion to seal, failed to even

recognize that furthering a protective order was a basis for sealing the trial records. (*See* 31 App. 7494:4-6] (“I can only do it for personal information, medical records, trade secrets, or when it’s justified – which gives me some discretion.”). Accordingly, the district court’s failure to consider or weigh United’s interest in furthering the protective order was clear legal error that must be corrected.

B. The District Court Erred by Refusing to Seal Any Page that Was Shown to the Jury at Trial

The district court also erroneously applied its own personal standards, instead of those provided by SRCR 3(4), to determine whether to seal a record.

Nothing in SRCR 3(4) suggests that a party’s interest in confidentiality evaporates merely because an opponent publishes confidential information to the jury. Yet the district court denied United’s request to seal the following pages based on its misunderstanding that in general, information published to the jury cannot be sealed: P066.002; P089.0058; P236.0002; P236.0011; P266.0002; P266.0004; P266.0005; P266.0008; P266.0011; P266.0032; P268.0001; P268.0002; P273.0002; P288.0070; P288.0176; P294.0001; P294.003; P329.0044; P361.0002; P403.0002; P421.0001; P423.0002;

P426.0012; P447.0003; P447.0006; P450.0001; P455.0001; P455.0003; P462.0023; P462.0026; P471.0003; P476.0002; P509.003; Trial Exhibit Number 1001, page 1001_005. (15 App. 3684, 3693, 3712, 3717, 3718, 3719, 3720, 3729, 3732, 3733, 3734, 3737, 3742, 3747, 3748, 3749, 3754, 3755, 3756, 3757, 3758, 3773, 3775, 3776.)

The district court first demonstrated its misunderstanding of the applicable standards to seal trial records when it repeatedly declared that it would not seal any exhibit admitted at trial. (1 App. 236:5-6, 237:17-18, 240:2-4.] Although the district court ultimately was inconsistent in applying that rule, the court’s analysis and order remained infected by that threshold misunderstanding.⁵ In particular, the district court’s final determinations applied the categorical rule that

⁵ Indeed, TeamHealth’s opening argument in its opposition to United’s motion to seal was to remind the district court that it had already determined that it would not seal any document that was admitted at trial:

This motion is only about ***admitted*** trial exhibits. The Court’s position on such documents has already been made clear: “I can tell you right now that I will not seal anything that’s admitted. It’s not going to happen[]”; “I can tell you I won’t seal any exhibit that gets admitted. I think I made that clear[]”; “[I]f . . . it gets admitted it’s in the public domain.” 1 App. 236:5–6; 237:17–18; 240:2–4.

(12 App. 2986:1-5.)

any page that included information shown to or discussed with the jury cannot be sealed. *See, e.g.*, 32 App. 7635:19-21 (“[I]t came up at trial, and you don’t want it now to be a matter of public record. That’s troublesome for me.”); 32 App. 7651:1-2 (“denied for the reason that the jury saw this page”). The district court also denied redactions on the similarly categorical basis that information related to the merits of the case could not be sealed. *See, e.g.*, 32 App. 7769:2 (denying redaction to P273.13 because the information “goes to the heart of the case”); 32 App. 7662:22-23 (“all of this information came out during the trial”); 32 App. 7665:1-2 (“all of this came up at the time of trial”). But as noted above, if information relevant to trial were categorically exempt from sealing, the Rules Governing Sealing and Redacting Court Records would serve no purpose.

The Rules Governing Sealing and Redacting Court Records apply to civil actions and make no distinction between pre-trial, trial, or post-trial court records. *See* SRCR 1(4) (identifying the “Scope” of the rules to “apply to all court records in civil actions”); SRCR 2(2) (defining “Court record” to include “[a]ny document, information, exhibit, or other thing that is maintained by a court in connection with a judicial

proceeding”). Exhibits admitted at trial, and even testimony elicited at trial, are like any other court record and may be sealed under the SRCR. *See, e.g., In re Elec. Arts, Inc.*, 298 F. App’x 568, 569-70 (9th Cir. 2008) (issuing mandamus when the district court ordered that a trial exhibit containing trade secrets would not be sealed if admitted into evidence); *Bhagat v. Diamond Info. Sys., LLC*, 84 Va. Cir. 233, 2012 WL 7827846 (Va. Cir. 2012) (sealing trial exhibits to maintain a protective order). It was error for the district court to apply a categorical rule without considering whether a significant interest enumerated in SRCR 3(4) applied. That is, the district court applied the erroneous legal principle that, despite the fact that SRCR 3(4) provides various instances of when the public interest in privacy outweighs the public interest in open court records, no privacy interest could be greater than the public interest in access to trial testimony and exhibits.

The district court’s erroneous legal interpretation was particularly harmful and circular under these circumstances. The district court urged United to resolve its sealing issues with TeamHealth so that United would not seek to seal the courtroom every time confidential information was presented at trial. (1 App. 238–40.) The resolution

urged by TeamHealth, and agreed to by United, was for United to move to seal the documents following trial. *See, e.g.*, 1 App. 112 (Opposition to Objection to Media Request) (TeamHealth offering “a reasonable alternative” to allow United to move post-trial to seal documentary evidence rather than objecting and moving to seal the courtroom each time evidence came up). As a result, United did not move to close the courtroom whenever a confidential document was raised. But after trial, the district court completely eviscerated that resolution by ruling that any information presented at trial was public record and could not be sealed. So, in addition to being the improper legal standard, the district court’s personal standard was extremely prejudicial to United in light of the agreed upon method for handling confidential documents at trial. Had United known that the district court would persist in its incorrect standard, United would have insisted on interrupting trial and objecting to information in exhibits as confidential and sealing the courtroom during those portions of the trial.

In sum, despite the protective order contemplating that exhibits shown to the jury and admitted at trial could remain confidential, and despite the agreement of the parties about how to handle potentially

sealable evidence at trial, the district court categorically ruled that pages shown to the jury or that related to topics discussed at trial could not be sealed. Because the district court was required to weigh the public interest against United's interest in having the exhibits sealed, the district court clearly erred by applying a categorical rule that any page that was published to the jury or discussed in opening statements or closing arguments cannot be sealed.

C. The District Court Erred by Refusing to Seal or Redact United's Trade Secrets Based on Misunderstandings of Trade Secret Law

The district court committed further clear legal error by failing to apply the correct legal standards in determining whether the information was entitled to protection from disclosure as trade secrets.

The Sealing and Redacting Court Records Rules require sealing records as needed to protect trade secrets. In other words, under SRCR 3(4)(g), if information is a trade secret, then it must be sealed even if it is part of a court record.

This rule is consistent with Nevada's statutory protections for trade secrets, and the manner in which courts protect trade secrets all across the country. *See, e.g., NRS 600A et seq.* (Nevada Uniform Trade

Secrets Act); *see also, e.g., Saini v. Int’l Game Tech.*, 434 F. Supp. 2d 913, 921 (D. Nev. 2006) (“[W]e find that the public’s interest in uncovering any sale of defective gambling devices is not so great as to outweigh the public interest in enforcement of trade secret and confidentiality agreements.”); *Uncle B’s Bakery, Inc. v. O’Rourke*, 920 F. Supp. 1405, 1438 (N.D. Iowa 1996) (“[T]he court finds that the public interest in protection of trade secrets weighs in favor of an injunction to accomplish that end.”); *JetSmarter Inc. v. Benson*, 2018 WL 2709864, at *8 (S.D. Fla. Apr. 6, 2018) (“Florida law, however, makes plain that protecting trade secrets does not disserve, but rather promotes the public interest.”); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 905 (E.D. Pa. 1981) (“[T]here can be no doubt that society in general is interested in the protection of trade secrets and other valuable commercial information.”).

It also makes sense as a policy matter: when it comes to trade secrets, the people through their elected representatives have already decided that this information should remain confidential. No judicial second-guessing is necessary or appropriate.

In this case, United disclosed documents under a protective order

that contain trade secrets that can only remain protected if sealed. *See Valley Broad. Co.*, 798 F.2d at 1294 (noting that the publication of trade secret materials “counsels against” providing public access to the judicial process). Thus, the only evidence before the Court—declarations from United—which established that the information in the exhibits included protected trade secrets.

Instead of applying NRS chapter 600A and SRCR 3(4)(g), however, the district court created exceptions to trade-secret protection based on incorrect legal standards, accepting TeamHealth’s argument that compilations of public data or otherwise old information cannot be trade secrets. *See Matter of Tiffie*, 137 Nev. at 225, 485 P.3d at 1251 (“A district court abuses its record sealing discretion when it commits legal error.”).

1. United Demonstrated that the Exhibits Were Trade Secrets and TeamHealth Failed to Rebut that Showing

NRS 600A.030(5) defines a trade secret as

information . . . that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other persons who can obtain commercial or economic value from its disclosure or use; and . . . is the subject of efforts that

are reasonable under the circumstances to maintain its secrecy.

a. UNITED ESTABLISHED THAT THE EXHIBITS
SUBJECT TO ITS MOTION ARE TRADE SECRETS
THAT SHOULD BE SEALED

United's strategic business plans and other portions of the highly confidential trial exhibits are valuable precisely because of their confidentiality. That is, the information derives economic value from not being generally known to and/or readily ascertainable by United's competitors, clients, and medical providers.

The district court misunderstood the nature of United's business and assumed insurers know everything about each other and have the same business model. *See* 31 App. 7493:21–7494:1]. That assumption is decidedly wrong. The market for commercial fully insured and self-funded customers is highly competitive. (*See* 17 App. 3952 at ¶8.)⁶ The

⁶ *See also* Richard A. Epstein & Paula M. Stannard, *Constitutional Ratemaking and the Affordable Care Act: A New Source of Vulnerability*, 38 Am. J.L. 7 Med. 243, 262 (2012) (“There is cut-throat competition among large and sophisticated suppliers who deal with sophisticated employers who know that if they do not supply decent coverage to their employees, they risk the loss of their services. There are smaller group purchasers that are anxious about healthcare costs, and individuals who also search the market.”).

Strategic Business Plans produced by United contain highly sensitive competitive and commercial proprietary and non-public information, including business strategy; information about third party pricing and/or reimbursement rates; internal financial data not publicly disclosed to investors or included in its filings with the SEC such as United's profit targets from 2021 to 2026 and how they intend to achieve those targets; business results and projections; United's goals and strategies for entering new markets; and future product designs that, if disclosed, would significantly harm business advantages of United and which deserve the utmost protection from United's competitors and public disclosure.⁷ (*Id.*)

(i) The Information Derives Economic Value from Not Being Generally Known

As was detailed for the district court in the Declarations of Dan Keuter, (17 App. 3952–53 at ¶¶ 8-11), and Jenny Hayhurst, (17 App. 3959–60 at ¶¶ 7-11), disclosure of this information will give United's

⁷ Arguably, it is not in the public interest to release unreported financial information outside of the regulatory framework of the U.S. Securities Exchange Commission precisely because selective disclosures of financial information can negatively impact fair trading in financial markets. *See, e.g.*, SEC Regulation FD, 17 CFR 243.100-243.103.

competitors and clients a significant advantage since they would have a roadmap for how to out-compete United in a variety of arenas. Broadly, the Strategic Business Plans and portions of the other Highly Confidential Exhibits this petition seeks to seal provide competitors information on (1) what United sells (i.e. detailed product information); (2) how United prices what it sells (i.e. margin information, pricing strategies, risk adjustment, etc.); (3) who United sells to (i.e. by customer size or funding type); (4) where United sells its products and services (i.e. United's existing footprint and geographic priorities); and (5) how United seeks to out-compete its competitors (i.e. affordability initiatives, network strategies, etc.). (17 App. 3952 ¶ 9.) Information such as United's business objectives, strategies for achieving their financial goals, and the considered strength and weaknesses of United and their peers is not known to United's competitors, clients, or investment analysts and, indeed, is not even widely shared within United's organization. *Id.*

The strategic business plans United sought to redact are highly sensitive internal documents that are not part of the securities filings required by the SEC and whose distribution is strictly limited even

within United's organization. (17 App. 3952–53 at ¶ 10.) Despite the extraordinary sensitivity of these documents, United, with a few exceptions, proposed to only redact and/or seal the portions of the at-issue trial exhibits that were not shown to the jury on the courtroom monitor or discussed with a witness at trial.

Two examples of the most sensitive documents are a 2020 business plan and internal presentation detailing United's strategic goals for a core business division. *See* P447; P273 (29 App. 6998; 25 App. 6002). The 2020 business plan sets forth, among other things, (1) specific actions United's competitors in that space have taken and what actions United will take in response to those actions (P447.0003); (2) United's financial plan (P447.0004, P447.0021-25); (3) United's strategic priorities and steps to achieve those priorities (P447.0005); and (4) United's 3-5 year growth plan (P447.0017). Similarly, the 2020 internal strategy presentation includes United's internal future profit targets (P273.0003) and a study on how United's this business division can meet its strategic goals (P273.0006-29). (29 App. 7000, 7002, 7018–20, 7002, 6934; 28 App. 6004; 26 App. 6187, 6195–97; 25 App. 6007–30.)

Over ninety-eight percent of the material in the above example

documents was not even referenced by TeamHealth Plaintiffs' counsel or a witness in the trial record and thus has no relevance to the issues in dispute. From P273, a highly sensitive 198-page document concerning United's goals and business strategies (25 App. 6002), plaintiffs only discussed three pages at trial. From P447, a 27-page business plan (29 App. 6997), plaintiffs only discussed page six with the jury.

Yet, without intervention from this Court the TeamHealth plaintiffs intend to post all 225 pages of these exhibits online. Although the district court partially sealed parts of these documents by allowing redaction of very limited financial figures, the district court failed to seal the overwhelming majority of the sensitive information in those documents. These documents, and other trial exhibits like them, give United's competitors an unfair roadmap for competing against United. They also give investment analysts valuable internal data that will lead to market volatility and manipulation if publicly released. As evidenced by the financial impacts TeamHealth caused Multiplan when TeamHealth previously disclosed United's confidential business plans on the TeamHealth website, these concerns are not just theoretical.

The irreparable business harm that United will suffer from public disclosure of the strategic business plans and portions of the other highly confidential exhibits easily outweighs any public interest in reviewing that information.

(ii) United Takes Reasonable Steps in the Course of Business to Protect its Strategic Plans and Confidential Information

United takes reasonable steps in the ordinary course of business to protect the strategic business plans and other documents of the like, as required for a trade secret. *See* NRS 600A.030(5). As detailed in the declaration of Dan Kueter, “[i]n the ordinary course of business, [United] use[s] several methods to protect their highly competitive and commercially sensitive proprietary and non-public information like the Strategic Business Plans and other [highly confidential exhibits].” (17 App. 3951, at ¶ 5.) At the highest level, United maintains a non-disclosure and confidentiality policy that sets forth how and when highly competitive and commercially sensitive proprietary and non-public information can be used and disclosed. *Id.* Each new hire must agree to abide by this policy as a condition of employment, and to participate in a privacy and security training program. *Id.* Thereafter, each employee of United is required to participate in an annual privacy

and security training program. *Id.* Each new hire must also participate in an intellectual property protection training program. *Id.* United also protects its highly competitive and commercially sensitive proprietary and non-public information through other information security policies that were designed to protect and limit access to such information. *Id.*

In short, the Strategic Business Plans and the Highly Confidential Exhibits are documents that are “the subject of efforts that are reasonable under the circumstances to maintain [their] secrecy” under NRS 600A.030(5). Because these exhibits contain proprietary information and trade secrets, as defined in NRS 600A.030(5), sealing that information is appropriate. United met its burden to show compelling reasons to seal this trade secret information, and the district court abused its discretion by failing to do so.

b. TEAMHEALTH FAILED TO REBUT UNITED’S SHOWING

The district court effectively ignored the sworn declarations from United that the information was highly confidential and damaging to United’s competitive interests in favor of TeamHealth’s counsel’s speculations that various information was either publicly available or stale because it was old. *See* 32 App. 7686–87 (United arguing that “if

you're balancing the persuasiveness, an executive at the company and the sworn affidavit versus speculation by a lawyer that it's stale and won't help, you ought to come down on the side of the affidavit").

Indeed, United recognized that the district court was discounting its declarations, despite no actual evidence from TeamHealth, and requested an evidentiary hearing. *See, e.g.*, 32 App. 7580–81 (United's counsel asking for evidentiary hearing because TeamHealth "challenged our factual evidence, but they haven't done so through declarations or witnesses or experts" yet the court "essentially disregarded or discounted the factual evidence" in the declarations).

United specifically explained to the district court that staleness was an issue that could best be addressed in an evidentiary hearing and that the court and TeamHealth's counsel could test their theories of staleness through cross examination of United's witnesses. *See* 32 App. 7582–83. Nonetheless, the district court refused to consider witness testimony, finding that the briefing was sufficient. *See* 32 App. 7585:13-16 ("I just don't see why it would be necessary to have evidence on these issues. I think the matters are so fully briefed and so well argued that it's just not necessary."). The district court manifestly

abused its discretion by refusing an evidentiary hearing and not applying any evidentiary burden to TeamHealth to rebut United's evidence.

In sum, United presented two declarations in support of its arguments that the trial exhibits subject to the motion to seal must remain confidential. In response, TeamHealth's counsel simply argued without evidence that the documents were old, stale, made of publicly available information, or widely known in the industry. Rather than hold an evidentiary hearing, as United requested, the district court largely agreed with Team Health's counsel's arguments. Given that United presented evidence that the trial exhibits contained trade secret information that must be redacted to protect United, the district court manifestly abused its discretion by simply accepting opposing counsel's argument that they were not.

As discussed immediately below, the district court created judicial exceptions to trade-secret protection that defy trade-secret law and this Court's sealing rules.

2. Trade Secrets Can be Developed from Publicly Available Information

The district court demonstrably misunderstood what a trade

secret is, particularly with respect to compilations of public information. According to the district court, compilation of otherwise publicly available information cannot be a trade secret. *See* 32 App. 7762 (district court: “I just don’t see where information that a consultant obtained from public data could be a trade secret. So it will be denied.”); 32 App. 7767 (district court: “I’ll deny the request for redaction, because it is – really a compilation of data.”).

This Court recently came to the exact opposite conclusion. *See Nevada Indep. v. Whitley*, 138 Nev., Adv. Op. 15, 506 P.3d 1037, 1045 (2022). One of the issues in *Whitley* was whether an insulin manufacturer was entitled to trade secret protections for insulin pricing schemes, even though its pricing was publicly available information. The Court favorably cited to *Mallet & Co. Inc. v. Lacayon*, 16 F.4th 364, 386 (3d Cir. 2021), for the proposition that “information will not necessarily be deprived of protection as a trade secret because parts of it are publicly available.” *Whitley*, 506 P.3d at 1045.

Whitley & Mallet do not stand alone. To the contrary, “[c]ourts have long recognized that ‘a trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public

domain, but the unified process, design and operation of which, in unique combination, affords a competitive advantage and is a protectable secret.” *AirFacts, Inc. v. de Amezaga*, 909 F.3d 84, 96 (4th Cir. 2018); *see, e.g., 3M v. Pribyl*, 259 F.3d 587, 595-96 (7th Cir. 2001) (same); *Imperial Chemical Industries Ltd. v. National Distillers & Chemical Corp.*, 342 F.2d 737, 742 (2d. Cir. 1965) (collecting cases in support of same); *Enter. Leasing Co. of Phoenix v. Ehmke*, 3 P.3d 1064, 1069 (Ariz. Ct. App. 1999) (“[A] trade secret may consist of a combination of elements even though each individual component may be a matter of common knowledge.”); *State ex rel. Lucas Cty. Bd. of Commrs. v. Ohio Environmental Protection Agency*, 724 N.E.2d 411, 419 (Ohio 2000) (“Where documents already in the public domain are combined to form a larger document, a trade secret may exist if the unified result would afford a party a competitive advantage.”) (quoting *The Plain Dealer v. Ohio Dept. of Ins.*, 687 N.E.2d 661, 674-75 (Ohio 1997)).

Indeed, the statutory definition of “trade secret” itself includes a “compilation” of information. *See* NRS 600A.030(5)(a) (“‘Trade Secret’ . . . Means information, including, without limitation, a formula,

pattern, *compilation*, program, device, method, technique, product, system, process, design, prototype, procedure”) (emphasis added).

That settled rule applies here. Many of the documents the district court refused to seal reflect otherwise public information that United compiled and combined in a way to create a competitive advantage. For example, P273 included compilations from McKinsey & Company that were disclosed as attorneys’ eyes only by United. Page twelve of P273 reveals the relative importance of various products and programs to United’s earnings. (25 App. 6013.)

This page is one example of many in P273 in which United’s working relationship with a consulting company and its analysis would give insight and information into how United thinks about its growth opportunities and which specific growth opportunities it is considering. That information is treated as highly confidential and sensitive within United, and is the reason United designated it “Attorneys’ Eyes Only.” But because the information was compiled from publicly available sources, TeamHealth argued that it was not confidential and “just a graph of public data.” (32 App. 7766:7-16.) The district court agreed on the basis that it “really is a compilation of data.” (32 App. 7767:6.)

The district court erred by refusing to grant further sealing redactions to P273 based on its misunderstanding that compilations of public data were not trade secrets. As a result, this Court should order the district court to apply the correct legal standard regarding compilations of data when determining whether to seal United's trade secrets. Given the paucity of the district court's analysis, it is impossible to determine the full extent to which this flawed legal interpretation infected the district court's sealing determinations. The district court should be instructed on the correct legal rule and directed to reconsider all of United's motion to seal in light of the correct rules of law.

3. *Staleness is a Case-Specific Inquiry Not Dependent on the Age of the Information*

TeamHealth also opposed United's motion to seal, in part, on the theory that the records "cannot possibly have any value as trade secret or proprietary because the information is stale." (12 App. 2989.)

TeamHealth argued that "the majority of these documents were well over two years old—many of them over five or even as many as fifteen years out of date." (12 App. 2990.) TeamHealth relied on the age of the documents to argue that they were presumptively stale. *See, e.g.* 12 App. 2990 n.3 ("In some cases, even a matter of months can render

information stale.”). The district court credited TeamHealth’s arguments and improperly required disclosure of confidential and trade secret documents based solely on when they were prepared, without any inquiry into the *continued* need for confidentiality. *See* 32 App. 7738 (court finding that “[i]t’s just stale information, and it deals with other public entities.”); 32 App. 7740–41 (TeamHealth arguing that 2017 is not “still relevant to the marketplace today” and court denying motion to seal).

Staleness is a fact-specific inquiry that cannot be triggered by singular, rigid factors such as the age of a document. *See Synergetics, Inc. v. Hurst*, 477 F.3d 949, 958 (8th Cir. 2007) (“Determinations of when trade secret information becomes stale cannot be made by reference to a bright line rule and necessarily requires fact specific consideration.”). Information does not lose status as a trade secret solely as a function of time; rather, information no longer constitutes a trade secret when the information loses its commercial value to competitors. *Cf. Enter. Leasing Co. of Phoenix v. Ehmke*, 3 P.3d 1064, 1069 (Ariz. Ct. App. 1999) (recognizing that “trade-secret status may continue indefinitely so long as there is no public disclosure”).

TeamHealth argued that United was required to show that older plans were still the current plans, otherwise the information was stale and not a trade secret. *See, e.g.*, 31 App. 7443:1-3 (arguing that “none of the declarations, none of the evidence from United, supports a finding that these old business plans are still current strategies”). Even if information “does not provide direct insight into current business strategies,” however, it is still relevant and can be a trade secret if “the information can be extrapolated to predict future strategies and practices.” *Stanislaus Food Products Co. v. USS-POSCO Industries*, 2012 WL 6160468, *2 (E.D. Cal. 2012). That principle applies to many of the documents at issue, but the district court simply refused to apply it.

For example, P329 is a strategic business plan from 2019. TeamHealth argued the information was stale because, although created for 2019, it was never intended for release to the general public and United’s competitors. Page 15 of this document, along with numerous others, details United’s business strategies for growth and improving their cost structures. (27 App. 6492.) Those strategies were not specific to 2019 and did not “expire” that year—they remain

relevant today. It thus does not matter that 2019 has “already come and gone,” as TeamHealth argued. (12 App. 2992:9.) Because information from the 2019 document can be extrapolated to identify United’s future strategies and practices, it remains a trade secret and United’s confidential information. *See Stanislaus Food Products Co.*, 2012 WL 6160468, at *2. TeamHealth presented no evidence to the contrary. It was error to order such information to be unsealed.

Similarly, P378 is a 2019 analysis of United’s market competitiveness in Employer & Individual plans. Although prepared in 2019, it includes analyses of current and future network competitiveness (28 App. 6719–21, 6725), ways to improve performance (28 App. 6727, 6731–33), percentages of reduction off billed amounts (28 App. 6734), an analysis of United’s distribution of spend by program (28 App. 6735), and a five-year roadmap with financial targets through 2023 (28 App. 6736). All of this information was designated attorneys’ eyes only and is highly sensitive to United and gives United’s competitors insight into how United assesses its competitiveness and future growth opportunities.⁸

⁸ TeamHealth sought to unseal numerous documents based on its

United asks this Court to direct the district court to seal those documents that were confidential under the protective order, or alternatively to direct the district court to reconsider United's sealing requests in light of the correct legal analysis for staleness.

D. Sealing is Justified Based on the Compelling Circumstances of this Case

Finally, a court may seal documents when “[t]he sealing or redaction is justified or required by another identified compelling circumstance.” SRCR 3(4)(h). “In general, ‘compelling reasons’ sufficient to outweigh the public’s interest in disclosure and justify sealing court records exist when such ‘court files might have become a vehicle for improper purposes,’ such as the use of records to gratify private spite,

incorrect understanding of staleness, including: PX1; PX3; PX5; PX8; PX10; PX16; PX22; PX23; PX25; PX26; PX34; PX53; PX66; DX4569; DX5507; PX67; PX71; PX73; PX75; PX76; PX92; PX94; PX96; PX127; PX132; PX509; DX5499; PX144; PX147; PX148; PX149; PX150; PX154; PX159; PX170A; PX174; PX175; PX178; PX193; PX212; PX218; PX220; PX229; PX230; PX231; PX236; PX239; PX243; PX244; PX246; PX254; PX256; PX265; PX266; DX5506; PX262; PX267; PX268; PX270; PX273; PX288; PX294; PX297A; PX297S; PX314; PX319; PX320; PX324; PX329; PX340; PX342; PX344; PX348; PX354; PX359; PX360; PX361; PX367; PX368; PX370; PX375; PX378; PX380; PX394; PX395; PX400; PX403; PX413; PX418;1 PX421; PX423; PX426; PX440; PX444; PX447; PX462; PX476; PX477; PX471; PX483; DX4048; DX4478; DX4573; DX5505; PX450; PX455; PX464; PX472. *See* 13 App. 2992:10-21, 3002.

promote public scandal, circulate libelous statements, or release trade secrets.” *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006); *see also Valley Broad. Co.*, 798 F.2d at 1294 (orders to seal are appropriate when there is a “likelihood of an improper use,” including the publication of “trade secret materials” and the infringement of “residual privacy rights”). TeamHealth’s conduct in disclosing the Strategic Business Plans midtrial, and the harm that then resulted from their actions, constitute independent compelling circumstances that warrant the sealing and redactions. *See* 76 C.J.S. Records § 82 (“[C]ompelling reasons sufficient to outweigh the public’s interest in disclosure exist when court records might become a vehicle for improper purposes, such as the use of records to gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets.”).

TeamHealth has not been shy about how it will use the trial exhibits to “gratify private spite,” “promote public scandal,” and “release trade secrets.” Not only did it already once disclose confidential documents, but it is openly broadcasting that it intends to do so to the full extent this Court will allow it. The vast majority of the information

TeamHealth threatens to publish has no relevance to this case, was not displayed in the courtroom, and was not addressed by witnesses or counsel at trial. The information instead involves internal business strategies about products, partnerships, marketing, financial targets and similar information. Disclosing such information serves no purpose related to open court records, or any public purpose at all. It serves only to advance the TeamHealth Plaintiffs' strategy to impact other pending cases by exerting pressure on United unrelated to the merits of the reimbursement rate issues in this case. This is a textbook example of a litigant using "court files... [as] a vehicle for improper purposes."

Kamakana, 447 F.3d at 1179.

Beyond the act itself of using sealed documents to "gratify private spite," "promote public scandal," and "release trade secrets," the results of that conduct further support the need to seal the Strategic Business Plans and redact portions of the other Highly Confidential Exhibits. *See Hunt v. Zuffa, LLC*, 528 F. Supp. 3d 1180, 1188 (D. Nev. 2021) (finding "compelling reasons" to seal when "exhibit contain[ed] confidential business information, public disclosure of which could potentially damage the parties' competitive standing"). A court will not ordinarily

have the benefit of hindsight in determining the extent of harm that would result from disclosure of confidential documents. But the district court did.

When TeamHealth posted United's confidential information to its website, the damage was immediate. A nonparty's stock value and bond rating fell when investors learned from United's AEO documents that United had considered terminating certain contracts with that nonparty in 2023. *See* 17 App. 3931–47. After TeamHealth's previous leak affected Multiplan, it should have been apparent that these documents are highly sensitive and that their disclosure is disruptive to United and the market. The harm that will result from disclosure was demonstrated to the district court in real time. Yet the district court chose to allow disclosure of the Strategic Business Plans and unredacted copies of the other Highly Confidential Exhibits, which can only be expected to cause even greater damage than what happened the first time.

This recent real-world experience alone established the particularized showing the district court needed to justify sealing judicial records. The district court thus erred by failing to do so here.

CONCLUSION

The district court and plaintiffs must be enjoined from publishing to the world United's highly sensitive, confidential documents, which would cause irreparable damage both to United and those third parties who work with United and depend on this confidentiality.

For these reasons, this Court should grant the petition.

Dated this 15th day of November, 2022.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief exceeds the type-volume limitations of NRAP 21(d) because, except as exempted by NRAP 32(a)(7)(C), it contains 12,657 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

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CERTIFICATE OF SERVICE

I certify that on this 15th day of November, 2022., I served the foregoing “Petition for Writ of Mandamus or, Alternatively, Prohibition” for filing *via* the Court’s eFlex electronic filing system. Electronic notification will be sent to the following:

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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:

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