Case Nos. 85525 & 85656

In the Supreme Court of Nevada

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

APPELLANTS' APPENDIX
VOLUME 16
PAGES 3751–4000

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CHRONOLOGICAL TABLE OF CONTENTS TO APPENDIX

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Filed Under Seal

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

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

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

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

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

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

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

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

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

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

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

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

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

ALPHABETICAL TABLE OF CONTENTS TO APPENDIX

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CERTIFICATE OF SERVICE

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

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DISTRICT COURT JUDGE – DEPT. 27
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EXHIBIT 4

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News & Resources

Completes Previously Announced Transaction with Blackstone

Press Releases

TeamHealth Completes Previously Announced Transaction with Blackstone, CDPQ, PSP Investments and NPS and Becomes a Private Company

Team Health Holdings, Inc. (“TeamHealth” or the “Company”), a leading physician services organization, today announced the successful completion of its acquisition by funds affiliated with Blackstone, a leading global asset manager, and certain other investors, including Caisse de dépôt et placement du Québec (“CDPQ”), the Public Sector Pension Investment Board (“PSP Investments”), and the National Pension Service of Korea

("NPS") for $43.50 per share in cash, valued at approximately $6.1 billion.

The transaction was announced on October 31, 2016, and received approval from TeamHealth's stockholders on January 11, 2017. As a result of the transaction, TeamHealth is now a privately held company. TeamHealth's common stock is no longer traded on the New York Stock Exchange, effective today. "We are pleased to reach this significant milestone at TeamHealth," said Leif Murphy, President and CEO of TeamHealth. "We are committed to delivering the highest quality of patient care and supporting our affiliated clinicians and hospital and post-acute partners. With Blackstone's support, we look forward to continuing to leverage our national scale and functional expertise to drive high quality patient care, operational efficiencies and clinician satisfaction in hospital-based and post-acute settings."

"We are pleased to have completed this transaction with Blackstone and appreciate their recognition of the strength of our organization and the thousands of skilled and dedicated clinicians and non-clinical healthcare professionals who comprise TeamHealth," said Lynn Massingale, MD, co-founder and Executive Chairman of TeamHealth. "As we continue to execute on our strategic priorities, Blackstone will be a valuable partner as we continue our long-term objective to be the leading provider of hospital and post-acute clinician services."

"TeamHealth has built an industry leading physician services platform ideally positioned to navigate the evolving healthcare landscape, and we are pleased to have invested in the Company," said Neil Simpkins, a Senior Managing Director at Blackstone. "We look forward to once again working together with TeamHealth's experienced management team and supporting the Company's next phase of development."

Bruce McEvoy, a Senior Managing Director at Blackstone, added, "We are excited to help the Company further its long track record of organic and acquisition-driven growth while continuing to provide outstanding service to its patients."

Goldman, Sachs & Co. acted as lead financial advisor, and Citigroup Global Markets Inc. acted as co-financial advisor to TeamHealth. Simpson Thacher & Bartlett LLP acted as TeamHealth's legal counsel. Bank of America Merrill Lynch, Barclays, J.P. Morgan and Morgan Stanley & Co. LLC acted as advisors to Blackstone on the transaction. Kirkland & Ellis LLP and Ropes & Gray LLP acted as Blackstone's legal counsel.

About TeamHealth

At TeamHealth, our purpose is to perfect physicians' ability to practice medicine, every day, in everything we do. Through our more than 20,000 affiliated physicians and advanced practice clinicians, TeamHealth offers outsourced emergency medicine, hospital medicine, critical care, anesthesiology, orthopedic hospitalist, acute care surgery, obstetrics and gynecology hospitalist, ambulatory care, post-acute care and medical call center solutions to approximately 3,300 acute and post-acute facilities and physician groups nationwide. Our philosophy is as simple as our goal is singular: we believe better experiences for physicians lead to better outcomes—for patients, hospital partners and physicians alike. Join our team; we value and empower clinicians. Partner with us; we deliver on our promises. Learn more at https://www.teamhealth.com.

The term "TeamHealth" as used throughout this release includes Team Health Holdings, Inc., its subsidiaries, affiliates, affiliated medical groups and clinicians, all of which are part of the TeamHealth organization. "Clinicians" are physicians, advanced practice clinicians and other healthcare clinicians who are employed by or contract with subsidiaries or affiliated entities of Team Health Holdings, Inc. All such clinicians exercise independent clinical judgment when providing patient care. Team Health Holdings, Inc. does not have any

employees, does not contract with clinicians and does not practice medicine.

About Blackstone

Blackstone is one of the world's leading investment firms. We seek to create positive economic impact and long-term value for our investors, the companies we invest in, and the communities in which we work. We do this by using extraordinary people and flexible capital to help companies solve problems. Our asset management businesses, with over $360 billion in assets under management, include investment vehicles focused on private equity, real estate, public debt and equity, non-investment grade credit, real assets and secondary funds, all on a global basis. Further information is available at www.blackstone.com. Follow Blackstone on Twitter @Blackstone.

About CDPQ

Caisse de dépôt et placement du Québec (CDPQ) is a long-term institutional investor that manages funds primarily for public and parapublic pension and insurance plans. As at June 30, 2016, it held C$254.9 billion in net assets. As one of Canada's leading institutional fund managers, CDPQ invests globally in major financial markets, private equity, infrastructure and real estate. For more information, visit cdpq.com, follow us on Twitter @LaCDPQ or consult our Facebook or LinkedIn pages.

About PSP Investments

The Public Sector Pension Investment Board (PSP Investments) is one of Canada's largest pension investment managers with C$125.8 billion of net assets under management as at September 30, 2016. Its diversified global portfolio is composed of investments in public financial markets, private equity, real estate, infrastructure, natural resources and private debt. Established in 1999, PSP Investments manages net contributions to the pension funds of the federal Public Service, the Canadian Armed Forces, the Royal Canadian Mounted Police and the Reserve Force. Headquartered in Ottawa, PSP Investments has its principal business office in Montréal and offices in New York and London. For more information, visit investpsp.com, Twitter @InvestPSP or LinkedIn.

About NPS

The National Pension Service of Korea ("NPS") is a public pension institution in South Korea. Established in 1988, NPS launched the Investment Management ("NPSIM") in 1999 for professionally managing its pension fund. The National Pension Fund has become one of the top 3 global public pension funds in the world with U$466bn in assets as of November 30, 2016. Over the past decade, NPS has pursued investment diversification in order to maximize long-term returns. NPSIM has diversified global portfolio with investments in fixed income, equities and alternatives including private equity, real estate and infrastructure. NPSIM has currently its principal business office in Seoul and overseas offices in New York, London and Singapore. For more information, visit http://www.nps.or.kr/ or fund.nps.or.kr.

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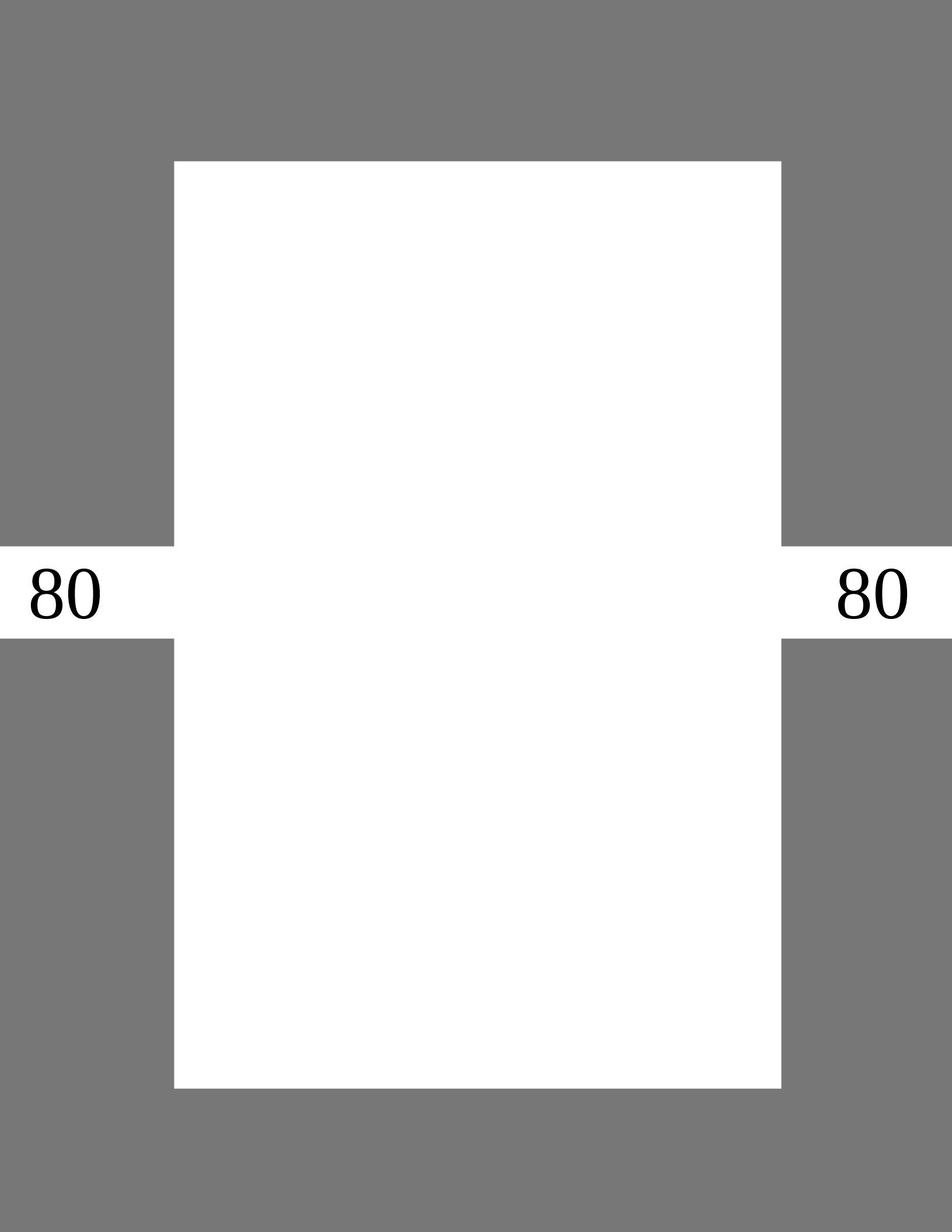
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CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA) LTD., Plaintiff(s), vs. UNITED HEALTHCARE INSURANCE COMPANY, Defendant(s).	CASE NO: A-19-792978-B DEPT. XXVII

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE
MONDAY, FEBRUARY 22, 2021

RECORDER'S TRANSCRIPT OF PROCEEDINGS
RE: MOTIONS

APPEARANCES (Attorneys appeared via Blue Jeans):

For the Plaintiff(s): PATRICIA K. LUNDVALL, ESQ.
KRISTEN T. GALLAGHER, ESQ.
AMANDA PERACH, ESQ.

For the Defendant(s): D. LEE ROBERTS, JR., ESQ.
BRITTANY M. LLEWELLYN, ESQ.
NATASHA S. FEDDER, ESQ.
LEE K. BLALACK, ESQ.
DENISE ZAMORE, ESQ.

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

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LAS VEGAS, NEVADA, MONDAY, FEBRUARY 22, 2021

[Proceeding commenced at 1:31 p.m.]

THE COURT: So Fremont versus United, let's take appearances, starting first with the plaintiff.

And a polite reminder to please mute yourself when you're not speaking.

MS. GALLAGHER: Hi, good afternoon, Your Honor. Kristen Gallagher, on behalf of the plaintiff Health Care Providers.

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

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

THE COURT: And for the defendants, please?

MR. ROBERTS: Good morning, Your Honor.

Lee Roberts, Weinberg, Wheeler, Hudgins, Gunn & Dial, here with my partner Brittany Llewellyn. I've also had present Lee Blalack and Natasha Fedder, who are admitted *pro hac vice*; and two client representatives, who I will allow to introduce themselves to the Court, with the Court's indulgence.

THE COURT: Thank you. Thank you.

MS. ZAMORE: Hi. Good morning, Your Honor. My name is Denise Zamore, and I'm senior associate general counsel with United Healthcare -- and it's Z as in zebra.

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My colleague, Ryan Wong, is likely not going to be able to join. But thank you for allowing me to attend.

THE COURT: Thank you and welcome. Court is always open. You're always welcome.

So, Mr. Roberts, this is your motion. And it's an Emergency Motion to Stay the Deposition of Dan Rosenthal.

We have a similar motion tomorrow with regard to Paradise and Nierman.

MR. ROBERTS: Yes, Your Honor.

And really, I don't think it's necessary to get into the merits today.

We have requested, as the Court knows, a Protective Order with regard to Mr. Rosenthal, under the Apex Doctrine. He's the CEO of United Healthcare's employee and individual business. He oversees the CEOs in 13 Western states. He does not have any unique, nonrepetitive knowledge of other witnesses who could be deposed with less burden on United Healthcare.

And really the purpose of today's hearing is we filed the Motion for Protective Order on Order Shortening Time. It was not set until the day after deposition.

And so, for today, we're simply asking for due process. As the Court knows, under Goodyear -- *Bahena v. Goodyear* simply -- and other authority -- simply moving for a protective order does not excuse you from showing up and complying with your discovery obligations. So we just felt it was necessary to ask the Court to

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formally stay this, just long enough to give us due process on the substance of the motion.

And this deposition was set with -- without any request for dates or availability. It was set unilaterally.

We did meet and confer on this, Your Honor, and I think we got close, but ultimately it came down to if the Court denied the Motion for Protective Order, we indicated that we would find a date prior to the March 15th cutoff of discovery, at which the once would be produced.

And the insistence of the plaintiffs was that the deponent be produced without -- within three days of tomorrow's hearing, if we lost the hearing.

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And three days, we believe, Your Honor, is just unreasonable in light of an Apex deposition that we feel with discovery ending on March 15th and agreeing to produce him prior to that, which is really just less than a month from now, would be a reasonable solution that would allow us to get to tomorrow's hearing and address this on the merits.

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Thank you, Your Honor.

THE COURT: Thank you.

And the opposition, please.

MS. GALLAGHER: Thank you, Your Honor.

You know, we're actually sorry this has had to go forward on an emergency basis. The Health Care Providers did provide an opportunity to have the deposition taken -- continued to

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accommodate the Court's schedule to hear the motion on the Apex doctrine, and the attempt to preclude, entirely, Mr. Rosenthal's deposition. And we thought that our offer to take it off calendar and then reconvene in the event the Court denies the motion within three days was a reasonable request.

And perhaps a little background in terms of how the deposition was scheduled is we actually indicated to United back in December, early December, in fact, that we intended to take Mr. Rosenthal's deposition, along with about 13 other witnesses. We invited an engagement -- a discussion about scheduling. Unfortunately we didn't hear anything.

And with the end of discovery approaching, we went ahead and we did notice the deposition. United did accept subpoenas for Mr. Rosenthal and the two other deponents that we'll take up at tomorrow's hearing.

And so, you know, to characterize it as unilateral and without giving a courtesy -- a professional courtesy, I just -- I wanted to set that full record straight, Your Honor, with respect to that.

But I think more important to what United was asking from the Health Care Providers is not just simply to reset it at some point between now and the end of discovery, which is currently set to close on March 15; but what they are telling us is that they are not complete with their document production, don't intend to be complete until April, and have proposed a four-month extension of discovery.

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And so what you saw in our opposition papers is discussion about that extension that they're seeking and also conditioning Mr. Rosenthal's appearance on the fact that if he does appear before they're complete with document production that they would ask us -- and they're demanding -- that we waive any entitlement to be able to recall him and ask additional questions if documents are produced.

So what we're seeing, sort of, is this squeeze on the Health Care Providers to have to agree to waiving certain provisions that are within their purview, within the Rules of Civil Procedure.

We can depose Mr. Rosenthal. You'll see our opposition come through probably while we're on the phone today, with respect to the Apex piece of it. I'm happy to get into that if Your Honor would like to, but you'll see our full written opposition this afternoon for that hearing.

We don't think that there is a basis to preclude him in the entirety. He does have first-hand knowledge. He injected himself into this case because he participated in negotiations. He participated in threats to the Health Care Providers representatives, that were then carried out. So we can talk about that specific merits discussion at the next hearing.

But with respect to the stay, we just simply weren't in a position nor should we be asked to be in a position to give up or waive certain rights. If United hasn't completed their document production, we do think it's well past due, given the Court's earlier

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orders with respect to -- especially the ones relating to Mr. Rosenthal and other executives' e-mails -- those were to be produced long ago, Your Honor. And that'll be an issue that we take up separately.

But certainly with request to the stay, we would ask if Your Honor is inclined to consider it, that in the event you deny the motion on the schedule date, which is the 24th, that you ask him to appear within a date certain. And that -- and also permit us to recall him in the event United discloses documents that are related to him or relevant to him or that the Health Care Providers have a reasonable ability to speak with him about. That would be only fair.

And the attempt to try and preclude us entirely or delay or put additional conditions is just simply something that we were willing to agree to, Your Honor, which is, unfortunately, I think, why we are here this afternoon.

I'm happy to answer any additional questions you may have.

THE COURT: All right. And I misspoke. We don't have anything tomorrow, but we do have things Wednesday.

And the deposition -- just give me an overall, because I -- there wasn't a lot to read here, other than the exhibits to the Motion to Stay.

Where are you on the eight 30(b)6 witness and is then the other six people that you had indicated in the December correspondence?

MS. GALLAGHER: Your Honor, I'm guessing you're asking

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me with respect to what was attached to the opposition. We --

THE COURT: No. I haven't seen the opposition yet. But --

MS. GALLAGHER: Okay. So with respect to the 30(b)6 witnesses, United, again, is indicating objections to the first one of a UMR deposition which is scheduled to go forward on Friday. They've indicated an objection.

We have attempted to meet and confer and have not had the opportunity to confer.

What I'm getting basically is similar to the other discussions about deponents, which is we won't produce them -- united is saying they won't produce them again, in the event they produce additional documents later -- essentially trying to hamstring us into this four-month proposed discovery schedule extension that they have made.

And they aren't willing to -- what they've indicate, recall deponents in the event that they do produce documents again. And so again, we're sort of left with no real choice here, Your Honor, based on the strategy that United is adopting, which is not producing documents, holding and withholding them, and then telling us that they don't want to produce anybody until after they've had -- they finished that production.

So it's simply just more of the same delay that we've been before, Your Honor, before on many occasions.

THE COURT: So you designated 14 depositions you wanted to take. Have any of them been taken yet?

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MS. GALLAGHER: No, Your Honor. We have had an objection or, you know, indication that United that the -- none of the depositions can go forward at this point. And so what they did was when we asked to increase the number of depositions by agreement, what they eventually came back with -- and it took them two and a half weeks to respond to our request -- is that what they came back with was we'll allow you 20 depositions in the event that you agree to this four-month extension.

And that's sort of where we are. And you know, unfortunately, we're not -- we're just not able to agree to that kind of tactic and continue to try and delay, and in the meantime impeding us from being able to depose anybody at all.

THE COURT: Okay. Thank you.

Mr. Roberts, your reply, please.

MR. ROBERTS: Thank you, Your Honor.

And in the 20 that we offered as a compromise is up from the 14, and the request prior to that was an increase to 25 depositions.

And it's not our intent to delay. We're just trying to make the process work efficiently. If there are 25 depositions that they want to take, we don't want to have everyone taken twice -- once now, and then another bite at the apple later on the grounds that they've got new documents.

So that has been our request -- not that they're required to delay. But if they want to go forward with some of these depositions

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now, that they waive the right to take everyone twice, if they insist on going prior to the entire productions being made.

The December e-mail did give us notice of Mr. Rosenthal and a dozen other people that they wanted to depose. But they never followed up with a specific request for Mr. Rosenthal's availability or date that would allow us to respond to this more efficiently.

And again, Your Honor, we're not trying to delay things. We've been producing thousands, if not tens of thousands of documents. And we've been doing our best to comply with the Court's orders. We should be complete within the four months that we proposed, with an orderly taking of depositions. And that -- all we're asking for is just a little time and the Court denies our request on the merits.

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You know, three days -- it's not just that Mr. Rosenthal is a CEO with a busy schedule, you know -- we're dealing with a lot of very busy lawyers, you know, who, it's hard to coordinate a date within three days for a group like this.

And with 25 or 20 depositions to go on their side and the same amount on our side, Your Honor, I just think we need to inject some civility and professionalism into the scheduling to allow us to get through that, Your Honor.

THE COURT: All right. So this is the defense motion to stay a deposition that's scheduled tomorrow of original CEO, which would be the first deposition taken in the case.

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I'm going to grant it so that we can hash everything out on Wednesday. And that way I'll be -- I'll have the ability to be more prepared. I'm not addressing the Apex argument at this point.

But my normal course in business court cases is to require the 30(b)6 witnesses to testify before we get to the C-suite. So that being said, of course, I keep an open mind to both sides and keep an open mind to your arguments on Wednesday.

I am assuming that this motion Wednesday can't go forward on a stacked calendar. Would everyone be available at 1:00 so that you can have the time you need?

MS. GALLAGHER: Yes, Your Honor. The plaintiffs have communicated with your court staff that they are available at 1 o'clock on Wednesday afternoon.

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THE COURT: Mr. Roberts, your team?

MS. LLEWELLYN: Your Honor, we had also communicated with your court staff that we are available at 1 o'clock.

THE COURT: Okay.

MR. ROBERTS: [Indiscernible], thank you, Brittany.

THE COURT: All right. Thank you.

The JEA is out today. I get to go to the office tomorrow for the first time since January 10th, I think. So I will be in the courtroom with you on Wednesday at 1:00. So -- and we can have up to 9 people there, but there are four of us. So that's just in case anyone wants to appear in person.

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So Mr. Roberts to prepare the order. It's -- be clear that it's a temporary stay pending resolution of the motions on Wednesday. And then --

MR. ROBERTS: I will do that, Your Honor.

THE COURT: Thank you.

Who from the plaintiff's side will approve the form of the order?

MS. GALLAGHER: I will, Your Honor. Thank you.

THE COURT: Okay. And is that Ms. Perach?

MS. GALLAGHER: Ms. Gallagher. Thank you.

THE COURT: Oh, I'm sorry. Thank you, Ms. Gallagher. I didn't -- when I don't see the faces, it makes it harder.

Okay. You guys, anything else to do today, until I see you Wednesday at 1:00?

MR. ROBERTS: Nothing for the defendants, Your Honor.

THE COURT: All right. And then see you Wednesday.

MR. ROBERTS: Thank you, Judge.

MS. GALLAGHER: Thank you.

MS. LLEWELLYN: Thank you, Your Honor.

[Proceeding concluded at 1:46 p.m.]

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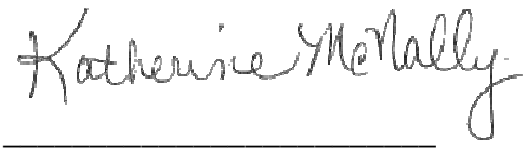
ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



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DISTRICT COURT

CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA) LTD., Plaintiff(s), vs. UNITED HEALTHCARE INSURANCE COMPANY, Defendant(s).	CASE NO: A-19-792978-B DEPT. XXVII

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE
THURSDAY, FEBRUARY 25, 2021

RECORDER'S TRANSCRIPT OF PROCEEDINGS
RE: MOTIONS

APPEARANCES (Attorneys appeared via Blue Jeans):

For the Plaintiff(s):	PATRICIA K. LUNDVALL, ESQ. KRISTEN T. GALLAGHER, ESQ. AMANDA PERACH, ESQ.
For the Defendant(s):	COLBY L. BALKENBUSH, ESQ. BRITTANY M. LLEWELLYN, ESQ. NATASHA S. FEDDER, ESQ. LEE K. BLALACK, ESQ. DENISE ZAMORE, ESQ. RYAN WONG, ESQ.
SPECIAL MASTER:	DAVID T. HALL, HON.

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

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LAS VEGAS, NEVADA, THURSDAY, FEBRUARY 25, 2021

[Proceeding commenced at 12:01 p.m.]

THE COURT: Okay. It's 12:01. I'm going to call the case of Fremont Emergency versus United Healthcare.

Let's take appearances, please, starting first with the plaintiff.

MS. LUNDVALL: Good afternoon, Your Honor. This is Pat Lundvall from McDonald Carano --

THE COURT: Thank you.

MS. LUNDVALL: -- appearing on behalf of the Health Care Providers.

THE COURT: Thank you.

MS. GALLAGHER: Good afternoon, Your Honor. Kristen Gallagher, also on behalf of the plaintiff Health Care Providers.

THE COURT: Thank you.

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

THE COURT: Thank you.

And for the defendants, please?

MR. BALKENBUSH: Good afternoon, Your Honor. Colby Balkenbush, appearing for the defendants.

THE COURT: Thank you.

MS. LLEWELLYN: Brittany Llewellyn, also behalf of defendants.

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THE COURT: Thank you.

MS. FEDDER: Good afternoon, Your Honor. Natasha Fedder, also on behalf of the defendants.

THE COURT: Thank you.

MS. FEDDER: And I believe my colleague -- oh, I'm sorry, Your Honor, to interrupt you.

THE COURT: I'm sorry that I interrupted you. Go ahead, please.

MS. FEDDER: Oh, I believe my colleague, Lee Blalack, will be joining as well, and perhaps only via audio, but he intends to join.

THE COURT: Thank you. Any other --

MS. FEDDER: And, Your Honor, we also have our --

I'm sorry, Your Honor.

THE COURT: I need to slow down when we do these remotely. My apologies again.

MS. FEDDER: No problem at all. Your Honor, we also have our client with us this afternoon. And I would like to give her an opportunity to introduce herself, please.

THE COURT: Thank you.

MS. ZAMORE: Good afternoon, Your Honor. This is Denise Zamore with United Healthcare. I also have my colleague on the line -- I talked to him a moment ago -- Ryan Wong. He's also counsel for United Healthcare.

THE COURT: Thank you. And welcome.

MS. ZAMORE: Thank you.

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THE COURT: Any other appearances?

Okay. All right. So --

SPECIAL MASTER HALL: Yes. Good afternoon. This is David Hall. I'm on as well.

THE COURT: Thank you for joining us, Special Master.

All right. So we've got a number of motions on today dealing with depositions and protective orders.

And when we -- after we had our hearing on Monday where I kind of indicated to you guys that I thought it made sense to do 30(b)6 and work your way up the ladder, I spoke with the Special Master after that. I did make a disclosure via minute order with regard to that conversation.

So who is the spokesperson for the defendant?

MS. LUNDVALL: That would be me.

Excuse me, Your Honor, for the defendant, you asked for.

THE COURT: All right. So today --

MS. FEDDER: Yeah, Your Honor. For the -- Your Honor, for the defendant, Natasha Fedder.

THE COURT: Okay. Good.

Now, just to let you guys know, I'm finally back to work, which is great. I was working anyway, but I can actually be here now. The system is voice-activated, but I have your pictures on a TV screen. So when I look away, it means that I am paying attention to your arguments.

So, Ms. Fedder, your motions, please.

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MS. FEDDER: Thank you, Your Honor.

Is there a particular order you would like me to present them in?

THE COURT: No.

MS. FEDDER: Perhaps the order filed or I can take them in a different order, whatever is agreeable to you.

THE COURT: However you choose to present.

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

I think we'll start with -- Your Honor alluded to the order -- the motion we made for a protective order with respect to Mr. Rosenthal's deposition, so I think I will start there this afternoon.

So, Your Honor, as you know, we are seeking a protective order to prevent Mr. Rosenthal's deposition from going forward as noticed.

By way of background, the named plaintiffs in this case are professional corporations that provide emergency medical services. But this is really a case brought by their affiliate TeamHealth, which is a large, for-profit, private equity-backed company.

Plaintiff's complaint includes allegations pertaining to unsuccessful negotiations that took place in the late 2017 and 2018 time frame between United employees and TeamHealth employees whom the plaintiffs describe as their representatives.

Although we dispute plaintiffs' factual allegations, we agree that negotiations between United and TeamHealth occurred.

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We also agree that Dan Rosenthal was involved in those negotiations. But, importantly, he was not the only one involved, such that he has unique knowledge of those negotiations, nor was he the lead negotiator or even involved day to day.

Angela Nierman, whose deposition plaintiffs have also noticed, is United's national vice president of contracting strategy. And she was the United employee who was primarily responsible for decision making relating to United's national contracting and contract negotiations with TeamHealth. She submitted a declaration to that effect in support of this motion.

Plaintiffs have noticed ten depositions in the past few weeks without extending United the professional courtesy of conferring as to dates and witness availability.

Plaintiffs noticed Mr. Rosenthal as the lead-off deposition, followed by Ms. Nierman and seven 30(b)6 deponents. All seven 30(b)6 deposition notices include the following topic: Negotiations between you, i.e., United, and the Health Care Providers regarding contractual arrangements and your reimbursement rates, slash, methodologies, with respect to the provision of emergency services and care to United members from January 1, 2017, to the present.

The notice defined -- the notices defined the Health Care Providers to include their affiliates and related entities, i.e. TeamHealth.

United is moving for a protective order to prevent the deposition of Mr. Rosenthal under Nevada Rule of Civil Procedure

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Nevada courts recognize that federal cases interpreting the Federal Rules of Civil Procedures are strong, persuasive authority because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.

The District of Nevada in *Luangisa versus Interface Operations* applied Federal Rule 26C to recognize the apex rule which states that where a party seeks the deposition of a high-level executive, or apex, the Court may exercise its discretion under the federal rules to limit discovery.

In determining whether to allow an apex deposition, courts consider, first, where the deponent has unique, first-hand, nonrepresentative knowledge of the facts at issue in the case; and, second, whether the party seeking the deposition has exhausted other less-intrusive discovery methods.

The District of Nevada in *International Game Technology versus Illinois National Insurance Company* recognized that courts have discretion to prohibit apex depositions given the tremendous potential for abuse or harassment that exists for such discovery. Numerous other states and federal courts have adopted this rule as well, as we have set forth in our papers.

We respectfully submit that the Court should apply this rule to prevent Mr. Rosenthal's deposition.

Plaintiffs do not contest that Mr. Rosenthal, who is United's regional chief executive officer for United Healthcare's

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employee and individual business is an apex. United has put forward the declaration stating that Ms. Nierman, not Mr. Rosenthal, was the one with primary responsibility for decision making related to United's contract negotiations with TeamHealth, and that Mr. Rosenthal was not involved in the day to day of those negotiations. On the face of this evidence, plaintiffs have not carried their burden to demonstrate that Mr. Rosenthal has unique, first-hand, nonrepresentative knowledge of United's negotiations with TeamHealth.

The standard is not whether Mr. Rosenthal was directly involved or whether Mr. Rosenthal lacks knowledge altogether. It is whether he has some unique knowledge that plaintiffs cannot obtain from either Ms. Nierman or any of the seven 30(b)6 deponents.

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The e-mails plaintiffs point to do not establish that Mr. Rosenthal has such unique knowledge. Indeed, Mr. Rosenthal is not the only United employee on any of those e-mails. Furthermore, plaintiffs have not and cannot establish that they have exhausted less intrusive discovery methods, mainly deposing other lower-level employees.

To date, no depositions have taken place, though plaintiffs have noticed the depositions of Ms. Nierman and the seven 30(b)6 deponents who are able to speak to negotiations between United and TeamHealth.

In short, Your Honor, plaintiffs seek to depose Mr. Rosenthal as the lead-off deposition, but they have not made the

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showing that would justify deposing an apex like Mr. Rosenthal right out of the gate. And for these reasons United respectfully requests that the Court enter a protective order to prevent Mr. Rosenthal's deposition from going forward as noticed.

Thank you, Your Honor.

THE COURT: Let's argue all three motions and then we'll have one consolidated response -- opposition.

MS. FEDDER: Yes, Your Honor. Would you like me to take next the motion for --

THE COURT: Nierman, then Paradise.

MS. FEDDER: Yes, Your Honor. Your Honor, we are seeking a protective order to prevent the depositions of two United vice presidents, Angela Nierman and Rebecca Paradise, from going forward as noticed.

On February 9th, plaintiff noticed these depositions for February 24th and 25th, again without asking United for the availability of these two senior level employees. Ms. Nierman and Ms. Paradise are not available on these dates. And furthermore, document discovery is not yet complete, and United has moved the Court for an extension of the schedule that would allow for these and all depositions to proceed once document discovery is complete or substantially complete.

Your Honor, before I go further, I want to make clear that there is no dispute that Ms. Nierman and Ms. Paradise are relative witnesses, and there is no dispute that plaintiffs can depose them as

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fact witnesses. Our objection is to the timing of plaintiffs' notices.

And this motion is bound up in the larger question of how we are going to conduct discovery in this case. Not only are Ms. Nierman and Ms. Paradise not available on the notice dates, document discovery is ongoing on both sides. United has produced over a hundred thousand pages of documents, whereas plaintiffs have produced less than half of that. Both sides have assured the other that more documents are forthcoming.

In particular, the parties only recently reached agreement on a protocol to govern electronic discovery. And while both parties had produced some e-mail prior to reaching agreement, e-mail discovery had not begun in earnest until recently. The parties are also in the process of negotiating a claims-matching protocol that would limit the scope of the discovery that is specific to the 22,153 health benefit claims at issue in this case.

All that said, given certain discovery disputes that the parties have raised with each other informally, it's likely that Motions to Compel are also forthcoming.

In light of the current state of the record, United proposed an extension of all deadlines to plaintiffs and ultimately moved for an extension earlier this week because that was the deadline to do so and the parties had not yet reached agreement.

Plaintiffs responded with a counterproposal. Although plaintiffs' counterproposal does not, in United's view, present a reasonable extension, United has requested from plaintiffs and

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remains open to a different counterproposal. All that said, it appears both parties agree that an extension is appropriate and the discovery is outstanding.

In United's view, respectfully, the Court should extend the current case management schedule, and Ms. Nierman and Ms. Paradise should be deposed when document discovery is substantially completed. Plaintiffs should not be able to proceed with these depositions now and still reserve the right to come back and depose these same witnesses a second time when they know full well that additional relevant documents will be produced after the first round of depositions.

In addition, Your Honor, the issues we raise this afternoon are not unique to Ms. Nierman and Ms. Paradise. Plaintiffs have noticed seven 30(b)6 depositions for dates prior to March 15th, again, without conferring with United as to witness availability, and have also asked United's consent to an increase of the presumptive deposition limit from 10 to 25 fact witnesses per side.

United has made this motion and has moved for an extension of deadlines to facilitate a process where the parties can meet and confer, set a schedule for that accounts for witness availability and completeness of the record, and ensures that witnesses are deposed only once.

For these reasons United asks the Court to enter a protective order to preclude these depositions from going forward on the notice dates. We also ask the Court to hold the issue of when

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these depositions should proceed until next week, when the Court rules on United's motion for an extension of the current schedule.

Thank you, Your Honor.

THE COURT: Thank you.

And the opposition, please.

MS. LUNDVALL: Thank you, Your Honor.

We have divided up the motions between us. I'm going to handle Mr. Rosenthal's, and Ms. Gallagher then is going to handle the protective orders in dealing with Ms. Nierman and Ms. Paradise.

Let me start, though, with Mr. Rosenthal. One of the things -- and maybe I'm a little bit old school in this regard -- but what I did is I took a look at their motion to see specifically what it is that they wish with Mr. Rosenthal. And what they're asking the Court to do is to prohibit his deposition outright -- not to delay it, not to sequence it, not to time it, not to have him come in at some later stage in the proceeding -- but to prohibit it outright. So I think that that is the context in which that the Court has to consider then their motion for a protective order.

When you look at each and every one of the cases that have been cited by both sides dealing with the apex doctrine, there is a common denominator among all of those cases and that common denominator is that even if there's been a demonstration by United that this witness is an apex witness -- which we do dispute in that counsel for United has misrepresented our position on that particular point -- but if that particular witness does have personal

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knowledge that the related to the litigation, then, in fact, the deposition cannot be prevented.

He or she with personal knowledge related to the dispute that's at issue cannot be precluded from being deposed. That is the common denominator that exists from among all of those cases.

So let me talk to you first and foremost then to get a context then as to the personal knowledge that we have been able to glean then from the documents and from the information that's been made available to us about Mr. Rosenthal's role in this matter.

As the Court knows from its review of our first amended complaint, there's really two time frames that are at issue in this case. The first time frame that's at issue is the 8 to 10 years that preceded the parties' dispute for which that there was a pattern of practice and a course of conduct by which that the Health Care Providers would provide medical care to the members that were covered by United and that United would pay then those covered claims based upon specific rates and based upon specific networks. That all changed in 2017.

And the second time frame that is at issue in this case is the 2017 to 2019 time frame. That's when the positions began being taken by United that they were going to slash payments, arbitrarily, in the event that we did not go into network with them. They said that they would begin slashing those payments across the board -- first by 33 percent, that they would then ratchet down to 40 percent to 50 percent, and now where we're at, at this point in time, upwards

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of 70 and 80 percent then of any of the billed charges that we had submitted. And all of this was a threat that was given to us in the event that we did not accept the contract that was being proposed to go in-network and that was under negotiation.

And who was doing that negotiation? None other than Dan Rosenthal. So how do we know this? He has personal knowledge because, on December 20th, he participated in a face-to-face meeting in Nashville, Tennessee, with various representatives then of the Health Care Providers. At that time, Mr. Rosenthal threatened to implement what he called a benchmark pricing program against the Health Care Providers that was going to have an effective date of March 31st, 2018, if the Health Care Providers did not accept the in-network proposal that was being offered by United.

That benchmark pricing program, as I described, was going to be a reduction that was going to ratchet upward or downward, however you wish to describe it. But, in other words, sequentially across time that if we did not accept their in-network program that slowly, but surely, the squeeze on us from a financial standpoint was going to get tighter and tighter.

After that meeting in December of 2017, in which Mr. Rosenthal participated and took the lead on behalf of United, he sent an e-mail. And we've given a copy of that e-mail then to the Court. It's part of our errata to underscore then the role in the personal knowledge that Mr. Rosenthal has relevant then to this

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dispute. He sent an e-mail on December 22nd of 2017. It is found at DEF 01777, and it came from Mr. Rosenthal himself.

He begins that e-mail by thanking and describing the honest and open dialogue that had been engaged in at that meeting. And then let me go on to read portions of the message then that he sent. He speaks in that message on December 22nd of 2017, that after reviewing my notes -- and then he goes on to identify a four-part program or four ideas or four suggestions that he wanted to implement -- now, have we received those notes from Mr. Rosenthal? No.

But he goes on to say, after identifying these four points -- and I'm going to read out loud, and I'm quoting here: Please let me know if I've accurately captured our discussion points and if you would like to add or change anything. Additionally, let's consider spending time with our respective teams on these items after the holidays, and then let's schedule another session in about a month. We are ready to fully engage with TeamHealth and to become your premier business partner. And as I think you already know, you have my personal commitment to continue to work together and to achieve our shared goals.

Mr. Rosenthal's personal commitment to achieve what he claims were shared goals.

There was a follow up then in about a month. And at that month -- during that follow up then there was another message that Mr. Rosenthal sent to a representative then of the Health Care

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Providers. That follow-up message can be found at DEF 10775. And we also supplied that e-mail then to the Court.

In the message that was sent by Mr. Rosenthal to the representatives of the Health Care Providers, he starts by saying he's thanking -- it's a message that was sent on January 24th of 2018. And he talks -- he expresses his thanks to begin with. But then he goes on, in the third line, where he says, For UHC, I'll continue to provide overall leadership -- and he identifies two additional folks that he's going to provide that overall leadership. You can let me know if I'm missing something, and we can ensure our respective teams are activated and stay engaged with support from you and me.

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Now, who is he sending this to? He's sending this message then to the apex witness for the Health Care Providers -- the same apex witness for which that the United wishes to take a deposition of, and the same apex witness then for which that we're in the process then of working through some dates then to be able to supply so that our apex witness can provide testimony about these very meetings and about these very negotiations.

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These are the same meetings that United wants deposition testimony upon, but they suggest that somehow that we should be denied that same access.

Mr. Rosenthal, in his message then to the Health Care Provider representatives, goes on to say that he's going to stay close with Nina -- and he identifies earlier who Nina is -- to lend support

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and look for broader opportunities.

Thereafter, in May of 2018, Mr. Rosenthal, himself, attended a two-hour meeting in Minneapolis, Minnesota, along with various representatives of the Health Care Providers.

How do we know that he attended that? We also gave you GEF 1010890. It was a meeting that originally John Haben was supposed to attend. John Haben identifies the fact that he can't attend, but Dan Rosenthal is going to come in my place. He's in town and he will meet with you -- and meet with us he did.

And during that period of time, it was a two-hour period of time, he prevented -- he presented a schedule of impacts that was going to be in place as a result of this benchmark pricing program that they were suggesting. That schedule identified all of the various TeamHealth affiliates, but it also specifically lined them out one by one.

When you look at the Nevada affiliates, the Health Care Providers that are the plaintiffs in this action, what you see is a delta for just one of those of $20 million. Just one of a delta of $20 million if this benchmark pricing program then -- that was being threatened upon us is going to be put in place.

Now, after that, the Health Care Providers continued to negotiate with Rosenthal. And there was back and forth then all the way through August and toward the end then of 2018 through various different proposals.

In November, John Haben, who is the first lieutenant then

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for Rosenthal, he then sent a message saying that they were going to then go hard, basically, and implement this benchmark pricing program, and it was now going to be at the 50 percent level. And at that point in time, it was communicated to us that this was being done at the direction then of Mr. Rosenthal.

Thereafter, it is our understanding, based upon communications that were given to us, that sometime in 2019, Mr. Rosenthal then took a different position. But it is that relevant time frame from 2017 through the 2018 time frame, through the end of 2018, that he continued to have a role.

And we believe he also continued to have a role then in the termination letters that were being sent then to the hospitals urging them, or informing them, as far as their relationship then with TeamHealth. We know that because there was a letter that was sent, and we appended a copy of the article describing this letter that it was sent and authored by Mr. Rosenthal to the Envision Hospitals. And the Envision Group is another group that is similar to the description that United wishes to -- how it wishes to describe the Health Care representatives -- in other words that they're affiliates of each other, and that they have, in their words, investment backing.

These two groups were the specific target then of Mr. Rosenthal and this implementation of the benchmark pricing program. That benchmark pricing program is the one that is at issue in this litigation. And it is as -- it is at issue in this litigation front and center particularly for our claims that [indiscernible] in the unfair

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trade practices, the bad faith, and the RICO claims.

So when we described in our opposition papers that Mr. Rosenthal was literally the pitcher in this game of hardball, we were being accurate about that, based upon the information that we had and based upon the information that we want to receive from him.

So when they describe him as not being involved, he's merely incidental, he had no real direct involvement -- that's not an accurate picture and it is not an accurate description.

So let me turn then to the legal analysis then under this motion before the Court. As this Court is well aware, Nevada has not adopted the apex doctrine, and it is questionable as to whether or not it will. But whether we analyze this motion for protective under -- order under the apex doctrine or under a standard Rule 26C, the burden of proof continues to be on United to demonstrate that there is some reason why an individual with personal knowledge related to the litigation must not or cannot sit for a deposition.

The first and foremost thing that other courts, the minority of the courts, have required is for there to be a showing that, in fact, the deponent is actually an apex corporate officer. And this is where I think that the declaration that has been offered by Ms. Newman -- I don't know if it was intended; I don't know if it's oversight.

But they lead a reader to believe that somehow that Mr. Rosenthal is second in line to the publicly-traded company that is United Health Group. Mr. Rosenthal is not. That's not accurate.

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In fact, they've made no demonstration that, in fact, that he is an apex officer.

All they have done is to identify at a third tier level that, in fact, that he is an employee of United Healthcare Services Inc. And from the materials that we've been able to pull from Edgar on the public filings on the different and the tertiary levels then of ownership is that it appears that this is now a third tier level entity, and this third tier level entity is one of many, many that are listed.

And so to the extent that I want to make sure that the Court is well aware that we're not talking about the publicly-traded entity that is a defendant in this action, and that he's not second in command of that publicly-traded entity, but it appears that he is now at least in a third tier level down.

They've also made no showing that, in fact, that sitting for a deposition is a severe hardship for him in light of his obligations. That is another common denominator that the cases in which that have embraced and adopted the apex doctrine have suggested that there has to be some demonstration that whatever deponent that they are contending or claiming that there is an apex relationship to, that this is somehow a severe hardship based upon their position.

The suggestions that have been made by the cases talk about offering some demonstration that there's a likelihood of business disruption. There's been no offer of such that had been made in dealing with Mr. Rosenthal sitting for a deposition. Or the number of people that report to him that would be adversely

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impacted if, in fact, that his -- he has to sit for a deposition. There's been nothing of that nature that has been suggested.

In fact, they've done nothing to discharge their burden of proof on what adverse impact might be on the company or any of the companies that are litigants in this case, if Mr. Rosenthal is required to sit for a deposition.

In addition, they suggest that somehow that they want to sequence our discovery. And they want us to take the deposition of others before we take him. That's been implied. That's not what their papers state, but that's been implied in the oral presentation by Ms. Fedder.

But, as you well know, they've objected to the deposition then of Ms. Nierman and Ms. Paradise. We tried to take the 30(b)6 depositions. We identified then a laundry list of topics for which that we wish to take those depositions. And what did we get? We got a whole laundry list of objections back. And there's been an on and off -- an ongoing back and forth that's gone on for about two to three weeks then over whether or not that any of those objections then are legitimate, if there's a need for some type of a modification of those notices, so as to adequately put them on a notice that, in fact -- of who they need to prepare and who they need to bring to the deposition.

And then we were told that even once that they agree to some type of a notice of a 30(b)6 deposition, it's going to take them 30 days to identify and educate and produce then a witness so as to

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be able to sit for a deposition.

So what do you end up with? You end up with a two-month process that even exceeds then the amount of time that they're suggesting for an extension of a discovery cutoff.

So this is the game that is being played vis-a-vis these depositions.

But the most important thing that I think that I wish to impress upon the Court and that is this from the case law, the case law does not allow an executive, no matter what level that they may be at, to escape from sitting for a deposition if, in fact, that they were directly involved in the dispute. And Mr. Rosenthal was directly involved in the dispute.

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This is a network dispute. They acknowledge that he was in charge of networks. We've got a series of e-mails that identify then that he was involved in these meetings and that we know that he was involved in these meetings because our representatives then actually met with him and conversed with him and corresponded with him. And the threats dealing with the benchmark pricing program, and the eventual squeeze and the ratcheting that was going to be implemented then against the Health Care Providers, who did that come from? It came from none other than Dan Rosenthal.

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So to the extent that we have discharged then our demonstration or discharged any obligation that we may have, even if the apex doctrine would be applied, that he does have personal

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knowledge related to this litigation, and therefore must sit for a deposition.

And because the burden of proof has not been discharged by United, they have not demonstrated that he is an apex witness. They have not demonstrated that there will be some type of an undue burden upon him as an apex witness, if he, in fact, is required to sit; and nor have they demonstrated that he lacks personal knowledge related to this litigation.

And therefore we would ask the Court then to deny the motion for a protective order that has been proffered by United.

And from here, I'll turn it over to Ms. Gallagher to speak to the issues then dealing with Ms. Paradise and Ms. Nierman.

THE COURT: Thank you.

MS. LUNDVALL: Kristen, you're on mute at this point.

MS. GALLAGHER: Then I'll start again.

Good afternoon. Good afternoon, Your Honor. Kristen Gallagher, on behalf of the plaintiff Health Care Providers.

We were put in what I would call an untenable position with respect to the response from United regarding Ms. Nierman and Ms. Paradise's deposition. We were given two choices that were basically no choice at all. The first is agree to a four-month extension of the discovery and the firm trial setting; and the second was, if you want to have them produced and appear for a deposition, that we would have to agree to waive any ability to recall them once United produces additional documents. And so, as you can see, that

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was simply not a choice at all.

The most concerning part of this dialogue that is developing is that United has admitted that it has not completed -- nearly completed discovery. It may not for two months or longer, depending on which document you read.

And what's most concerning is that they continue to point to the ESI protocol as a basis for delay in review of e-mail documentation.

Your Honor is well familiar with -- we've had an order in place since October of 2020 that indicated that waiting for an e-mail protocol or an ESI protocol would not be an appropriate reason to stay United's review and production of documents. And we know since at least June of 2020 that United has had 100,000 e-mail documents in connection with just two RFPs that are at issue in this case, and they've been compelled to produce.

And it appears what I'm hearing through the documents briefing and through the oral presentation today is that United simply hasn't, in earnest, I think is the -- the description -- has not in earnest reviewed or produced those e-mails.

So from that perspective, what we are seeing is an intentional decision not to produce documents in this case, and then using that as leverage against the Health Care Providers. You either wait for our documents that we will produce at some point or you waive the ability to bring these witnesses back when we do produce documents.

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This isn't simply just a scheduling issue, based on what this exchange is. And I think it's important we lay this out in our opposition to know that there is a history. This wasn't a unilateral setting of depositions.

The Health Care Providers previewed this back in December of 2020. We included Ms. Nierman and Ms. Paradise on that list. We did invite United to engage with us on scheduling. We didn't hear anything, which is their prerogative. However, what we did then is, one, ask for an increase to the number of depositions; and then two, issue -- start issuing the notices of deposition to which United did accept the deposition subpoenas on their behalf.

And so instead of trying to simply find another date, what we see is United trying to secure the extension that they haven't been able to get so far from Your Honor, through other ways. They've asked for an extended period of discovery from the beginning. They've indicated that they have repeatedly tried to extend this discovery period.

And so here we are now in a manufactured situation that has put the Health Care Providers in a position essentially of no choice that would be beneficial to them, that would allow them to prosecute this case, in a manner that is appropriate.

You know, I think that the purposeful withholding of documents is problematic, especially because if we put it in perspective, you know -- and I like to refer to how many thousands of pages of documents that they've produced. I think it's important

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to put it in the categories that have actually been produced. So 91,000 pages of at-issue or administrative records and leaving us with about 3400 documents that are otherwise not administrative or not contract documents.

So that puts into perspective just sort of the lack of documentation regarding e-mails or other exchanges that we would have then expected at this point. And certainly their use and their inability to produce those documents should not then allow them to basically take over this extension that they have asked for.

Ms. Fedder, I think, made reference to the fact that they are open to a counterproposal from the Health Care Providers. We did make a counterproposal. Our proposal was to extend deposition discovery for a period of 30 days. However, I heard back yesterday from United's counsel that that is not acceptable. The only acceptable offer from them is something that changes the schedule entirely, including the trial date.

So that is where we are at this point, Your Honor. We do not believe that we -- that United has met their burden in regard to this. As you know, they have to show that there's some sort of undue burden, some other harassment in forms of why Ms. Nierman or why Ms. Paradise cannot be deposed. It's simply a situation of their own making in terms of what the burden would be, which is simply just having them come back for additional time with us, if there are documents that are responsive and include them and are relevant to their deposition. And so the burden really isn't great.

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So what we would ask for, Your Honor, is an order compelling their depositions immediately within seven days, and then allowing us to recall them once United does produce documentation.

Thank you.

THE COURT: Thank you.

And the opposition, please.

MS. FEDDER: Yes, Your Honor. Thank you.

Bear with me just one second. I'm just collecting my thoughts to be able to respond.

I think the first thing I'll say is I -- in response to plaintiffs' point about the apex, I certainly don't mean to misrepresent their position. I understand from Ms. Lundvall's presentation that they dispute the point that Mr. Rosenthal is an apex, and I respectfully disagree with that position.

The declaration that we submitted from Ms. Nierman is based on our internal organization chart. And according to that chart, Mr. Rosenthal is at the third level below the president of the publicly-traded entity United. And I've confirmed that with our client who is present today, so we are -- we are comfortable with the representations that we've made and the declaration that they are accurate.

Taking a step back, Ms. Lundvall went through a series of allegations. And I think it's important for us to note that we do not agree with those allegations. We dispute the allegations that she's

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made. But none of those allegations really respond to the argument that we are making this morning.

Briefly, the -- Your Honor, the issue is not whether Mr. Rosenthal has relevant knowledge. Every apex challenge necessarily involves a request for testimony from a witness who has some relevant knowledge. Otherwise, that witness would not be subject to deposition discovery at all.

The issue here is with respect to the sequencing that I will get into in a moment.

But just briefly, to respond to Ms. Lundvall's allegations with respect to Mr. Rosenthal's role, we believe the record will show that in October of 2017, Miles Snowden of TeamHealth reached out to Mr. Rosenthal regarding various opportunities for collaboration between TeamHealth and United. This outreach led to a December 2017 meeting between Leif Murphy and Miles Snowden, both of TeamHealth, and Mr. Rosenthal and Chris Parillo of United.

In January 2018, Mr. Rosenthal sent a follow-up message designating Mr. Parillo and John Haben as lead negotiators. And from that point forward, virtually every communication was with Mr. Haben and Mr. Parillo -- not Mr. Rosenthal.

When Mr. Haben's involvement in the negotiations stopped in 2019, he handed his role off to Ms. Nierman, who we've discussed earlier today. The negotiations never came to fruition. But Mr. Rosenthal did not play a role that would imbue him with unique knowledge that the lower-level employees involved in the

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negotiations do not have.

Your Honor, Ms. Lundvall addressed burden. It's our position that the burden is on the plaintiffs. But either way, Your Honor, this is not a close call. Plaintiffs have not deposed a single witness in this case.

The deposition of an apex like Mr. Rosenthal is premature because plaintiffs have not taken the deposition of any lower level employee with direct knowledge. And to that point, Your Honor, we are not, at this stage and on this record, asking you to rule that Mr. Rosenthal can never be deposed in this case. That issue is not ripe.

We are asking you to rule that he may not be deposed before other depositions occur. And on that point, Your Honor, we don't think if we -- we don't think that you need to make a ruling regarding the apex rule to be able to address our motion.

You have broad discretion. The Court has broad discretion under rule -- Nevada Rule 26 to manage discovery in a way the Court deems reasonable and orderly. Whether the Court proceeds under the apex rule or Nevada Rule 26, the Court has authority to enter an order to prevent Mr. Rosenthal's deposition from going forward as noticed, prior to any other deposition.

In our view, as a practical matter, the outcome is the same either way. Plaintiffs are prevented from deposing Mr. Rosenthal now. If they believe, after deposing other witnesses, that he has some sort of unique knowledge, the parties will meet and confer.

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And either we will produce Mr. Rosenthal voluntarily or we will make a similar motion at that time.

Your Honor, I also wanted to offer a response to Ms. Lundvall's point regarding our own deposition notices. It is accurate that we have noticed Mr. Leif Murphy -- or we have communicated to plaintiffs that we intend to notice Mr. Leif Murphy. We've reached out to them to request dates of availability.

But as we made clear to plaintiffs in that communication, we do not think it is prudent to go forward with depositions now, prior to the completion of facts discovery. If an extension is granted in the manner that we've encouraged, then we may change our approach and we may not take all of the depositions that we intend to notice today.

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But given that the current discovery deadline stands at March 15th as of now, we need to serve these notices within the notice requirements of the Nevada rules to protect our clients' rights to take discovery.

So again, Your Honor, we're not asking at this stage and on this record that you rule that Mr. Rosenthal can never be deposed in this case. We are, however, asking that you rule that he may not be deposed before other depositions occur.

Your Honor, I can proceed to replying to Ms. Gallagher's opposition, but I wanted to pause to ask if there are any questions that I may respond to from you.

THE COURT: No questions. Thank you.

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MS. FEDDER: Thank you, Your Honor.

Moving to Ms. Gallagher's presentation, I would like to address a few points. First, Your Honor, just as a practical matter, given the current state of the record, if we start taking 15 to 20 depositions per side with document discovery incomplete, we're just going to get into this all with the knowledge that there will be future motions practice. We think that that is avoidable with the schedule extension that we have moved for.

We are not dictating to plaintiffs when they can take depositions. We're simply saying that we will not voluntarily produce witnesses more than once. We wish to make clear that if the Court denies our extension motion, we will produce these witnesses before March 15th, in accordance with the Court's ruling. But if the Court grants the extension and plaintiffs insist on proceeding with these depositions prior to completion of fact discovery, we will be back in front of you.

In candor and fairness, we have informed plaintiffs and the Court that neither party is finished with document discovery -- and I emphasize neither party. And we are not going to voluntarily produce witnesses a second time after the document discovery that we're saying isn't complete has been completed.

Taking a deposition, collecting documents that you knew were outstanding at the time when you took it, and then seeking to use those documents to take another bite at the apple is not good cause. Unexpected late productions are one thing, but trying to

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redepose a witness whose document production you knew was incomplete when you deposed for the first time is another.

Again, Your Honor, the Court has broad discretion to manage discovery, as you know. And we think the most rational approach is to set a discovery schedule such that document discovery can be substantially complete before depositions commence.

In response to Ms. Gallagher's point that United is manufacturing this delay -- that is simply untrue. And I don't think anyone could look at the record today and say that United is not pulling its weight in terms of discovery. We have produced e-mail to date. We have produced over 500 e-mails and attachments.

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And as I indicated in my opening presentation, we retained a team of contract attorneys to assist us with mail review and production going forward, to be able to conduct that in a more efficient manner.

Ms. Gallagher divides our productions into categories. But I will say that those categories are not meaningful in terms of the amount of work that it took to collect and produce all of those documents. It's taken tremendous efforts on the part of United to collect and produce the administrative records that Ms. Gallagher described. We've also produced market data and claims data. We've retained a contract -- or excuse me -- a consulting expert, as we have indicated in our papers to assist us with those productions. We've provided claims matching data to plaintiffs in the interest of

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facilitating the claims-matching protocol negotiation that I referenced earlier.

In short, you know, we've undertaken significant efforts and we've invested significant resources in discovery, and we are continuing to do so. And we are certainly not manufacturing any sort of delay here.

And I will note that in December when we engaged with defendant -- excuse me, with plaintiffs regarding the initial discovery extension, we indicated our position that it wasn't -- it wasn't long enough. We came to an agreement. It was the agreement that the parties reached at the time. But we made clear our position that we thought a future extension would be required, and we have now moved for one, in accordance with that position.

Speaking to plaintiffs' productions, Your Honor, as I've indicated, they've produced less than half the number of pages that we have. Not only are their productions small, they also have considerable deficiencies. For example, they have applied significant redactions to broad swaths of their produced documents, including redacting apparently responsive information pertaining to negotiations between United and TeamHealth, as well as par and nonpar reimbursement rates.

United is engaged in informal meet and confer efforts with plaintiffs regarding those deficiencies, but if plaintiffs do not cure them through an informal process, we will have no choice but to move to compel.

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So in short, Your Honor, I reiterate our request that you enter a protective order to preclude the depositions of Ms. Paradise and Ms. Nierman from going forward.

Again, we also ask the Court to hold the issue of when these depositions should proceed until next week when the Court rules on United's motion for an extension of the current schedule.

And if the Court is not inclined to hold the issue, we would ask that the Court allow us several business days to provide plaintiffs with dates to make these witnesses available before March 15th, with the understanding that the parties will confer as to whether those depositions would still proceed if the schedule is extended next week.

Thank you, Your Honor.

THE COURT: Thank you, both.

This is the defendant's three separate motions for a protective order. It may be that Nierman and Paradise are in the same category.

The motions are going to be denied, but I will give some limited relief to the defendant.

First, the plaintiff makes a *prima facie* case that Rosenthal has information and would be a relevant witness. The defendant admits that Nierman and Paradise are relevant witnesses.

The order of how the plaintiff chooses to take the depositions is within the discretion of the plaintiff. They will take the depositions in the order that they choose. The defendants will take

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depositions of the plaintiff in the order that they choose.

It shall be based upon reasonable availability, meaning, you know, a prescheduled business meeting probably is not grounds for a deposition not to go forward. A health emergency or a family emergency probably is grounds for a reasonable availability.

I will allow during the depositions of both sides for either side to inquire with regard to scheduling issues if either side believes that the witness was evasive with regard to their availability.

All of the -- this order affects only those 14 witnesses for the plaintiff who were designated on December 7th. And from this point on, the Special Master will determine the number of depositions.

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I base this in part based upon the statement of the defendant on 2/16/21, which said, We refuse to produce witnesses voluntarily until document discovery is complete. I believe that that was an inappropriate statement to make, not that it was -- well, I -- not that it's sanctionable conduct, but it shows an unwillingness to move the case forward.

I find that this solution is no undue burden to the defendant.

The apex rule is not adopted in Nevada.

And from this time forward, depos will go soon -- go forward on both sides as soon as practicably available. If needed, depositions may be supplemented at a later time by both sides, to be determined by the Special Master. The issue of whether each side

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may designate new witnesses will be determined by the Special Master. When and how depositions proceed will be determined by the Special Master. And all future discovery disputes should go to the Special Master, unless he chooses to refer them to the Court.

So that is the ruling.

Ms. Lundvall to prepare the order.

Ms. Fedder and your team to approve the form of the order.

If you can't approve the form, file a written objection. I'll return any order that is submitted. I will only accept the order by the party directed to prepare the order.

But if you have an objection, file that, so we have a record of it. Then I look at it. The law clerk looks at it. And then the two of us talk about it. And if necessary, we go back and watch the proceedings again.

Any questions?

MS. FEDDER: Yes, Your Honor, I have two questions.

THE COURT: Sure.

MS. FEDDER: The first is -- thank you. The first is you had indicated that you were denying the motions, but would offer some relief.

THE COURT: That's --

MS. FEDDER: And I just wanted to make sure that I understood the procedures we ought to be following for -- to obtain that.

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THE COURT: Reasonable availability -- reasonable availability -- a scheduled business meeting can be moved. A family emergency or health emergency would be grounds for not going forward with the deposition right away.

And the Special Master will make those determinations.

MS. FEDDER: Understood, Your Honor.

There was also a third motion for a protective order unrelated to depositions that was slated to be heard this afternoon.

THE COURT: Okay.

MS. FEDDER: I know we've been going for an hour. I'm not sure if you wanted us to move forward with that.

THE COURT: You know, I just -- I need to reboot. I didn't touch my screen long enough. I just need to pull it up. I'm prepared to go.

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MS. FEDDER: Okay. Your Honor, should I begin?

THE COURT: Yes, please.

MS. FEDDER: Thank you, Your Honor.

Your Honor, on this motion, we ask the Court to enter a protective order permitting United to maintain AEO designations that plaintiffs have challenged.

Before getting into our argument, I would like to provide some background on the case and the protective order. In this case plaintiffs challenge United's reimbursement rates for out-of-network emergency services rendered in Nevada. United offers out-of-network programs to its clients and their members, as do

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United's competitors. United's strategy and implementation of those out-of-network programs is commercially sensitive and proprietary.

The named plaintiffs in this case are professional corporations that provide out-of-network emergency medical services, but this is really a case brought by their affiliate TeamHealth, which is a large, for-profit, private entity-backed company.

As the complaint alleges, plaintiffs or their representatives contact United through one of its external vendors, seeking to increase the allowed amount on particular out-of-network health benefit claims. As the complaint also alleges, TeamHealth engages in negotiations with United over reimbursement rates, seeking to become a participating provider in United's network.

Plaintiffs provide out-of-network services to health plan members that are administered by United's competitors. Plaintiffs surely engage in similar negotiations with those competitors.

Against this backdrop, the protective order the parties negotiated in this case allows the producing party to designate as attorney's eyes only, or AEO, documents that contain such highly competitive or commercially sensitive proprietary and nonpublic information that would significantly harm business advantages of the producing or designating party or information concerning third-party pricing and/or reimbursement rates, including, for example, reimbursement rates that providers other than plaintiffs

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have charged or accepted, disclosure of which could reasonably be expected to be detrimental to the producing or designating parties' interests.

The AEO designation limits disclosure of documents so designated to two pre-identified in-house counsel with no role in or responsibility for contract negotiations, rate negotiations, or negotiation of claim payment amounts.

Documents designated confidential, on the other hand, can be shared more broadly with party officers or employees. Plaintiffs appear to be interpreting party to include TeamHealth.

With this motion, United seeks to maintain the AEO designations it has affixed to two categories of documents. United has produced these documents to plaintiffs in full, with only the limited redactions for nonparty provider identifying information that this Court has allowed.

The first category is Data iSight monthly appeal reports. As background, United uses MultiPlan to support the Outlier Cost Management or OCM program, one of the out-of-network programs that United offers its clients. In the context of this program, MultiPlan provides United with both the claims pricing recommendation through its proprietary Data iSight pricing tool, as well as back-end services, including negotiations that may take place in the event a provider disputes the reimbursement rate.

MultiPlan provides data related to these back-end services to United in the form of monthly appeals reports. These reports

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contain data reflecting the total number of appeals, successive appeals -- excuse me -- successful appeals, success rate, total charges, original savings, and retained savings on a monthly basis. Savings means the delta between the provider's billed charges and United's reimbursement rate.

United does not authorize MultiPlan or Data iSight to disclose such information to providers who may call Data iSight to inquire about reimbursement rates. Disclosure of this information to providers who call Data iSight to dispute such rates, as plaintiffs have alleged they do, could harm United by giving those providers a window into the reimbursement rates United allows for other disputing providers.

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Other payers with whom United competes also use the Data iSight pricing service. To the extent plaintiffs use United's information to dispute reimbursement rates those payers allow, that could also harm United by giving its competitors a window into the reimbursement rates United allows.

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Disclosure of this information could further harm United to the extent plaintiffs engage in negotiations with United to be brought into its network at a particular contracted rate, as plaintiffs have alleged that they do. And plaintiffs could use this information in other similar negotiations with United's competitors, there again harming United by giving its competitors a window into United's reimbursement rates.

The second category is e-mails related to Data iSight

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appeals which plaintiffs concede are variations of the same single e-mail thread. These e-mails contain, for example, images of the same kinds of Data iSight appeal reports that I described earlier. They also contain United's specific data requests, in other words, reporting details that United is requesting MultiPlan add to Data iSight appeal reports.

Finally, they contain United specific claim processing rules for the OCM program. These e-mails thus create competitive risks for United for the same reasons as the reports themselves do. And they also reflect specifics of the implementation of United's OCM program, which competitors offering similar out-of-network programs could use to United's disadvantage.

These documents are distinct from the Data iSight preference sheets the Court ordered United to redesignate confidential and redact for commercially sensitive information last year. Those preference sheets show United's instructions to MultiPlan for how to implement the OCM program and, in particular, how to use the Data iSight tool in the context of the OCM program.

With the documents subject to challenge here, however, MultiPlan is sharing with United the concrete results of those instructions, i.e. what United actually paid to disputing providers.

We have designated these documents AEO in good faith, and respectfully request that the Court grant our motion for a protective order to maintain them.

Thank you, Your Honor.

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THE COURT: Thank you.

And the opposition, please.

MS. GALLAGHER: Yes, thank you, Your Honor. This is Kristen Gallagher, on behalf of the plaintiff Health Care Providers.

So this is more like a follow on to the initial motion for a protective order. It involves MultiPlan and United exchanges.

However, the information that United is asserting that is contained in these spreadsheets and documents is not quite so. And perhaps United has not taken a close look at the specific items in these appeal reports that we are challenging, because there are another set of Data iSight appeals reports that have additional information that sounds more akin to what Ms. Fedder discusses, which is other provider information.

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But what we have sought with respect to a D designation to confidential; right? We're not asking the Court to make these available to the public. We're just making -- asking the Court to make it so that we can prosecute this case, that we have information relating to what we've alleged is a scheme to identify reimbursement rates that are not supported by anything other than United's direction to do so.

And the part of the problem with retaining an AEO designation for United is that it has not provided the Court the information perhaps necessary in order to be able to look and see what they're talking about.

But I think our opposition did -- at least attempted to set

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forth these various fields that are in the spreadsheets. And I do want to make notice of the very first document we have listed, which is DEF 030407 is actually a multipage PDF. So there is no data to be gleaned other than aggregated information about the total number of appeals, the successful number of appeals, and the success rate.

So really this is sort of this high-level, aggregated information. And to be honest, we don't know what this represents. Is it only with respect to the Health Care Providers? Is it with respect to TeamHealth nationally? Is it with respect to all of the work that United directs with respect to their Outlier Cost Management program?

So to suggest that this is information that would give somebody a competitive advantage I think isn't an accurate picture of what we're actually looking at with respect to these documents.

Even on subsequent halves within a spreadsheet -- I'm looking now -- it's just an aggregated amount. In fact, United has redacted other United entities within their umbrella that apparently use Data iSight. And they aren't -- you know, they aren't providing that information to us. So even within this sheet, they're providing other United entity information.

The documents that we've brought before the Court does not have any information about providers, because, while we may challenge those at a later point, that was not the point of this particular motion.

With respect to the categories for e-mails, this is very

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similar, just exchanges about United's implementation and discussions about how it wants to put parameters on TeamHealth. So this is part, and goes part and parcel, to our allegations about RICO and deceptive trade practices. And these are facts and information that our Health Care Provider entities should be able to have access to in prosecuting this case and seeing what actually has been happening between these two companies that we have alleged worked together to create and implement this scheme to defraud the Health Care Providers.

And so to suggest that the information can be sort of parsed, to be able to provide somebody information about what CPT Code 99285 is being paid or reimbursed at simply is not the case on what we're seeing in these particular documents.

And so, you know, the other piece of this is that the protective order will make sure it doesn't see the public, Your Honor. We are not asking for this to be de-designated altogether.

But the other piece of it is through this process what happens is that Data iSight puts a reimbursement rate out. If the Health Care Providers challenge or call Data iSight, there's an exchange of information. And so the Health Care Providers know how much they are able to negotiate.

This is not information that is a secret. You know, the AEO designation is meant to protect the most commercially sensitive information. But the Health Care Providers, if they called on all 22,000 claims or every claim, they could put this information

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together because there's an exchange happening with Data iSight. When they call and when they negotiate they know the price that United is standing on.

And so to suggest that this is something of a commercially sensitive trade secret I think is just maybe a stretch a little bit too far in connection with what's contained in these e-mails.

Again, United hasn't offered any less opportunity to redact or anything else that -- that may satisfy their concern, but certainly these are documents that we think, like last time, Your Honor, should be de-designated to confidential. And so that they can maintain protection from the public if United views them to be confidential in that regard. But they certainly don't -- they're not entitled to the highest level, Your Honor.

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THE COURT: Thank you.

And the reply, please.

MS. FEDDER: Thank you, Your Honor.

As a threshold matter, these reports present information regarding other providers. So this information is not specific to the plaintiff providers.

These reports that are at issue present the data categories that I've indicated: Total appeals, successful appeals, success rate, total charges, original savings, retained savings, on an aggregated monthly basis for providers that make use of the Data iSight service.

That information is certainly provided for as AEO under the protective order, which expressly covers information concerning

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third-party pricing and/or reimbursement rates: For example, reimbursement rates that providers other than plaintiffs have charged or accepted.

That's language that the -- that's language I'm quoting from the protective order from the definition of AEO.

And, Your Honor, Ms. Gallagher made a point that these documents are not before the Court. I believe on our prior motion, the Court indicated that it does not review documents in camera, and for that reason, we did not submit copies of the documents. But certainly if the Court would like us to submit copies, we can do so.

And perhaps I could just pause there to seek your direction as to whether that would be appropriate?

THE COURT: No. I -- if both sides were willing for me to review things in camera, I would be happy to. But I was concerned about the potential for conflict.

So, Ms. Gallagher, would you address that, please.

MS. GALLAGHER: Yes, Your Honor. With the last submission United did an *ex parte* submission, so I believe that's the reason that the Court declined to review those in camera.

I would have no objection to the Court looking at them in camera, because I'm quite comfortable that you will find our opposition to be supportive of those documents.

But I don't think that United has made the showing, with respect to its motion so far, to establish that these are not otherwise protectable as confidential under the protective order.

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THE COURT: And Ms. Fedder, your reply, please.

MS. FEDDER: Yes, Your Honor.

You know, I respectfully disagree. Again, this is information pertaining to reimbursement rates that are paid to other third-party providers, that is expressly contemplated by the protective order that the parties have negotiated.

Moreover, Ms. Gallagher described a situation where providers might call MultiPlan or Data iSight and receive certain information. This is not the type of information that MultiPlan or Data iSight would be authorized to disclose.

United does not authorize disclosure of these reports. It -- and they -- this is not information that would be offered through the public in the ordinary course.

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Moreover, the -- as I indicated in my opening, for AEO designations, documents designated as such are limited to -- or the plaintiffs are limited in terms of disseminating those documents to their employees to two pre-identified in-house counsel that have no role or responsibility for contract negotiations, rate negotiations, or negotiation of claim payment amounts.

Certainly the type of information that is included in these reports and these e-mails would -- could be -- it could commercially damage United if that information were disclosed and used to a provider's advantage in negotiations with United, and as plaintiffs have alleged that, you know, they've participated.

Another point -- I apologize, Your Honor, I had a few other

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points that I wanted to make.

THE COURT: Sure.

MS. FEDDER: And I just had -- I'm just going to take a moment to collect my thoughts in that regard.

Oh, regarding the e-mails that Ms. Gallagher made reference to, as I indicated, those e-mails contain not only images of the same kinds of appeal reports that I described earlier, they also contain United-specific data requests and they also contain United-specific claim processing rules.

Ms. Gallagher described certain information that is specific to TeamHealth. I haven't seen that in the documents at issue today. But, in any event, you -- in any event, based on Ms. Gallagher's description, I'm not comfortable that that's information that would be disclosed either, even if a disputing provider called requesting it from Data iSight or MultiPlan.

So -- and also Ms. Gallagher mentioned that the data in the reports is aggregated.

The protective order does not distinguish, Your Honor, between aggregated and claim-by-claim information. And that's for a good reason. Disclosure of information concerning reimbursement rates is harmful to United, regardless of whether it's aggregated, because it nonetheless offers a window into United's reimbursement rates that other providers could use to United's disadvantage in negotiations and that competitors could use to United's disadvantage in developing competing out-of-network

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programs.

Furthermore, the data available in the reports can be used to break down the information further. And if aggregated data were not informative, United itself would be requesting that the data be provided in a different form. Indeed, it's common for businesses to use data that is aggregated on a periodic basis to evaluate program operation as United has done here.

Ms. Gallagher also indicated that United hasn't offered any sort of lesser opportunity here. We have, in our reply brief, asked the Court if it is not inclined to grant this motion in full, respectfully, we request the Court allow United to redact the most commercially sensitive information contained in the challenged documents and to provide a corresponding log.

003818

And though we disagree that these documents are the same as the documents that the Court ruled on last year, such relief would be consistent with the Court's prior ruling.

So with that, Your Honor, if you feel it would be beneficial to you for us to submit the documents in camera, I'm certainly willing to confer with the plaintiffs and arrange for that. But we'll just -- we'll be guided by whatever would be most helpful to you.

Thank you, Your Honor.

THE COURT: Thank you, both.

All right. This is an issue we visited last fall. And I realize that this motion is nuanced from the one that I denied last fall.

So my tentative ruling is that I will review the documents

003818

and proposed redactions on an in camera basis based upon however long it will take the defendant to provide that to me.

It would be e-mailed to my law clerk. And give me a reasonable -- well, first -- that is my proposal.

I was leaning toward denying your protective order today, simply because I wasn't persuaded that there was a lot of commercially sensitive information here or trade secrets that would entitle the defendant to have the highest level of protection on the production. But I'm willing to look at redacted -- the proposed redactions.

Are there comments? Because that is just a tentative ruling.

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MS. FEDDER: Your Honor, we're happy to look -- to provide the proposed redactions that you're requesting.

Just so I'm clear on the request, we would provide to you and your law clerk the AEO documents with a box around -- a box kind of indicating the information we would propose to redact as commercially sensitive, but so you could still -- you could view that information in camera.

Am I understanding that properly?

THE COURT: That's correct.

And I want to give Ms. Gallagher a chance, because I know I'm putting everybody on the spot.

MS. GALLAGHER: Sure, Your Honor. Well, I like your initial thought that you would deny the motion.

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But if you are inclined to consider tentative proposed redactions, what I would like is, if it's okay with Your Honor, to have an opportunity to object to the proposed redactions to the extent that they may exceed what would be, you know, essentially an end-run and basically trying to keep it AEO just by virtue of redactions.

THE COURT: And I'll keep an open mind to that.

I'm going to go ahead and make the tentative ruling my ruling.

What is a reasonable time, Ms. Fedder, for you to provide that information? The 12th or 19th of March?

MS. FEDDER: Your Honor, I --

THE COURT: Preferably the 12th.

MS. FEDDER: Yes, I think --

THE COURT: Because your discovery deadline is the 15th. So it needs to be the 12th. Can you do that?

MS. FEDDER: Understood, Your Honor.

THE COURT: Does that create undue burden for you?

MS. FEDDER: Your Honor, I have to be honest. Sometimes there are complexities with applying redactions to Excel spreadsheets. But because Your Honor is simply asking for us to highlight in some way the information that we propose to redact, I think that we -- I think that a March 12th deadline would be manageable.

THE COURT: Okay.

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MS. FEDDER: And, Your Honor, just, would I -- would we provide -- we would provide a copy of that to the plaintiffs at the same time as we provide a copy to you, our proposed redactions?

THE COURT: That's correct.

MS. FEDDER: Okay.

THE COURT: And that would be e-mailed to the law clerk, not to me directly. All right.

MS. GALLAGHER: And then Your Honor a reasonable time to submit an objection -- it would need to come quickly just because of the close of discovery.

THE COURT: Right.

MS. GALLAGHER: So we'll endeavor to do that, I guess by Monday the 15th?

THE COURT: Right. And Nicole McDevitt, are you with us?

THE CLERK: Yes, Judge.

THE COURT: Can we put this on the chambers calendar for March 16th?

THE CLERK: Yes, Judge.

THE COURT: Thank you.

And so that all of you know, I'm in a bench trial the week of March 15th. The case was on this morning. It's -- it will never settle. So if I am delayed by a few days, it's only because of the burden of my schedule.

Okay. So that will be on chambers calendar. And I will

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then determine whether or not the motion is granted or denied -- granted, denied, or the redactions will be allowed.

Okay. Anything else to take up today while we're all here?

SPECIAL MASTER HALL: Judge, this is David Hall. Can I --

THE COURT: Yes, please.

SPECIAL MASTER: -- offer two things. One is I'm -- I haven't seen the signed order shortening time on the motion to extend, so if you could let me know the date and time of that hearing next week, and --

THE COURT: It is Wednesday the 3rd at 10 a.m.

SPECIAL MASTER: Okay. And --

THE COURT: And that's the last thing on the calendar that morning.

SPECIAL MASTER HALL: Okay. And if I could impose upon your staff to send me the Blue Jeans invite for that.

THE COURT: Our court recorder here isn't in the courtroom. And I had already sent an e-mail. I've cc'd you on it, but I may have gotten your e-mail wrong, about including you on all the Blue Jeans links for this case.

SPECIAL MASTER HALL: Okay. Great.

The only other thing was if you want to send that bench trial over to JAMS, I'm sure we could resolve it for you.

THE COURT: It's kind of a fun case. It's a business dissolution.

SPECIAL MASTER HALL: All right. Thank you.

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THE COURT: All right. You guys, levity aside, is there anything else to take up before we conclude the hearing today?

All right. Everybody stay safe. Stay healthy. I'll see you next Wednesday.

MS. LUNDVALL: Thank you, Your Honor.

MS. GALLAGHER: Thank you, Your Honor.

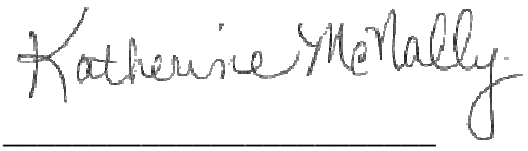
MS. FEDDER: Thank you, Your Honor.

THE COURT: Thank you.

[Proceeding concluded at 1:27 p.m.]

* * * * * * *

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.



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DISTRICT COURT

CLARK COUNTY, NEVADA

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

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003824

BEFORE THE HONORABLE NANCY L. ALLF, DISTRICT COURT JUDGE

WEDNESDAY, MARCH 3, 2021

RECORDER'S TRANSCRIPT OF HEARING
DEFENDANTS' MOTION TO EXTEND ALL CASE MANAGEMENT DEADLINES AND CONTINUE TRIAL SETTING ON ORDER SHORTENING TIME (SECOND REQUEST)

APPEARANCES ON PAGE 2:

RECORDED BY: PATRICIA SLATTERY, COURT RECORDER

003824

Appearing via Videoconference:

For the Plaintiff:	KRISTEN T. GALLAGHER, ESQ. PATRICIA K. LUNDVALL, ESQ. AMANDA PERACH, ESQ.
For the Defendant:	COLBY BALKENBUSH, ESQ. NATASHA S. FEDDER, ESQ. D. LEE ROBERTS, ESQ.
Special Master:	DAVID WALL, HON.

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Las Vegas, Nevada, Wednesday, March 3, 2021

[Case called at 10:00 a.m.]

THE COURT: Good morning, everyone. It's 10 o'clock. Calling the case of Fremont Emergency Services versus United Healthcare.

And let's take appearances, please, starting first with the Plaintiff.

MS. LUNDVAL: Good morning, Your Honor. Pat Lundval from McDonald Carano here on behalf of the Plaintiff.

THE COURT: Thank you.

MS. GALLAGHER: Good morning, Your Honor. Kristen Gallagher also here on behalf of the Plaintiffs.

THE COURT: Thank you.

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

THE COURT: Thank you. And for the Defendants, please.

MR. ROBERTS: Yes. Good morning, Your Honor. Lee Roberts appearing for the Defendants.

THE COURT: Thank you.

MR. BALKENBUSH: Good morning, Your Honor. Colby Balkenbush also appearing for the Defendants.

THE COURT: Thank you.

MS. FEDDER: Good morning, Your Honor. Natasha Fedder also appearing for the Defendants.

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THE COURT: Thank you. And do I have the Special Master here today?

SPECIAL MASTER WALL: Yes. Good morning, Your Honor.

THE COURT: Thank you.

All right. So this is the motion to extend all case management deadlines and continue trials. I did see a late filed response yesterday afternoon. Is everything in -- are there -- is there agreement as to new deadlines?

MR. ROBERTS: Yes, yes, Your Honor. We -- we've continued to meet and confer and the parties have reached an agreement as to all relative deadlines as set forth in the opposition brief at pages two to three. There are -- there remain several areas of disagreement but it's our understanding the parties have agreed that those will be considered by Special Master Wall if they cannot be satisfactorily resolved.

So, we believe that there are no issues remaining for the Court. If the Court does agree to the proposed deadline set forth in the Plaintiff's opposition brief, then we would request that the Court issue an amended scheduling order, setting forth those dates. And we will withdraw our current request to continue the trial.

As you probably haven't seen our reply brief. But, although we're withdrawing the request to continue the trial, Your Honor. We continue to believe that that date may not be realistic, and eventually -- and reserve the right to seek a continuance in the future. But the -- we do believe that these dates give us the best chance of

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trying to preserve that, and we're willing to work hard to accomplish everything that needs to be done within the amended scheduling dates, Your Honor.

THE COURT: Thank you, Mr. Roberts, and I actually did get a chance to look at your reply. So.

MR. ROBERTS: Thanks.

THE COURT: All right. And then let me have the confirmation from the Plaintiff then, please.

MS. GALLAGHER: Good morning, Your Honor. Kristen Gallagher on behalf [Indiscernible - unstable Internet connection]. Back to the schedule that appears in our response at pages two and three. We want to [Indiscernible - unstable Internet connection] that we do treat that [Indiscernible - unstable Internet connection] firm date. What we continue to hear is -- is United sort of throwing doubt [Indiscernible - unstable Internet connection] it's not new [Indiscernible - unstable Internet connection] basically since this case [Indiscernible - unstable Internet connection] them asking for more time, extending time and we've seen in that occasion to explain to the Court the tactics that are being taken. You know, whether it be obstructing, discovery not agreeing to engage in discovery. And so, we want to make sure that we treat that as a firm date in terms of where the healthcare providers are viewing that firm trial date.

We see a new argument in United's [Indiscernible - unstable Internet connection] first time trying to inject into that firm trial date which is reference to the pandemic. We didn't [Indiscernible - unstable Internet

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connection] moving papers. So, we're just very aware, very cognizant of the efforts that you [Indiscernible - unstable Internet connection] We want to let the Court know that we do indeed consider [Indiscernible - unstable Internet connection] in getting ready for today that we seek [Indiscernible - unstable Internet connection] engagement in discovery is similar to [Indiscernible - unstable Internet connection] which is sort of [Indiscernible - unstable Internet connection] because we can't. What we're seeing is a lack [Indiscernible - unstable Internet connection] why it actually [Indiscernible - unstable Internet connection] can't be [Indiscernible - unstable Internet connection] and we'd just like to have that on record that we do [Indiscernible - unstable Internet connection] continue with our efforts to make sure to the best that we can, subject to the Court's availability, that is the firm date that we intend to do everything that we can to keep, Your Honor.

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THE COURT: And Mr. Roberts if you feel the need to respond for the record, you may do so.

MR. ROBERTS: We just take exception to the continued interpretation of our tactics. I -- I couldn't catch a lot of what was said, my line was breaking up, I'm afraid. But, I don't believe it's necessary to address any of that now further, Your Honor.

THE COURT: Good enough.

We need to have an order that relates to this hearing so that the issue is closed out. So, I will task Mr. Roberts, just saying that the issue -- the motion didn't go forward by resolution of -- and just include that a new scheduling and trial order will be issued.

003829

So -- so that I understand. The two remaining issues for Judge Wall with regard to this will be custodial documents before the Rosenthal deposition, and data matching protocol. Is that correct? Mr. Roberts, Ms. Lundval, or Ms. Gallagher?

MR. ROBERTS: I believe that is correct, Your Honor. But the Rosenthal documents, I believe, are just part of a greater disagreement with regard to the ESI protocols, which also will be resolved by Special Master Wall.

THE COURT: Thank you.

MS. GALLAGHER: And Your Honor, this is Kristen Gallagher, again. We have also opened just from the last hearing, a number of witnesses, so we anticipate that that will also be, you know, considered by the Special Master when appropriate.

THE COURT: Okay. Thank you.

Mr. Wall, did you have anything to add?

SPECIAL MASTER WALL: Yeah, I wouldn't mind getting served with the opposition and the reply. I haven't seen those.

THE COURT: They came in after hours.

SPECIAL MASTER WALL: I just don't think I was on the service list, frankly. So, if I could get served with those just so I have that information, that'd be helpful.

THE COURT: Good enough.

And I'm not sure, Mr. Wall, how you'd get on the service list. But if you make an appearance as the special master, that may just add you to the service list so you don't have to look at Odyssey for things as

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they come through.

SPECIAL MASTER WALL: Yeah, I'm not sure exactly how that works either. But.

THE COURT: I'll ask -- I'll ask my law clerk to look at it today and we'll get back to you on that.

SPECIAL MASTER WALL: Okay. And -- I mean if they -- I'm not sure how that works between the JAMS access upload feature and what goes through Odyssey. So, it may be that they have to just be e-mailed to me separately. I'm not sure.

THE COURT: Good enough.

So, maybe -- maybe you can work with the parties on that issue?

SPECIAL MASTER WALL: That'd be fine. Thank you.

THE COURT: Great. Okay. Is there anything else --

MR. ROBERTS: Your --

THE COURT: -- Yes, go ahead.

MR. ROBERTS: One clarification, Your Honor, thank you.

Just to make sure I get this right. You wanted the order on today's hearing to not include the new dates for the scheduling order; only to reference that an order would be forthcoming based on agreement of the parties?

THE COURT: It -- it's your choice. You can either --

MR. ROBERTS: Oh.

THE COURT: -- include that this was resolved with these dates. Either way, I will enter a new scheduling and trial order, because

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I have to close the loop on this motion, by --

MR. ROBERTS: Understood.

THE COURT: -- getting an order entered.

MR. ROBERTS: Very good, Your Honor.

THE COURT: All right. Sure.

Is there anything else, at this point?

Congratulations, to all of you. You've always shown the highest level of professionalism in this case. And so, I -- I thank you for not making me, today, deal with your deadlines, because you know your case better than I do. So.

Congratulations. Everybody stay safe and stay healthy until I see you next.

MR. ROBERTS: Thanks so much, Your Honor.

MS. GALLAGHER: Thank you, Your Honor.

MS. FEDDER: Thank you, Your Honor.

MS. LUNDVAL: Thank you, Your Honor.

MR. BALKENBUSH: Thank you, Your Honor.

[Hearing concluded at 10:08 a.m.]

* * * * * * *

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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

PLAINTIFFS' OPPOSITION TO MOTION FOR RECONSIDERATION OF COURT'S ORDER DENYING DEFENDANTS' MOTION TO COMPEL RESPONSES TO DEFENDANTS' FIRST AND SECOND REQUESTS FOR PRODUCTION

Hearing Date: March 23, 2021
Hearing Time: Chambers

Plaintiffs Fremont Emergency Services (Mandavia), Ltd. ("Fremont"); Team Physicians of Nevada-Mandavia, P.C. ("Team Physicians"); Crum, Stefanko and Jones, Ltd. dba Ruby Crest

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Emergency Medicine ("Ruby Crest" and collectively the "Health Care Providers") file this 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.'s (collectively, "United") Motion for Reconsideration of the Court's February 4, 2021 Order Denying United's Motion to Compel Responses to First and Second Requests for Production with respect to the Court's order denying cost-related documents and information (the "Motion").

This Opposition to the Motion ("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.

POINTS AND AUTHORITIES

I. INTRODUCTION

Despite the Court's multiple rulings that make it clear "the relevant inquiry in this action is the proper rate of reimbursement," United asks the Court to reconsider its ruling that cost-related documents are not relevant or proportional to the needs of this case. *See e.g.*, June 24, 2020 Order denying United's Motion to Dismiss First Amended Complaint at 12:14-15 ("The Court concludes that this dispute is one concerning rates of payment (*see, e.g.,* FAC ¶¶ 43, 265)."); October 26, 2020 Order Denying United's Motion to Compel Production of Clinical Records for At-Issue Claims and Defenses at 2:15-18 ("the Health Care Providers only seek the proper reimbursement rate, making this a "rate-of-payment" case."); February 4 Order at ¶ 10; January 21, 2021 Hr'g Tr. at 32:11-13 ("this is really what it comes down to is it's a rate of pay case and it's not a cost case, and the plaintiff very carefully re-pled in that first amended complaint."). The Court did not err in its determination that underlying cost data is irrelevant to this action because the Health Care Providers' costs of doing business has nothing to do with the reimbursement amount allowed by United. Accordingly, the Health Care Providers respectfully request the Court deny the motion for reconsideration.

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003834

II. OVERVIEW OF THE INSTANT DISPUTE

United moved to compel production of documents relating to, among other categories, actual costs of doing business even though the First Amended Complaint makes it clear that this litigation concerns ***United's*** failure to allow reasonable reimbursement rates and the related allegations of manipulated reimbursement rates. *See, e.g.,* First Am. Compl. ¶¶ 1-2, 55; Order Denying Clinical Records at ¶ 1 ("The First Amended Complaint alleges that the Health Care Providers "seek the proper reimbursement rate, making this a 'rate-of-payment' case."). Specifically, United sought, and the Health Care Providers opposed, documents related to actual costs because they have nothing to do with whether United has properly reimbursed the Health Care Providers for emergency services. Nevertheless, United made the following broadly worded requests:

> 68. Please produce all documents which reflect or discuss the extent to which the rates you charge for emergency medical services, from July 1, 2017 to present, capture or reflect your actual cost of doing business.
>
> 86. Please produce all documents and communications of any type related to any cost to charge analysis performed on any emergency medical service you offer patients from July 1, 2017 to present.
>
> 92. Documents showing each and every cost incurred by you in offering emergency services to patients from July 1, 2017 to present.
>
> 93. Documents showing each and every cost incurred by you in offering the types of services reflected in the Claims from July 1, 2017 to present.
>
> 94. A copy of any cost report(s) presented by you to any federal or state agency since July 1, 2017 to present.

United's Appendix to Motion, Exhibit 5 at Request Nos. 68, 86, 92, 93, and 94. United initially sought these documents by arguing that "the costs incurred by Plaintiffs in performing emergency medical services is directly relevant to the issue of ***whether any payment by United was "'reasonable'*** vis-à-vis the value of any services rendered." Motion at 17:12-14; *see* Exhibit __, Plaintiffs' Responses to Second Set of Requests for Production of Documents at Nos. 68, 86, 92, 93, and 94 (relevant excerpts). United articulated the same reason when it sought clinical records, arguing in a position now rejected by this Court, that the Health Care Providers had to

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prove they performed the services for which they billed. The Court disagreed and instead ruled that the framework for this case is the proper rate of reimbursement and the "Health Care Providers do not have the burden to provide what was done clinically to establish their claims." Order Denying Clinical Records at ¶ 18.[1]

Further, in its Motion, United seeks "documents and information with regard to Plaintiffs' incurred cost to perform emergency services and how that cost compares to Plaintiffs' unilaterally-set billed charges for those same services. United expects that the Actual Cost Discovery will show that the benefit rates to which Plaintiffs claim entitlement—75–90% of their billed charges—are excessive because those rates bear no relation to the actual cost of performing the underlying services." Motion at 4:7-12. Despite United's contention, Nevada law makes it clear that the reasonable value of services does not embody cost considerations, instead focusing on the reasonable value of services, which includes market value. *Certified Fire Prot. Inc.*, 128 Nev. at, 283 P.3d at 257 n. 3 (2012). And United confirms it anticipates expert opinion based on market value.[2] As the First Amended Complaint provides, and the Court has confirmed, the framework for this litigation is whether United's reimbursement rates are reasonable.

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[1] As this Court has had occasion to address, this is another of United's attempt to re-litigate the framework of this case that the Court has already decided. *See* December 23, 2020 Hearing Transcript at 51:22-24, 52:6-8 ("But this seems to be a continued pattern from your client with trying to argue matters that have already been decided without meeting and conferring…..And we're still -- I know it was removed and remanded, but we're still rearguing some of the fine points again and again, and in some cases three times.").

[2] THE COURT: But I assume your expert will be talking about market?

MS. FEDDER: Well, Your Honor --

THE COURT: The market where the plaintiffs operate.

MS. FEDDER: ***Your Honor, I expect so.*** But we – you know, we have not designated an expert. And I can't say, sitting here today, what exactly our expert would opine on.

See January 21, 2021 Hr'g Tr. at 12:24-13:5.

003836

III. LEGAL ARGUMENT

A. Legal Standard

United's motion does not meet the standard for reconsideration. A district court may reconsider a previously decided issue only if "substantially different evidence is subsequently introduced or the decision is clearly erroneous." *Masonry & Tile Contractors Ass'n of S. Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486,489 (1997) (emphasis added). "Only in very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted." *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976) (emphasis added); *see also* EDCR 2.24(a) ("No motions once heard and disposed of may be renewed in the same cause, nor may the same matters therein embraced be reheard, unless by leave of the court granted upon motion therefore.").

United's reliance on a series of out of state cases to support reconsideration is not persuasive. For example, *Wasatch Oil & Gas, LLC v. Reott*, 263 P.3d 391, 396 (Utah Ct. App. 2011) and *Trembly v. Mrs. Fields Cookies*, 884 P.2d 1306, 1311 (Utah Ct. App. 1994) rely on Utah procedural rule 54(b) which, like NRCP 54, concerns final judgments. Next, United points to NRAP 40(c)(2) which concerns petitions for rehearing. United also points to *Nelson v. Dettmer*, 305 Conn. 654, 675 (2012) and *Viola v. City of New York*, 13 A.D.3d 439, 440 (N.Y. App. Div. 2004) which appear to rely on procedural rules relating to motions to reargue available in those jurisdictions. Finally, United points to *Osman v. Cobb*, 77 Nev. 133, 136, 360 P.2d 258, 259 (1961) for the proposition that a motion to reconsider is preferred over an appeal. The convoluted procedural history there – and not applicable to this discovery dispute – gave rise to the comments.

Ultimately, United does not identify any new law or fact that calls the Court's February 4, 2021 Order into question because United already opposed the Health Care Providers' quantum meruit and market value measurement in its briefing and at the January 21, 2021 hearing. United cites to the same legal authority raised in its reply brief and may point to an additional case or two, but none are "new" such that they were not available to United at the time of briefing or

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oral argument. Further, the Court specifically commented about the time spent preparing for the matters heard that day, including United's motion to compel. January 21, 2021 Hr'g Tr. at 32:21-22. After hearing oral argument and in consideration of the briefing, the Court correctly concluded that cost-related documents are not relevant to the Health Care Providers' implied-in-fact or unjust enrichment claims or to United's affirmative defenses. Because the Court's ruling is supported by the law and the facts of this case, United does not meet the standard for reconsideration.

B. The Court Properly Ruled That Cost-Related Data and Information Does Not Inform the First Amended Complaint's Allegations or United's Defenses Because Costs Are Not Relevant to Establishing the Reasonable Value of Services

United contends that the Court applied an erroneous "market value" standard, instead of a "reasonable value of services" standard. Motion at 4:21-24. A review of the Court's February 4 Order and transcript makes it clear the Court followed Nevada law on quantum meruit's reasonable value of services measurement which is often "market value." The Court correctly ruled that "in connection with the breach of implied contract and related claims, the Health Care Providers challenge United's reimbursement rates, making this a "rate-of-payment" case. This case is not a cost case." February 4 Order at ¶ 1. In addition, the Order provides:

> The Court concludes that corporate structure, finances, and how the Health Care Providers' charges are determined are not relevant in this case. Further, financial information that United seeks with regard to the Health Care Providers' business and operations to purportedly establish the Health Care Providers' charges are excessive, as well as and United's monopoly argument, are not relevant to the claims or defenses in this case. None of the information sought by United in the Motion will lead to the discovery of relevant information.

Id. at ¶ 11. The Court's ruling is consistent with Nevada and other analogous legal authority describing the remedy of quantum meruit the reasonable value of services as "market value" or the "going rate." And while United contends that the Health Care Providers only relied on *Certified Fire* in opposing cost-related discovery and then misstated its holding (Motion at 7:13-21), United is wrong on both points. Conversely, as explained below, United misleads the Court

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003838

with its reliance on *Las Vegas Sands Corp. v. Suen*, 132 Nev. 998 (2016) for the proposition that costs constitute "any other evidence regarding the value of services" referenced by that Court in its discussion about reasonable value of services provided.

As this Court is well-apprised, in implied-in-fact contract claims, "quantum meruit fills the price term when it is appropriate to imply the parties agreed to a reasonable price" and "ensures the laborer receives the reasonable value, usually market price, for his services." *Certified Fire Prot.*, 128 Nev. at 380, 283 P.3d at 256 (citing Restatement (Third) of Restitution and Unjust Enrichment § 31 cmt. e (2011)). Quantum meruit's other role is in providing restitution for unjust enrichment: "Liability in restitution for the market value of goods or services is the remedy traditionally known as quantum meruit." Restatement (Third) of Restitution and Unjust Enrichment § 49 cmt. f (2011); id. § 31 cmt. e (2011) (quantum meruit's secondary use is as a pleading in the common law in cases "regarded in modern law as instances of unjust enrichment rather than contract")[3]; *see* Restatement (Third) of Restitution and Unjust Enrichment § 49(3)(c) & cmt. f (2011) ***("[T]he market value of...services is the remedy traditionally known as quantum meruit.***").

In their opposition to the underlying motion to compel, the Health Care Providers discussed the reasonable value of services. Specifically, they set forth that that the cornerstone of an evaluation of the reasonable "value of services" under Nevada law relates to market value.[4]

[3] *See also Ewing v. Sargent*, 87 Nev. 74, 79–80, 482 P.2d 819, 822–23 (1971) (discussing recovery in quantum meruit to prevent unjust enrichment). "'Where unjust enrichment is found, the law implies a quasi-contract which requires the defendant to pay to plaintiff the value of the benefit conferred. In other words, the defendant makes restitution to the plaintiff in quantum meruit.'" *Lackner v. Glosser*, 892 A.2d 21, 34 (Pa. Super. Ct. 2006) (quoting *AmeriPro Search, Inc. v. Fleming Steel Co.*, 787 A.2d 988, 991 (Pa. Super. Ct. 2001)). When a plaintiff seeks "as much as he ... deserve [s]" based on a theory of restitution (as opposed to implied-in-fact contract), he must establish each element of unjust enrichment. Black's Law Dictionary 1361 (9th ed. 2009).

[4] "A person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or choses in action, performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other, or in any way adds to the other's security or advantage." Restatement (First) of Restitution §1 cmt. b. (1937); *see also Certified Fire Prot. Inc*., 128 Nev. at 382, 283 P.3d at 257 ("'[B]enefit' in the unjust enrichment context can include 'services beneficial to or at the request of the other,' 'denotes any form of advantage,' and is not confined to retention of money or property").

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003839

Certified Fire Prot. Inc., 128 Nev. at 381 n.3, 283 P.3d at 257 n. 3 (citing Restatement (Third) of Restitution and Unjust Enrichment § 49(3)(c) & cmt. f (2011); *see also Massachusetts Eye and Ear Infirmary v. QLT Phototherapeutics, Inc.*, 552 F.3d 47, n.26 ((1st Cir. 2009), *decision clarified on denial of reh'g*, 559 F.3d 1 (1st Cir. 2009) (the fair market value of a requested benefit was a well-accepted measure of unjust enrichment). Or further, a previous agreement between the parties may be a proper consideration in determining the reasonable value of services rendered. *See Flamingo Realty, Inc. v. Midwest Dev., Inc.*, 110 Nev. 984, 988–89, 879 P.2d 69, 71–72 (1994); *see also Children's Hosp. Cent. California v. Blue Cross of California*, 172 Cal. Rptr. 3d 861, 872 (2014) (internal citations omitted) (the true marker of the "reasonable value" of services has been described as the "going rate" for the services or the "reasonable market value at the current market prices"); *Eagle v. Snyder*, 412 Pa. Super. 557, 604 A.2d 253 (1992) (reasonable value of medical services may be determined through expert testimony regarding the market value of the medical services provided based on the average charges in the region where the services were performed); Restatement (Third) of Restitution and Unjust Enrichment § 31 cmt. e (2011) ("Where such a contract exists, then, quantum meruit ensures the laborer receives ***the reasonable value, usually market price***, for his services.") (emphasis added).

Children's Hosp. further explained "under quantum meruit, the costs of the services provided are not relevant to a determination of reasonable value. ***Quantum meruit measures the value of services to the recipient, not the costs to the provider***." *Id.* at 875. That court further analogized provider fees to a determination of reasonable attorneys' fees, stating that "courts have rejected a 'cost-plus' approach finding that basing the fee on costs is neither appropriate nor practical." *Id. Children's Hosp*. provides guidance and is instructive in terms of its similarity to Nevada quantum meruit common law.

United is also incorrect that the Health Care Providers misstated *Certified Fire*. In opposition and at the hearing, the Health Care Providers referred to *Certified Fire* and its underlying source, the Restatement (Third) of Restitution and Unjust Enrichment § 49(3)(c), which provides that the reasonable value of services may be measured by the market value of

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003840

the benefit. *See also* Restatement (Third) of Restitution and Unjust Enrichment § 51 (2011) ("The value for restitution purposes of benefits obtained by the misconduct of the defendant, culpable or otherwise, ***is not less than their market value***.") (emphasis added). This legal authority explaining that the measure of the reasonable value of services is equated to market value is not isolated.

In *Sierra Development Co. v. Chartwell Advisory Group, Ltd.*, 325 F.Supp.3d 1102, 1106, 1107 (D. Nev. 2018), the federal district court explained that "the market value of...services is the remedy traditionally known as quantum meruit." *See also*, Restatement (Third) of Restitution and Unjust Enrichment § 49(3)(c) & cmt. f (2011). The *Sierra Dev. Co.* court went on to explain:

> There are two related contexts: contract and restitution. In the former, quantum meruit applies in an action based upon a contract implied-in-fact, which is found when the parties intended to contract and promises were exchanged. In that circumstance, quantum meruit may be employed as a gap-filler to supply absent terms. Quantum meruit's other role is in providing restitution for unjust enrichment. ***In this circumstance, quantum meruit imposes liability for the market value of services as a remedy***.. This is the form of quantum meruit that applies in this case.

325 F. Supp. 3d at 1107 (internal citations omitted) (citing *Certified Fire*, 283 P.3d at 256; Restatement (Third) of Restitution and Unjust Enrichment § 49; and *Risinger v. SOC LLC*, 936 F.Supp.2d 1235, 1246-47 (D. Nev. 2013)). United's attempt to characterize the Court's ruling as an erroneous application of "market value" instead of the "reasonable value of services" is not compelling given the foregoing legal authority.

In a final effort, United points to *Suen*, 132 Nev. 998, for the proposition that cost data constitutes "any other evidence regarding the value of services." Motion at 8:13-16. There, the *Suen* court determined a jury instruction about the "reasonable value of the services" was valid where the jury could consider "any other evidence" in making this determination, and went on to explain that "any other evidence" "necessarily includes evidence of the services' ***market value***." *Id.* United infers that *Suen's* reference to "any other evidence" means cost data (Motion

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003841
003841

at 5:5-8), but *Suen* provides no such guidance. Undeniably, "market value" is the "other evidence" to which the *Suen* court referred.

When United moved for cost-related discovery, it failed to point the Court to specific legal authority supporting its position on that point. Motion to Compel at 17:7-18:6. After the Health Care Providers pointed to legal authority demonstrating such cost discovery is unwarranted (Opposition at 12:17-13:11),[5] instead of trying to distinguish the Health Care Providers' authority, United pointed to *Florida Emergency Physicians Kang & Assocs., M.D., Inc. v. Sunshine State Health Plan, Inc.*, CACE19-013026, Filing No. 118577916, at 4-6 (Fl. Cir. Ct. Dec. 21, 2020) and cases underlying that decision. United relies on the same cases in the instant Motion. In other words, United does not point to any new material or information that was not before the Court when it denied cost discovery.

On the one hand, United urges the Court to disregard an order denying cost discovery in *Gulf-to-Bay Anesthesia Associates, LLC v. Unitedhealthcare of Florida, Inc. et al.*, No. 17-CA-011207 (Fla. Cir. Ct., December 21, 2020), but on the other, asks the Court to follow two other Florida cases that allowed cost discovery under the case-specific circumstances there. At face value, United's acknowledgment that Florida follows a statutory scheme seemingly undercuts its argument that this Court should depart from Nevada's common law application of quantum meruit in *Certified Fire*, § 49 of the Restatement (Third) of Restitution and Unjust Enrichment and *Risinger* in favor of three Florida state court decisions that turn on Florida law. But although United tries to distinguish the *Gulf-to-Bay* case involving United affiliates and a provider under the Team Health umbrella, an order identified by United in its moving papers provides a

[5] *NorthBay Healthcare Group - Hosp. Div. v. Blue Shield of California Life & Health Ins.*, 342 F. Supp. 3d 980, 990 (N.D. Cal. 2018) (denying motion to compel production of costing documents because in a quantum meruit dispute, because "the reasonable and customary value of hospital services is determined by value to the recipient, ***not the cost to the provider***" and the provider did not intend to introduce such evidence in support of the establishing the value of services); *see also Regents of the Univ. of California v. Glob. Excel Mgmt., Inc.*, No. SACV160714DOCEX, 2018 WL 5794508, at *19 (C.D. Cal. Jan. 10, 2018) ("under quantum meruit, ***the costs of the services provided are not relevant to a determination of reasonable value***.").

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003842
003842
003842

persuasive discussion as to why costs are ***not*** relevant to an inquiry about the reasonable value of services. *See* Exhibit 2, Gulf-to-Bay order denying motion to compel.

The *Gulf-to-Bay* case involves a Florida statute that requires payment of the usual and customary provider charges for similar services in the community, likening it to the "fair market value." As a result, that court concluded that costs are not part of the equation under the statute. But the court went even further to discuss other asserted claims for breach of implied-in-fact-contract, quantum meruit and unjust enrichment – claims included in the First Amended Complaint in this case – and also found that internal costing has no bearing on whether the reasonable value of services provided and/or a benefit has been conferred. *Id.* at ¶ 10.[6] The *Gulf-to-Bay* discovery order is consistent with Nevada law and the cornerstone element of unjust enrichment and quantum meruit claims that look to market value, not costs. *Certified Fire Prot. Inc.*, 128 Nev. at 381 n.3, 283 P.3d at 257 n. 3 (citing Restatement (Third) of Restitution and Unjust Enrichment § 49(3)(c) & cmt. f (2011); *see also Massachusetts Eye and Ear Infirmary v. QLT Phototherapeutics, Inc.*, 552 F.3d 47, n.26 ((1st Cir. 2009), *decision clarified on denial of reh'g*, 559 F.3d 1 (1st Cir. 2009) (the fair market value of a requested benefit was a well-accepted measure of unjust enrichment).

…

…

…

…

[6] The Florida state court found:

> Additionally, the Florida Standard Jury Instructions provide that the determination of damages for breach of implied-in-fact contract, quantum meruit, and unjust enrichment ***is based upon the fair compensation for the services rendered and/or benefit conferred – not the costs to provide the service***. *See* Florida Standard Jury Instructions in Contract and Business Cases, § 416.7, Restatement (First) of Restitution § 1 cmt. b (1937). Plaintiff's internal cost structure is therefore irrelevant to the analysis of the value of the services conferred by the Plaintiff or the factors to be considered by the jury.

(emphasis added).

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003843

003843

United also points to its sixth affirmative defense in support of its position that costs are relevant to the inquiry.[7] Motion at 4:13-16.[8] However, its sixth affirmative defense that [s]ome or all of Plaintiffs' billed charges are excessive under the applicable standards" has nothing to do with underlying costs to do business. Rather United's affirmative defense essentially says that United believes its rate of payment is justified, the opposing argument to the Health Care Providers' allegations that United's rate of payment is improperly manipulated. United cannot overcome the fact that its reimbursement rates are what is at stake in this litigation and not the Health Care Providers' costs.

Ultimately, United's characterization of the Court's application of an erroneous "market" standard is simply semantics aimed at trying to get a second bite at the apple. Like the Health Care Providers analogized at the hearing, in order to get paid for emergency services they already provided – much like any other service provider trying to get paid for services already delivered – the reasonable value of services provided is akin to market value, not costs.

C. The Court Did Not Make a Ruling Based on the Purported Public Availability of Information

Secondarily, United argues that the Court should reconsider its Order if the Court denied cost discovery "based on a finding that the information United seeks is available in the public domain." Motion at 5:13-17. The Court did not rule that cost discovery is barred because cost information is available in the public domain. United points the Court to three citations to the hearing transcript, but none of those support their claim. In the first cite, the Court stated:

> THE COURT: Okay. So I've got a few questions.
> So these are Nevada corporations. And so the – the members of the board of directors and the list of officers is available online; right, through the Secretary of State?
>
> MS. FEDDER: Your Honor, I don't know the answer to that question. It may be.

[7] Which states: "Some or all of Plaintiffs' billed charges are excessive under the applicable standards, and/or Plaintiffs have failed to identify any basis for entitlement to demand receipt of any fixed percentage of billed charges." Answer to First Am. Compl. at 44:21-23.

[8] United also points to its fourteenth (no damages suffered), eighteenth (mitigation) and twenty-sixth (already received payment and ERISA) affirmative defenses; however, none of these establishes any cost-based entitlement to discovery.

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003844
003844

January 21, 2021 Hr'g Tr. at 9:9-14. But, United omits the follow-on question:

> THE COURT: Okay. So why would you be entitled, though, to know who the shareholders are or what happens at the board meetings?

Id. at 9:15-17. The foregoing makes it clear the Court asked United's counsel a question in connection with the corporate structure/relationship documents that United also moved to compel, and to which the Court denied.

Second, United does not provide the full exchange in a section of the transcript where United discussed why it asked for and should be able to discover corporate financial information about profitability:

> THE COURT: All right. But one of the things you have asked for is basically the financial information that -- the profitability of the business and how that affects charges, how they're set.
>
> MS. FEDDER: Yes, Your Honor. We've asked for that information because we believe that as a profit-driven entity, Team Health has an incentive to inflate the billed charges.
>
> We also believe, based on news articles, that Team Health provides management and administrative services. It charges a fee for those services. And we believe that the billed charges may be inflated to reflect those fees.
>
> And we've requested financial information for that reason to try to understand the relationship between the billed charges and the profitability.
>
> THE COURT: Okay.
>
> MS. FEDDER: And whether --
>
> THE COURT: Sorry. Go ahead.
>
> MS. FEDDER: Excuse me. I'm sorry.
>
> Oh, and whether profitability considerations are informing the basis for the billed charges, as opposed to other considerations that might inform them, such as the plaintiffs' actual cost of providing the care.
>
> THE COURT: Okay. And everyone here is a for-profit entity; correct? All parties?
>
> MS. FEDDER: Yes, Your Honor. That's correct.
>
> THE COURT: Right. But some are public and some are private?

January 21, 2021 Hr'g Tr. at 10:19-23.

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003845
003845
003845

Finally, United points to page 34, lines 2-7 of the transcript which does not indicate that the Court denied cost-related documents because the information is available in the public domain either:

> MS. FEDDER: Certainly the plaintiffs are for-profit entities.
> I don't know the answer about whether they are publicly traded. I just wanted to make sure that's clear. I don't want to speak for plaintiffs. I don't -- I can't speak to what their corporate structure is.
>
> THE COURT: Good enough.

Id. at 34:2-7.

The foregoing exchanges make it clear that the Court did not deny cost discovery on the basis that the information is available in the public domain. Rather, the Court denied the discovery because United did not articulate any relevant and proportional basis to require cost-related discovery.

IV. CONCLUSION

Based on the foregoing, the Health Care Providers respectfully request that the Court deny United's motion for reconsideration because the Court already considered and rejected United's arguments. The Court did not err with respect to its ruling and the February 4, 2021 Order denying cost-related discovery should stand.

DATED this 4th day of March, 2021.

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By: */s/ Kristen T. Gallagher*

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003846

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on this 4th day of March, 2021, I caused a true and correct copy of the foregoing **PLAINTIFFS' OPPOSITION TO MOTION FOR RECONSIDERATION OF COURT'S ORDER DENYING DEFENDANTS' MOTION TO COMPEL RESPONSES TO DEFENDANTS' FIRST AND SECOND REQUESTS FOR PRODUCTION** to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

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003847
003847

EXHIBIT 1

003848

003848

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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 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 **PLAINTIFFS' RESPONSES TO DEFENDANTS' SECOND SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS** ***CONTAINS CONFIDENTIAL INFORMATION & PROTECTED HEALTH INFORMATION***

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") hereby respond

003849

further delay these proceedings; and is designed for an improper purpose to annoy, embarrass and oppress. For these reasons, the Health Care Providers decline to respond.

68. Please produce all documents which reflect or discuss the extent to which the rates you charge for emergency medical services, from July 1, 2017 to present, capture or reflect your actual cost of doing business.

RESPONSE:

Objection. This request is vague and ambiguous as to the phrase "actual cost of doing business"; potentially seeks documents protected by the attorney-client privilege and work product doctrine and/or are otherwise confidential; seeks information that is not relevant and proportional to the needs of the case as the Health Care Providers' costs have no import as to the Health Care Providers' allegations of underpayment, breach of an implied-in-fact contract, and civil racketeering, among other claims, nor does it have any bearing on or relationship to any of United's affirmative defenses; is a request designed to unreasonably further delay these proceedings; and is designed for an improper purpose to annoy, embarrass and oppress. For these reasons, the Health Care Providers decline to respond.

69. Please produce all any and all articles of incorporation, amendments and governing documents for each of the Plaintiffs in effect at any time from July 1, 2017 to present.

RESPONSE:

Objection. This request seeks documents that are confidential; seeks information that is not proportional to the needs of the case as the Health Care Providers' corporate documents has no import as to the Health Care Providers' allegations of underpayment, breach of an implied-in-fact contract, and civil racketeering, among other claims, nor does it have any bearing on or relationship to any of United's affirmative defenses; is a request designed to unreasonably further delay these proceedings; and is designed for an improper purpose to annoy, embarrass and oppress. For these reasons, the Health Care Providers decline to respond to the request as currently framed.

70. Please produce all copies of the minutes of any meetings of Plaintiffs' board of directors or other governing body from July 1, 2017 to present which relate to:

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billed charges" from "self-pay" or "uninsured" individuals, will not support or refute any of their claims or United's affirmative defenses. Subject to and without waiving the foregoing objections, the Health Care Providers decline to respond to the request.

86. Please produce all documents and communications of any type related to any cost to charge analysis performed on any emergency medical service you offer patients from July 1, 2017 to present.

RESPONSE:

Objection. This request is vague and ambiguous as to the phrase "any cost to charge"; potentially seeks documents protected by the attorney-client privilege and work product doctrine and/or are otherwise confidential; seeks information that is not relevant and proportional to the needs of the case as the Health Care Providers' costs have no import as to the Health Care Providers' allegations of underpayment, breach of an implied-in-fact contract, and civil racketeering, among other claims, nor does it have any bearing on or relationship to any of United's affirmative defenses; is a request designed to unreasonably further delay these proceedings; and is designed for an improper purpose to annoy, embarrass and oppress. For these reasons, the Health Care Providers decline to respond.

87. For each Commercial Payer (not including Defendants) with whom you have or had an in-network contractual relationship during the period July 1, 2017 to present, all documents showing, on an annual basis:

a) The identity of the Payer;

b) The total number of emergency-related services provided to members of each Payer;

c) The total charges you billed to each Payer;

d) The total amount allowed by each Payer;

e) The total amount paid by each Payer;

f) The total out-of-pocket patient responsibility related to each Payer's claims;

g) The total amount you collected from the Payer's members; and

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003851

92. Documents showing each and every cost incurred by you in offering emergency services to patients from July 1, 2017 to present.

RESPONSE:

Objection. This request is vague and ambiguous as to the phrase "cost"; potentially seeks documents protected by the attorney-client privilege and work product doctrine and/or are otherwise confidential; seeks information that is not relevant and proportional to the needs of the case as the Health Care Providers' costs have no import as to the Health Care Providers' allegations of underpayment, breach of an implied-in-fact contract, and civil racketeering, among other claims, nor does it have any bearing on or relationship to any of United's affirmative defenses; is a request designed to unreasonably further delay these proceedings; and is designed for an improper purpose to annoy, embarrass and oppress. For these reasons, the Health Care Providers decline to respond.

93. Documents showing each and every cost incurred by you in offering the types of services reflected in the Claims from July 1, 2017 to present.

RESPONSE:

Objection. This request is duplicative (RFP Nos. 67-68, 86, 92) vague and ambiguous as to the phrase "cost incurred…in offering the types of services"; potentially seeks documents protected by the attorney-client privilege and work product doctrine and/or are otherwise confidential; seeks information that is not relevant and proportional to the needs of the case as the Health Care Providers' costs have no import as to the Health Care Providers' allegations of underpayment, breach of an implied-in-fact contract, and civil racketeering, among other claims, nor does it have any bearing on or relationship to any of United's affirmative defenses; is a request designed to unreasonably further delay these proceedings; and is designed for an improper purpose to annoy, embarrass and oppress. For these reasons, the Health Care Providers decline to respond.

94. A copy of any cost report(s) presented by you to any federal or state agency since July 1, 2017 to present.

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003852
003852
003852

RESPONSE:

Objection. This request is vague and ambiguous as to the phrase "cost reports"; potentially seeks documents protected by the attorney-client privilege and work product doctrine and/or are otherwise confidential; seeks information that is not relevant and proportional to the needs of the case as the Health Care Providers' costs have no import as to the Health Care Providers' allegations of underpayment, breach of an implied-in-fact contract, and civil racketeering, among other claims, nor does it have any bearing on or relationship to any of United's affirmative defenses; is a request designed to unreasonably further delay these proceedings; and is designed for an improper purpose to annoy, embarrass and oppress. For these reasons, the Health Care Providers decline to respond.

95. Documents which show the relationship between Plaintiffs and Team Health from July 1, 2017 to present, including but not limited to documents showing the services provided to you by Team Health, any compensation Team Health received in connection with those services (including remuneration flowing between you and Team Health or collected reimbursement that Team Health keeps), and documents showing any Team Health ownership and/or control over you.

RESPONSE:

Objection. This request seeks documents that are confidential; seeks information that is not proportional to the needs of the case as any arrangement between the Health Care Providers' and Team Health have no import as to the Health Care Providers' allegations of underpayment, breach of an implied-in-fact contract, and civil racketeering, among other claims, nor does it have any bearing on or relationship to any of United's affirmative defenses; is a request designed to unreasonably further delay these proceedings; and is designed for an improper purpose to annoy, embarrass and oppress. For these reasons, the Health Care Providers decline to respond to the request as currently framed.

96. All documents which identify the Claims you has asserted against Defendants in the First Amended Complaint including, but not limited to:

a) The claim numbers assigned by Defendants with respect to each claim

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RESPONSE:

Objection. This request is vague and ambiguous as to the terms "date dictionaries," "legends" "detailed descriptions of parameters and filters used to generate data"; seeks information that would require the Health Care Providers to guess as to what United is asking for; seeks confidential and proprietary information. Subject to and without waiving the foregoing objections, the Health Care Providers are unaware of any documents responsive to this request.

DATED this 28th day of September, 2020.

McDONALD CARANO LLP

By: /s/ *Kristen T. Gallagher*

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EXHIBIT 2

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EXHIBIT 2

IN THE CIRCUIT COURT FOR THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

GULF-TO-BAY ANESTHESIOLOGY ASSOCIATES, LLC,

CASE NO.: 17-CA-011207

Plaintiff,

v.

UNITEDHEALTHCARE OF FLORIDA, INC., and UNITEDHEALTHCARE INSURANCE CO.,

The Insurance Companies.
_____/

ORDER DENYING DEFENDANTS' MOTION TO COMPEL DISCOVERY REGARDING PLAINTIFF'S INTERNAL COST STRUCTURE

003856

THIS MATTER came before the Court on September 24, 2020, on UnitedHealthcare of Florida, Inc. and UnitedHealthcare Insurance Co.'s (collectively, "Defendants") Motion to Compel Plaintiff's Supplemental Responses to Defendants' First Request for Production filed August 21, 2020 ("Defendants' RFP Motion") and Motion to Compel Plaintiff's Supplemental Responses to Defendants' First Set of Interrogatories filed August 25, 2020, (collectively "Defendants' Discovery Motions"). This Order addresses Requests for Production Numbers 2-7, 29-30, 55, 62-64 and Interrogatory Numbers 19 and 30, which seek production of documents and information from Plaintiff, Gulf to Bay Anesthesiology Associates, LLC ("Plaintiff"), relating to Plaintiff's internal cost structure ("Cost Discovery"). The Court having reviewed Defendants' Discovery Motions, Plaintiff's Omnibus Response to Defendants' Motions filed September 14, 2020 ("Omnibus Response"), having heard argument of counsel, having reviewed the Court file, and being otherwise fully advised in the premises, hereby ORDERS AND ADJUDGES as follows:

1. This case involves Plaintiff's claims for damages for medical services provided to Defendants' commercial members. Plaintiff alleges that since May 2017, there has been no written

003856

agreement between the parties that dictates the amount Defendants should pay for these medical services, and Plaintiff alleges that Defendants have reimbursed Plaintiff at below fair market rates (the "Disputed Commercial Claims"). In the Amended Complaint, Plaintiff alleges six causes of action, as follows: (1) violation of section 627.64194, Florida Statutes, which sets forth the rates at which preferred provider organizations (PPOs) must reimburse out-of-network healthcare providers (Count I); (2) violation of section 641.513, Florida Statutes, which sets forth the rates at which health maintenance organizations (HMOs) must reimburse out-of-network healthcare providers (Count II); (3) breach of contract implied-in-fact (Count III); (4) quantum meruit (Count IV); (5) unjust enrichment (Count V); and (6) declaratory relief (Count VI).

2. Defendants answered the Amended Complaint on February 22, 2019. Defendants did not raise any affirmative defenses challenging the reasonableness of Plaintiff's rates, charges, or pricing. Additionally, Defendants did not assert any counterclaims that would otherwise expand the issues as framed by the Amended Complaint.

003857

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3. The relevant framework for analyzing the appropriate reimbursement of the Disputed Commercial Claims arises out of sections 641.513(5)[1] for HMOs and 627.64194(4) for PPOs (which incorporates section 641.513(5) to the analysis of both emergent and non-emergent services). This framework provides as follows:

> (5) 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:

[1] While section 641.513 expressly applies to emergency services, Rule 69O-191.049, Florida Administrative Code, extends the obligation of an HMO to pay hospital-based providers, including anesthesiologists, for "medically necessary and approved physician care rendered to a non-Medicare subscriber at a contracted hospital." Moreover, section 641.3154 obligates HMOs to pay providers, such as Healthcare Provider, for authorized services without regard to the location where the medical services were rendered. As alleged in the Amended Complaint, the Disputed Claims were all authorized and determined by Defendants to be medically necessary.

003857

(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.

4. Notably, the statute focuses on "charges." There is no provision of this statute that identifies the provider's "costs" as a relevant consideration in the analysis.

5. The leading case interpreting section 641.513(5) is *Baker Cty. Medical Svcs., Inc. v. Aetna Health Mgmt., LLC*, 31 So. 3d 842, 845-46 (Fla. 1st DCA 2010). In that case, the First District analyzed the wording of the statute and the relevant provisions and concluded:

> The term "charges" is not defined in section 641.513(5). When a statute does not define a term, we rely on the dictionary to determine the definition. *See Green v. State*, 604 So.2d 471, 473 (Fla.1992). "Charge" is defined as a "[p]rice, cost, or expense." BLACK'S LAW DICTIONARY 248 (8th ed. 2004). In paragraph (5)(a), the term "charge" is modified by the terms "usual" and "customary." "Usual" is defined as "[o]rdinary; customary" and "[e]xpected based on previous experience." *Id.* at 1579. "Customary" is defined as "[a] record of all of the established legal and quasi-legal practices in a community." *Id.* at 413. **In the context of the statute, it is clear what is called for is the fair market value of the services provided. Fair market value is the price that a willing buyer will pay and a willing seller will accept in an arm's-length transaction.** *See United States v. Cartwright*, 411 U.S. 546, 551, 93 S.Ct. 1713, 36 L.Ed.2d 528 (1973).

Id. at 845 (emphasis added).

6. The *Baker County* Court then concluded that in determining the fair market value of the services, it is appropriate to consider the amounts billed and the amounts accepted by providers, except for patients covered by Medicare and Medicaid. *Id.* at 845-46. Consistent with the plain language of section 641.513(5), the First District did not mention or reference "costs" as having any relevance or impact on the analysis of the statute or the determination of "fair market value." *Id.*

003858
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7. The Defendants' Discovery Motions seek to compel Cost Discovery, arguing that such discovery is relevant to the reasonableness of Plaintiff's charge. Defendants rely on *Giacalone v. Helen Ellis Mem'l Hosp. Found*., 8 So. 3d 1233 (Fla. 2d DCA 2009) in support of its position[2]. In opposition, Plaintiff argues that Cost Discovery is irrelevant and not likely to lead to the discovery of admissible evidence based on the applicable statutes and case law related specifically to the claims and defenses asserted in this case. Plaintiff further contends that *Giacolone* is distinguishable, because the legal claims and issues in that case are materially different from those asserted here.

8. After careful consideration, the Court finds that the Cost Discovery is irrelevant and not likely to lead to the discovery of admissible evidence under Rule 1.280, Fla.R.Civ.P.[3] The legal theories asserted by Plaintiff and at issue in this case involve the determination of the lesser of its charges or the "usual and customary provider charges for similar services in the community where the services were provided." There is no mention of "costs" in the applicable statutes as a relevant factor in the analysis. And, the reasonableness of its charges is measured against the

003859

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[2] Defendants also rely on a news article in *Pro Publica* purporting to review a case and case materials pending in a court in Texas, that were subsequently sealed. Defendants have not identified the specific legal claims and defenses in the Texas case, how any issues in that case relate to the specific issues in this case or why this Court should rely on third-hand discussions in a news article to inform this Court on how to address the specific issues under Florida law. Accordingly, the Court does not consider this article as probative or informative for purposes of ruling on the pending Motions.

[3] Under Rule 1.280, Fla.R.Civ.P., a party may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and/or likely to lead to the discovery of admissible evidence. *See, e.g., Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 94 (Fla. 1995). While the scope of discovery is broad, it is not unlimited. For example, discovery is not intended to be a "fishing expedition," and courts routinely foreclose a party's attempt to use discovery in that manner. *See, e.g., Walter v. Page*, 638 So. 2d 1030, 1031-32 (Fla. 2nd DCA 1994); *see also State Farm Mut. Auto. Ins. Co. v. Parrish*, 800 So. 2d 706, 707 (Fla. 5th DCA 2001); *Sugarmill Woods Civic Ass'n v. Southern States Utilities*, 687 So. 2d. 1346, 1351 (Fla. 1st DCA 1997). Put simply, a litigant is not entitled "carte blanche to irrelevant discovery." *Langston*, 655 So. 2d at 95.

003859

"usual and customary provider charges for similar services in the community." The statute does not expressly contemplate any analysis of provider costs, either of the Plaintiff or of other providers in the community, and the Court refuses to read such a provision into the statute.

9. Likewise, the *Baker County* Court also determined that the relevant inquiry was in the "fair market value" of the services provided, defined as "the price that a willing buyer will pay and a willing seller will accept in an arm's length transaction." *Baker County*, 31 So. 3d at 845. As explained by the First District, that analysis focuses solely the price of the services, rather than the costs of the services. Importantly, the First District did not identify costs as a factor in the analysis or having any relevance to this determination.

10. Additionally, the Florida Standard Jury Instructions provide that the determination of damages for breach of implied-in-fact contract, *quantum meruit*, and unjust enrichment is based upon the fair compensation for the services rendered and/or benefit conferred – not the costs to provide the service. *See* Florida Standard Jury Instructions in Contract and Business Cases, § 416.7, Restatement (First) of Restitution § 1 cmt. b (1937). Plaintiff's internal cost structure is therefore irrelevant to the analysis of the value of the services conferred by the Plaintiff or the factors to be considered by the jury.

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11. The Court has carefully considered Defendants' arguments and reliance on *Giacalone;* however, *Giacolone* is distinguishable. *Giacalone* involved a contract dispute between an uninsured patient and a hospital regarding the patient's agreement to pay for services in accordance with "the regular rates and terms of the hospital." *Id.* at 1234. The hospital sued to collect its full billed charges, claiming those charges reflected the "reasonable value" of the services. The defendant/patient asserted defenses of unconscionability (unreasonable pricing), and asserted counterclaims for unfair or deceptive trade practices. *Id.* The Second DCA characterized

003860

the defendant's "primary claim" as the charges were unreasonable. There were no claims asserted under section 641.513 or 627.64194, Florida Statutes, and *Giacolone* did not discuss those statutes or *Baker County*.

12. At issue before the Second DCA in *Giacolone* was the trial court's form order issuing a blanket denial and containing no explanation of its decision to deny discovery regarding the hospital's charges and discounts provided to various categories of patients (including Medicare and Medicaid),[4] and the hospital's internal cost structure. *Id.* at 1235. The Second DCA did not find specifically that internal cost discovery was relevant or discoverable, but remanded the case back to the trial court for specific consideration of the individual requests in the context of the claims asserted by an uninsured patient against a hospital for breach of contract. *Id.* at 1236.

13. By contrast, Defendants have not raised any unreasonable pricing claims here, either by affirmative defense or counterclaim. Instead, the pleadings here focus on a statutory analysis that addresses the fair market value of the services provided, determined by the price a willing buyer would pay and willing seller would accept. *Baker County*, 31 So. 3d at 845-846. The focus of that analysis is on market pricing.[5] The Court has carefully considered the Cost Discovery requests in the context of this case, and finds that *Giacolone* is not controlling regarding discovery here.

14. Finally, the Court notes that the parties have already exchanged discovery contemplated by *Baker County*, including, for example, (a) information regarding Plaintiff's

[4] As noted above, the *Baker County* Court held that payments from Medicare and Medicaid were not relevant to the determination under section 641.513, Florida Statutes.

[5] Notably, Defendants have not explained how discovery of Plaintiff's internal cost structure would be relevant to a market rate analysis, how Defendants would compare Plaintiff's internal cost structure to the internal cost structure of others in the market, or how Defendants would even obtain that cost information from non-parties.

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charges; (b) amounts accepted by Plaintiff for similar services by other commercial insurers; and (c) amounts paid by Defendants for commercial insurance products for similar services in the community. This is precisely the information that is discoverable and is to be weighed by the jury in determining the fair market value of Plaintiff's anesthesia services. In contrast, Plaintiff's internal cost structure is wholly irrelevant and not likely to lead to the discovery of admissible evidence.

Based on the foregoing, it is hereupon **ORDERED** and **ADJUDGED** that Defendants' Motions to obtain documents and information regarding Plaintiff's internal costs and discovery requests related thereto are **DENIED**.[6]

DONE and ORDERED this ___ day of _____ 2020, in Tampa, Hillsborough County, Florida.

Electronically Conformed 12/1/2020
Christopher Sabella

CIRCUIT COURT JUDGE

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Copies furnished to:
Counsel of Record

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[6] This Order also applies to any third party discovery issued by the Defendants, including but not limited to Defendants' Notice of Intent to Serve *Subpoena Duces Tecum* Without Deposition Pursuant to Rule 1.351, Fla.R.Civ.P. for Production of Documents from Non-Party TeamHealth Holdings, Inc. and Notice of Intent to Serve *Subpoena Duces Tecum* Without Deposition Pursuant to Rule 1.351, Fla.R.Civ.P. for Production of Documents from Non-Party Collect RX, Inc.

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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

HEARING REQUSTED

PLAINTIFFS' RENEWED MOTION FOR ORDER TO SHOW CAUSE WHY DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT AND FOR SANCTIONS

Plaintiffs Fremont Emergency Services (Mandavia), Ltd. ("Fremont"); Team Physicians of Nevada-Mandavia, P.C. ("Team Physicians"); Crum, Stefanko and Jones, Ltd. dba Ruby Crest

003863

003863

Emergency Medicine ("Ruby Crest" and collectively the "Health Care Providers") renew their motion for sanctions in connection with 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") failure to comply with the Orders of this Court with respect to its discovery and production obligations. This Motion 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.

POINTS AND AUTHORITIES

I. INTRODUCTION

United is not in compliance with the Court's September 28, 2020,[1] October 27, 2020,[2] November 9, 2020,[3] and January 20, 2021[4] Orders because it has failed to produce critical information and documents compelled by these Orders. United will undoubtedly point to the number of pages of its document production, but the substance is lacking. Of the 97,901 pages of documents United has produced, 91,800 are at-issue claims files (which United refers to as the administrative record), leaving 6,101 pages of non-administrative record documents. Of those 6,096 pages, at least 2,617 pages are contracts or benefit plan templates. **Exhibit 1**, identification of documents produced and related Bates-ranges. This means that, to date, United has produced a total of 3,484 non-administrative, non-contract pages of documents. Given the

[1] Order Denying Defendants' Motion For Protective Order Regarding Electronic Discovery And To Compel The Entry Of A Protocol For Retrieval And Production Of Electronic Mail ("September 28 Order Denying Email Protocol").

[2] Order Granting Plaintiffs' Motion To Compel Defendants' List Of Witnesses, Production Of Documents And Answers To Interrogatories On Order Shortening Time ("October 27 Order Granting Motion to Compel").

[3] Order Setting Defendants' Production & Response Schedule Re: Order Granting Plaintiffs' Motion To Compel Defendants' List Of Witnesses, Production Of Documents And Answers To Interrogatories On Order Shortening Time "(November 9 Order Setting Production Schedule").

[4] Order Granting In Part And Denying In Part Defendants' Motion To Clarify The Court's October 27, 2020 Order On Order Shortening Time And Order Denying Countermotion For Order To Show Cause Why Defendants Should Not Be Held In Contempt And For Sanctions Without Prejudice ("January 20 Order on Motion to Clarify/Countermotion").

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depth and nature of the compelled discovery requests – aimed at United's coercive and manipulated setting of reimbursement rates that spans not only United, but externally to third parties like MultiPlan, Inc. – it can be easily appreciated that United has come nowhere near its ordered production obligation. The Court now has United's own admission from the February 25, 2021 hearing in this regard:

> In particular, ***the parties only recently reached agreement on a protocol to govern electronic discovery***. And while both parties had produced some e-mail prior to reaching agreement, ***e-mail discovery had not begun in earnest until recently.*** The parties are also in the process of negotiating a claims-matching protocol that would limit the scope of the discovery that is specific to the 22,153 health benefit claims at issue in this case.

February 25, 2021 Hr. Tr. at 10:9-15 (emphasis added). This statement is consistent with United's argument in opposition to the Health Care Providers' original countermotion on United's deficient document production where United stated that it "continues to work to produce responsive documents as fast as reasonably possible given Plaintiffs' numerous discovery demands, and given other competing priorities, such as negotiating an ESI protocol and a claims matching protocol as the Court has directed." *See* United's Reply in Support of Motion to Clarify and Opposition to Countermotion at 11:14-17. But to date, there has been no meaningful production of responsive documents. Moreover, the Court's earlier Orders make it clear that United was not permitted to use the ESI protocol to stay its production obligations:

> IT IS FURTHER ORDERED that ***discovery shall not be stayed pending completion of an ESI Protocol*** and all parties must comply with their discovery obligations during the pendency of negotiations concerning an ESI Protocol.
>
> ***
>
> IT IS FURTHER ORDERED that the Health Care Providers' Countermotion for order to show cause and for sanctions is DENIED without prejudice and ***the Health Care Providers may renew the request in the event there is not an immediate response to United by the issues raised in the Countermotion***.

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September 28 Order Denying Email Protocol at 6:15-17 (emphasis added);[5] October 27, 2020 Order Granting Motion to Compel at 4:24-27; January 20, 2021 Order on Motion to Clarify/Countermotion at 3:7-10 (emphasis added), respectively. None of these Orders, or any others issued by the Court, operate to excuse United's production failures or allow any delay. In fact, in the January 20, 2021 Order on Motion to Clarify/Countermotion, entered over one month ago, the Court made clear that it expected an "immediate response" by United on the issues raised in the Health Care Providers' initial motion for order to show cause. January 20, 2021 Order on Motion to Clarify/Countermotion at 3:9. Yet, the majority of issues raised in that initial motion remain deficient. Because this is not the first, second or even third time that United has not met its discovery obligations in this case,[6] the Health Care Providers respectfully request that the Court sanction United under NRCP 37 by striking its Answer and affirmative defenses.

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[5] United unsuccessfully tried to impede the Health Care Providers' discovery:

> "The Court further finds that the protocol proposed by United in its Motion would unreasonably hamper the Health Care Providers from obtaining information with regard to the identity of custodians and information which would otherwise be discoverable."

Id. at ¶ 15. *See also* September 28, 2020 Order Granting, In Part Plaintiffs' Motion To Compel Defendants' Production Of Claims File For At-Issue Claims, Or, In The Alternative, Motion In Limine ("September 28 Order Granting Production of At-Issue Claims File") at ¶ 18:

> The Court has also considered United's argument that the method of production of the Administrative Records would not be proportional to the needs of the case. United's proposal to employ statistical sampling methodology, require the parties to employ experts to attempt to match each party's claims data, and/or only require the parties to produce documents related to a smaller set of the at-issue claims does not sufficiently address the discovery needed for the Health Care Providers to prosecute this case.

[6] The Court has made the following findings:

> The Court finds that **United has not participated in discovery with sufficient effort and has not taken a rational approach to its discovery obligations. In the event that United does not meet the deadlines of the Court, the Court will have no choice but to make negative inferences**. October 27 Order Granting Motion to Compel at p. 4 ¶¶ 9-10 (emphasis added).
>
> The Court finds that **United's discovery conduct in this action is unacceptable** to the Court. The Court finds that United has failed to

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II. FACTS RELEVANT

United has not made meaningful document production in connection with the following categories and corresponding Interrogatories and Requests for Production of Documents ("RFPs"):[7]

Rental, wrap, shared savings program or any other agreement that United contends allows it to pay less than full billed charges (RFP Nos. 9, 16) and related financial documents (RFP No. 34):

United's deadline to provide full and complete supplemental responses to RFP Nos. 9, 16 and 34 was October 22, 2020, but United has failed to make a meaningful document production relating to its shared savings program. United was obligated to produce contracts with third parties regarding its shared savings program, amounts invoiced to third parties for out-of-networks claims and the amounts United was compensated in connection with the program. In its Ninth Supplemental RFP Responses (**Exhibit 2**), United pointed to DEF000722–DEF000854 (United-MultiPlan, Inc. Network Access Agreement and amendments thereto) and DEF011090–DEF011210 (UMR-First Health Agreement and amendments thereto. To date, United has not produced any agreement with any employer group related to its shared savings program, has not produced invoices or any documents relating to United's compensation or any other financial information. In light of a PowerPoint sales presentation that discusses the shared

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> properly meet and confer with regard to the Court's directive to meet and confer on a claims data matching protocol in connection with the Court's September 28, 2020 Order Granting, in part, the Health Care Providers' Motion to Compel United's Production of Claims File for At-Issue Claims, or in the Alternative, Motion in Limine ("September 28 Order"). November 9, 2020 Order Setting Production Schedule at ¶¶ 1-2 (emphasis added).
>
> United shall not impose a geography limitation in connection with its responses to Request Nos. 12 and 21 of Fremont's First Set of Requests for Production of Documents." January 20 Order on Motion to Clarify/Countermotion at 2:26-27.

Most recently, the Court found it inappropriate for United to state that it would not voluntarily produce witnesses until document production is complete and that it demonstrates "an unwillingness to move the case forward." February 25, 2021, Hr. Tr. at 35:13-18.

[7] The subject written discovery requests are set forth in **Annex 1**.

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savings program and financial benefits touted by United, United cannot deny the existence of such documents. **Exhibit 3**, Out-of-Network Cost Management Programs**,** DEF011238 at 11242. United's failure to produce responsive documents is not just wholly deficient but completely disregards the Court's October 27 Order Granting Motion to Compel.

Documents related to United's relationship with Data iSight and/or other third parties (RFP Nos. 11, 12 and 21). United's deadline to provide full and complete supplemental responses was October 22, 2020. United has produced limited documents exchanged with MultiPlan, Inc. ("MultiPlan") and none exchanged with National Care Network LLC ("NCN") representatives. At this point, United has produced:[8]

- MultiPlan Network Access Agreement and amendments thereto (DEF000722-854, DEF01388-1535).
- Eight pages of Data iSight client preference checklist sheets (DEF001380-1387).
- A closure report (DEF010555) that includes no claims from 2017 and just one claim from 2018. Another document identifies a United email address dedicated entirely to closure reports, yet, the Health Care Providers spent months in meet and confers during May through August 2020 during which time United denied the existence of this type of document and communicated that they did not know how closure reports were delivered to United. **Exhibit 5**, July 15, 2020 email chain at p. 6; **Exhibit 11**, DEF091150. There also appears to be another email address that is also dedicated to communications between the two companies.
- For the period June-November 2019 plus one email dated December 28, 2017, 25 emails/attachments representing various versions of an email chain between representatives of MultiPlan and United concerning application of a negotiation ceiling applied to emergency medicine providers under the Team Health umbrella and related workflow implementing the ceiling (DEF010455-10554; redacted version, DEF07984R-79905R), for a total of 99 pages. **Exhibit 6** (export of Bates-number, confidentiality designation, custodian metadata fields from

[8] *See* **Exhibit 4**, United's Twenty-Seventh Supplement to Initial Disclosures, List of Documents at 5-11.

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003868
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United's document production);[9] **Exhibit 7**, Declaration of Kristen T. Gallagher, ¶ 4 The emails make reference to other unproduced documents that describe quarterly meetings, references to the expansion of certain capabilities, the ability of United to make adjustments based on business objectives, and assertions related to the alleged defensibility of the data set, among other things that make it clear these are not one-off, isolated communications.

- For the period October 18, 2016 through May 15, 2019, a total of 75 emails/attachments (DEF079991-80136), totaling 145 pages, including a total of just 17 emails for all of 2017, 14 emails for all of 2018 and 10 emails for the first five months of 2019. **Exhibit 8** (export of Bates-number, confidentiality designation, custodian and date sent metadata fields from United's document production). Given the length of the parties' multi-year relationship and the nature of the relationship, this is not plausible. Indeed, the emails that have been produced refer to additional meetings and activity that underscores how frequently routine exchanges took place. For example, DEF079911 and DEF080036 reference bi-monthly governance plans and related agendas, yet only two emails from June 13, 2018 relating to a May 2018 governance meeting have been produced. **Exhibit 9** (governance meeting spreadsheet).
- For the period 2014-2020, 121 emails/attachments (DEF091132-091579), totaling 447 pages, comprised of various emails that include United-provided scripts for discussions with providers about the reimbursement rates. **Exhibit 10** (export of Bates-number, confidentiality designation, custodian and date sent metadata fields from United's document production).
    - The documents in this Bates-range make reference to other types of activity reports, meetings and meeting notes, United's implementation of an outlier cost management ("OCM") program and negotiation parameters and references to other documents approved by MultiPlan executives (DEF091427) that have not been produced, but to which the

[9] The Health Care Providers added a date column added because United's production did not include a load file with that metadata field.

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Health Care Providers know exist (e.g. whitepapers[10] and other Data iSight presentation materials). Further, a 2017 first quarter performance deck is referenced in a July 24, 2017 email (DEF091537) and references to a 2017 UMR data review and files that were exchanged (DEF091562) appear to depict "scenarios" and forecasts, but which United has not produced. In fact, there appears to be a shared drive and or use of an FTP site where MultiPlan uploaded spreadsheets for United's review (Ex. 11, DEF091150) as well as other documents depicted that have not been produced.

Data iSight Reports: United has not produced Data iSight reports for the period June 2018 through January 31, 2020. **Exhibit 12** (extract of Data iSight reports). This also assumes that there is only one type of report, but given the complexity of the relationship, this too is unlikely and the Health Care Providers expect there to be multiple types of reports that have not yet been produced.

Aggregated National Data: The October 27 Order Granting Motion to Compel and November 9 Order Setting Production Schedule required United, by October 26, 2020, to produce "aggregated market and reimbursement level data related to out-of-network and in-network reimbursement rates at the national level. Both claims-by-claims and aggregated market data shall exclude managed Medicare and Medicaid data." *See* November 9 Order Setting Production Schedule at 5:3-8. Further, in its January 20, 2021 Order, the Court clarified that:

> United shall not impose a geography limitation in connection with its responses to RFP Nos. 12 and 21 [Data iSight];
>
> United shall produce documents relating to emergency and nonemergency medical services in connection with its responses to RFP Nos. 12 and 21;
>
> United shall not be entitled to redact non-Nevada and non-emergency medical services information; and
>
> United shall not be entitled to redact payer information.

[10] One email chain with "whitepapers" has been produced (DEF091467) from 2016; therefore, the Health Care Providers do not believe this is a fulsome production.

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Id. at 2:26-3:6. Notwithstanding the foregoing, United has not produced aggregated national data relating to these requests.[11]

Most egregious, United has not produced any internal emails discussing United's development or strategy considerations of its OCM or shared savings programs and engagement of Data iSight in connection with these programs. Certainly, the decision to expand United's use of Data iSight at a time and outcome that is consistent with United's threats to the Health Care Providers' representatives that reimbursement rates would be drastically reduced – first by 33%, then by 45-50% and now at levels as much as a 70-80% reduction of billed charges – is not a coincidence. And it is improbable that United expanded its business with Data iSight without information from Data iSight, analysis and decision-making at all levels, including C-Suite executives. Yet, documents and internal emails of this nature have not been produced.

Documents related to United's decision making and strategy in connection with its out-of-network reimbursement rates and implementation thereof (RFP Nos. 6, 7, 18, 32). United's deadline to provide full and complete supplemental responses was October 22, 20200. United has supplemented on four occasions; however, none of the documents that United refers the Health Care Providers points to internal decision-making and strategy:

On October 22, United served its Sixth Supplemental RFP Responses supplementing Nos. 6, 7, 18, and 32, pointing the Health Care Providers to the limited set of emails exchanged between MultiPlan and United (DEF010455-10554). **Exhibit 13**, United's Sixth Supplemental RFP Responses.

On October 30, 2020, United served its Ninth Supplement and supplemented RFP No. 6 with "documents forthcoming, beginning at DEF11481" (administrative records); Nos. 7 and 18 by pointing to provider agreements, and No. 32 by pointing to "negotiation correspondence" between United and representatives of the Health Care Providers. Ex. 2, United's Ninth Supplemental RFP Responses.

[11] In its Twenty-Seventh Supplement to initial disclosures, United produced a claims list from Sound Physicians that appears to include limited data from other states in connection with RFPs that are not the subject of this Motion (RFP Nos. 68, 70, 71).

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On November 6, 2020, United's Eleventh Supplement updated responses to RFP Nos. 7 and 18 by pointing to provider or network agreements. **Exhibit 14**, United's Eleventh Supplemental RFP Responses.

On December 14, 2020, United's Fourteenth Supplement updated response to RFP No. 18 with DEF075426-75428 (AEO). DEF075426 is a single tab, 17-line spreadsheet that purports to show seven other Nevada in-network emergency medicine provider groups' reimbursement schedule with Health Plan of Nevada, Sierra Health and Life, Sierra Health Options and Medicaid; and lists six out-of-network provider groups with nothing other than "non-par" (non-participating) with no indication of the reimbursement amount for the out-of-network providers. **Exhibit 15**, United's Fourteenth Supplemental RFP Responses; Ex. 7, Gallagher Decl. ¶ 8. The other two spreadsheets contains heavily redacted information about median rates. Ex. 7, Gallagher Decl. ¶ 8.

The foregoing documents do not amount to a meaningful production of the specific RFPs identified herein. Indeed the foregoing do not capture United's decision making and strategy in connection with United's out-of-network reimbursement rates and implementation of the strategy that United's executives announced would be forthcoming and which was, in fact, implemented. United's refusal to produce these documents should result in sanctions and negative inferences that, if produced, the evidence would confirm the Health Care Providers' allegations.

Documents related to United's decision making and strategy in connection with its in-network reimbursement rates and implementation thereof (RFP No. 31). United's deadline to provide full and complete supplemental responses to this request was October 22, 2020. United has not sufficiently responded to this request, only pointing to emails between United and the Health Care Providers' representatives in DEF010559-11089 which largely consist of meeting invites and discussions about scheduling meetings; and a limited set of emails between United and MultiPlan in DEF10455-10554. Ex. 2, United's Ninth Supplemental RFP Responses at No. 31. Ex. 7, Gallagher Decl. ¶ 9. ***No*** **internal emails have been produced to date.**

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Methodology and sources of information used to determine amount to pay emergency services and care for out-of-network providers and use of the FAIR Health Database (Interrogatory Nos. 2, 3, 10 and 12 RFP Nos. 5, 10, 15). United's deadline to provide full and complete supplemental responses was October 22, 2020. In supplementing these responses, United continues to point to its earlier objections and even added a new one with respect to Interrogatory No. 10 and 12 even though the Court overruled all of its objections. **Exhibit 16**, United's Tenth Supplemental RFP Responses at Nos. 10, 15. October 27 Order Granting Motion to Compel at 5:23-25 ("IT IS FURTHER ORDERED that United's Objections, both written and oral, to each of the foregoing interrogatories, requests for production of documents and initial disclosure obligations are OVERRULED in their entirety."); **Exhibit 17**, United's Fourth Supplemental Interrogatory Responses.

With respect to RFP No. 5 (asking how United determines/calculates the allowed amount and reimbursement for the at-issue claims, including the methodology, United pointed to administrative records in DEF01536-10454 and DEF011481-28026. In other words, United points to the plan and failed to provide the underlying information about sources of data and methodology used to reach the amount allowed.

With respect to RFP Nos. 10 and 15 (asking for methodology- and source-related documents), United refers the Health Care Providers to two PowerPoint slides (DEF011212, DEF011238) that appear to be related to United's sales pitch of its OCM program and benefit templates (DEF28027-30187). Ex. 16, United's Tenth Supplemental RFP Responses at Nos. 10, 15. One of the slide decks references reasonable and customary charges and references Data iSight's methodology. Ex. 3, Out-of-Network Cost Management Programs, DEF011238 at 11241, 11248.

United has not produced a single document or email that provides information about the sources of data and methodology it, or via Data iSight, uses to determine reimbursement rates[12]

[12] For example, Ex. 3 identifies a variety of programs and indicates that, under one program, United may access a WRAP network or utilize OCM, but there is no explanation for why a WRAP network would not be accessed and OCM would instead by utilized under that program.

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other than confirming that United and/or an employer group (when United serves as the third party administrator) determines the cap/threshold for payment after the initial reimbursement rate is determined by Data iSight. However, it is clear from DEF030407-30431 (Data iSight appeals/performance reports) that guidelines exist that determine the rate of reimbursement.

Similarly, United's answers to Interrogatory Nos. 2, 3, 10 and 12 largely by pointing to the health benefit plans and disclaiming the ability to provide any description of the methodology used to impose reimbursement rates. Ex. 17, United's Fourth Supplemental Interrogatory Responses. The responses also belie credulity because in answer to Interrogatory No. 12, United acknowledges that it has "received health claim reimbursement-related information from MultiPlan, First Health group Corp. Services and from FAIR Health in the process of processing health benefit claims that accessed, tools, services or data provided by those entities." Despite this response, United has not produced any corresponding documents or information other than the contracts to which it points. *Id.* at Response to No. 12.

In sum, United has not provided meaningful document production in connection with the foregoing categories.

Documents concerning negotiations between United and the Health Care Providers' representatives (RFP Nos. 13, 27, 28). With respect to RFP No. 13, United cites to DEF10559-11089; however, they do not adequately cover communications that took place in 2017 nor do they provide much, if anything, in the way of internal communications exchanged among United representatives. Ex. 2, Ninth Supplemental RFP Responses. For the communications between UH Parties and Fremont (RFP No. 27), United has cited to four emails, none of which concern negotiations leading up to any participation agreements with Fremont, in effect prior to July 1, 2017. Ex. 7, Gallagher Decl. ¶ 10. In response to requests for all negotiations concerning reimbursement rates between Sierra Affiliates and Fremont (RFP No. 28), United has disclosed zero communications. Instead, United has cited to prior agreements (DEF011295-11410) and United's two-page "analysis" of reimbursement rates (DEF011276-11279). Ex. 2, Ninth Supplemental Responses. This is wholly deficient, especially given United's identification of 100,000 emails it had collected and provided to its counsel for review

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since at least June 23, 2020. September 28, 2020 Order Denying Email Protocol at ¶ 6 ("United stated during meet and confers between counsel that it would not produce any emails until an email protocol was entered by the Court. United also stated through counsel that it had already provided over 100,000 emails to its counsel for review."); *see also* the Health Care Providers' Appendix to Opposition to Entry of Email Protocol, Ex. 2 at ¶ 11 (United identified the emails in its counsel's possession during a June 23, 2020 meet and confer).

Recently, United has confirmed that Dan Rosenthal's documents have not been produced despite the fact that RFP No. 13 specifically refers to him:

> Regarding Mr. Rosenthal, we are unable to commit to making a full custodial production by March 8. We will continue to make document productions for Mr. Rosenthal before March 8th and even March 12th but we will not complete the production of all of his custodial documents by that date.
>
> ***
>
> Plaintiffs are on notice that they will be proceeding with Mr. Rosenthal's deposition when they do not possess many of his custodial documents and with many weeks left to complete fact depositions.

Exhibit 18, March 5, 2021 email chain, at p. 2 and 4, respectively (email) . United has produced just three emails that identify Mr. Rosenthal as a custodian. **Exhibit 19** (identifying three custodial emails from metadata provided by United's document load files). Mr. Rosenthal also refers to "reviewing [his] notes," but no such notes have been produced. **Exhibit 20**, December 22, 2017 email chain (DEF011050-11051).

Documents related to United's communications with other emergency medicine provider groups/hospitals relating to negotiations of reimbursement rates and fee schedules (RFP No. 30). United's supplements point to aggregated and claim-by-claim market data (DEF010558, 11274, 11275, 45751-45766) and a purported analysis contained in DEF075426-75428. Ex. 15, United's Fourteenth Supplemental RFP Responses. This is plainly deficient.

Privilege Log. Finally, and perhaps indicative of the lack of non-administrative, non-contract documents produced, United has not produced a privilege log.

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The Health Care Providers respectfully request that the Court impose sanctions to put an end to United's pattern of discovery abuses.

III. LEGAL ARGUMENT

A. United is in Contempt of Court

This Court has the "power to compel obedience to its…orders." NRS 1.210(3). Acts or omissions constituting contempt include "[d]isobedience or resistance to any lawful writ, order, rule or process issued by the court or judge at chambers." NRS 22.010(3). "Generally, an order for civil contempt must be grounded upon one's disobedience of an order that spells out 'the details of compliance in clear, specific and unambiguous terms so that such person will readily know exactly what duties or obligations are imposed on him.'" *Southwest Gas Corporation v. Flintkote Co. – U.S. Lime Div.*, 99 Nev. 127, 131, 659 P.2d 861, 864 (1983) (citations omitted). "Courts have inherent power to enforce their decrees through civil contempt proceedings, and this power cannot be abridged by statute." *In re Determination of Relative Rights of Claimants and Appropriators of Waters of Humboldt River Stream Sys. & Tributaries*, 118 Nev. 901, 909, 59 P.3d 1226, 1231 (2002) (citation omitted).

Further, NRS 22.040 provides that when a "contempt is not committed in the immediate view and presence of the court or judge, a warrant of attachment may be issued to bring the person charged to answer, or, without a pervious arrest, a warrant of commitment may, upon notice, or upon an order to show cause, be granted; and no warrant of commitment shall be issued without such previous attachment to answer, or such notice or order to show cause." And NRS 22.100(2) provides, "[e]xcept as otherwise provided in NRS 22.110, if a person is found guilty of contempt, a fine may be imposed on the person not exceeding $500 or the person may be imprisoned not exceeding 25 days, or both." NRS 22.100(3) further states, "In addition to the penalties provided in subsection 2, if a person is found guilty of contempt pursuant to subsection 3 of NRS 22.010, the court may require the person to pay to the party seeking to enforce the writ, order, rule or process the reasonable expenses, including, without limitation, attorney's fees, incurred by the party as a result of the contempt." NRS 22.110 provides that "when the contempt consists in the omission to perform an act which is yet in the power of the person to

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003876
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perform, the person may be imprisoned until the person performs it. The required act must be specified in the warrant of commitment."

Here, United has willfully disobeyed the lawful September 28, 2020, October 27, 2020, November 9, 2020 and January 20, 2021 of this Court that expressly and unambiguously directed United to produce documents that are the subject of this Motion. Despite the Orders' clarity, United has admitted it has failed to comply by virtue of recent filings wherein United admits that it will not be complete its document production until April or later and most recently acknowledged that it has not conducted email discovery "in earnest." February 25, 2021 Hr. Tr. at 10:9-15.

United also points to the entry of an ESI protocol as justification for its failure to search, collect and produce electronically stored information. *Id.* However, the Court made it clear that United could not delay production of emails and other documents, including the 100,000+ emails that United acknowledged it was reviewing in connection with RFP Nos. 13 and 27. *See* September 28, 2020 Order Denying Email Protocol at ¶ 6 ("United also stated through counsel that it had already provided over 100,000 emails to its counsel for review.").

This is not the first time United has displayed its lack of respect for this Court's authority. For example, when this Court ordered that the parties meet and confer on a claims matching protocol, United provided a half-hearted proposal to the Health Care Providers which ostensibly sought to eliminate its requirement to produce claims files while maintaining that the Health Care Providers should meet their evidentiary burden of proving the existence of each claim. This issue is still open. Most critically, United is now the subject of three orders compelling it to produce documents and information to the Health Care Providers after United repeatedly failed to produce substantive information over the course of nearly one year. *See* August 10, 2020 Order Granting Motion to Compel Defendants' Production of Unredacted MultiPlan Agreement; September 28, 2020 Order Granting, In Part, Plaintiffs' Motion To Compel Defendants' Production Of Claims File For At-Issue Claims Or, In The Alternative, Motion In Limine; September 27, 2020 Order Granting Plaintiffs' Motion to Compel Defendants' List of Witnesses, Production of Documents and Answers to Interrogatories on Order Shortening Time.

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This conduct has led to repeated warnings from this Court about United's "unacceptable" discovery conduct and even a finding in this Court's October 27 and November 9, 2020 Orders that "United has not participated in discovery with sufficient effort and has not taken a rational approach to its discovery obligations" and "United's discovery conduct in this action is unacceptable to the Court." October 27 Order Granting Motion to Compel at ¶ 9; November 9 Order Granting Motion To Compel ¶ 1. In the October 27 Order, the Court went on to conclude that "In the event that United does not meet the deadlines of the Court, the Court will have no choice but to make negative inferences." October 27 Order Granting Motion to Compel at ¶ 10. Most recently, on February 25, 2021, the Court again highlighted United's improper discovery conduct, stating, "I base this in part based upon the statement of the defendant on 2/16/21, which said, 'We refuse to produce witnesses voluntarily until document discovery is complete.' I believe that that was an inappropriate statement to make…it shows an unwillingness to move the case forward." February 25, 2021 Hr. Tr. at 35:13-18.

United has ignored Court orders, disregarded our jurisdiction's discovery rules, recently tried to block depositions from going forward and withheld discoverable information all in an apparent effort to delay these proceedings and impede the Health Care Providers from prosecuting this case. Now, United has violated this Court's October 27 and November 9 Orders. As a result, the Health Care Providers request that this Court sanction United and issue an Order to Show Cause why United should not be held in contempt.

B. Respectfully, the Court Should Sanction United's Conduct

"[I]f a person is found guilty of contempt, a fine may be imposed on him not exceeding $500." NRS 22.100(2). Additionally, "if a person is found guilty of contempt pursuant to subsection 3 of NRS 22.010, the court may require the person to pay to the party seeking to enforce the writ, order, rule or process the reasonable expenses, including, without limitation, attorney's fees, incurred by the party as a result of the contempt." NRS 22.100(3). "A civil contempt order may be used to compensate the contemnor's adversary for costs incurred because of the contempt." *Humboldt River*, 118 Nev. at 901, 59 P.3d 1231 (internal citations omitted).

In addition to civil contempt sanctions, NRCP 37 provides an additional avenue for

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003878

sanctions for a party's failure to comply with an order compelling discovery. Specifically, under NRCP 37(b)(1):

> If a party…fails to obey an order to provide or permit discovery, including an order under Rule 35 or 37(a), the court may issue further just orders that may include the following:
>
> (A) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
>
> (B) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
>
> (C) striking pleadings in whole or in part;
>
> (D) staying further proceedings until the order is obeyed;
>
> (E) dismissing the action or proceeding in whole or in part;
>
> (F) rendering a default judgment against the disobedient party; or
>
> (G) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

As the Nevada Supreme Court has underscored, "courts have 'inherent equitable powers to dismiss actions or enter default judgments for ... abusive litigation practices.'" *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990) *quoting TeleVideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 916 (9th Cir.1987) (citations omitted). While courts typically favor adjudication on the merits, where a party engages in "repeated and continued abuses, the policy of adjudicating cases on the merits" is not furthered and sanctions may be necessary "to demonstrate to future litigants that they are not free to act with wayward disregard of a court's orders." *Foster v. Dingwall*, 126 Nev. 56, 66, 227 P.3d 1042, 1049 (2010).

Indeed, entry of default judgment may be an appropriate sanction where a party is unresponsive and has engaged in "abusive litigation practices" causing "interminable delays." *Id.* at 65, 227, P.3d at 1048. Thus, when faced with "repetitive, abusive, and recalcitrant" conduct, a sanction in the form of striking pleadings and entering default against the offending

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party may be appropriate. *Id.* at 64, 227 P.3d at 1047 ("Because the district court's detailed strike order sufficiently demonstrated that [appellants] conduct was repetitive, abusive, and recalcitrant, we conclude that the district court did not err by striking their pleadings and entering default judgment against them."). Furthermore, prejudice from the unreasonable delay in failing to comply with a court order will be presumed. *Id*., Nev. at 65-66, 227 P.3d at 1048-1049. Importantly, courts are not obligated to impose less severe non-case terminating sanctions first. *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 252, 235 P.3d 592, 598 (2010) *quoting Young,* 106 Nev. at 92, 787 P.2d at 779-780. In deciding whether dismissal is an appropriate discovery sanction, courts consider, among other things:

> the degree of willfulness of the offending party, the extent to which the non-offending party would be prejudiced by a lesser sanction, the severity of the sanction of dismissal relative to the severity of the discovery abuse, whether any evidence has been irreparably lost, the feasibility and fairness of alternative, less severe sanctions, such as an order deeming facts relating to improperly withheld or destroyed evidence to be admitted by the offending party, the policy favoring adjudication on the merits, whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney, and the need to deter both the parties and future litigants from similar abuses.

Young, 106 Nev. at 93, 787 P.2d at 780.

Here, United's repeated and complete disregard for this Court's September 28, October 27, November 9 and January 20 Orders and the rules of discovery in this jurisdiction warrants severe sanctions. And now its cumulative delays have culminated in United's motion to extend all discovery deadlines and the firm October 4, 2021 trial setting by an additional four-months. This request is not the result of diligent efforts but one that has been strategically laid out time and time again since commencement of this litigation. The Health Care Providers submit that sanctions are appropriate here, including case terminating sanctions based on the repeatedly admonished conduct at issue, but the Court may also consider striking United's affirmative defenses and enter a directed verdict in the Health Care Providers' favor on their Nevada civil racketeering, tortious breach and deceptive practices claims because the discovery United continues to resist is directed both at its affirmative defenses and the Nevada tort claims.

With respect to the first *Young* factor, United has failed to provide any explanation for

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003880

its refusal to comply with the Court's multiple Orders. At this point, United's conduct is willful. Second, prejudice can be presumed here, but even if it were not presumed, the Health Care Providers will suffer substantial prejudice by United's further delay in producing this critical information. Indeed, this failure earlier forced the Health Care Providers' to agree to a fact discovery extension of 75 days, an outcome that United has tried to garner from the beginning through its cumulative delay tactics. And recently has resulted in United's attempt to obtain a four-month extension of all deadlines and the trial, first by trying to leverage the Health Care Providers' agreement while trying to block depositions and then by moving for relief from the Court. Any delay in trial – which United seeks – also delays the appropriate payment to which the Health Care Providers are entitled. United already once secured delay of the prior August 2, 2021 trial setting. Each day that passes results in additional claims not being paid at their full billed amount. Any lesser sanction would not resolve this issue.

Third, the severity of any of the suggested sanctions are appropriate here because this is not an isolated incident. This is part of a universal, concerted scheme from United to delay proceedings and interfere with the discovery process. Again, United has been the subject of three orders compelling its production of documents and information and the Court recently had occasion to comment that United's deposition tactics were inappropriate. February 25, 2021 Hr. Tr. at 35:13-18. The RFPs that are the subject of this Motion were served 14 months ago. Moreover, this Court has already expressly ordered in its October 27 Order that if "United does not meet the deadlines of the Court, the Court will have no choice but to make negative inferences."

Fourth, it is unknown whether the evidence has been irreparably lost so this factor is neutral. Fifth, as noted, any lesser sanction would be ineffective as every delay in this proceeding operates to delay payment of future claims payable by United. Sixth, this Court has previously recognized that this discovery misconduct is that of United and United alone – not due to the misconduct of the attorneys for United. Thus, United cannot shift the blame to its attorneys for this discovery misconduct. Seventh, sanctioning United here in the form of case terminating sanctions would serve to appropriately address United's continuing misconduct here and also

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serve as a reminder to other litigants that even if you are as large and powerful as United, you still remain bound by the discovery rules and Court orders of this jurisdiction. In all, case terminating sanctions are appropriate here.

At a minimum, if this Court concludes that suggested sanctions pursuant to NRCP 37 are not warranted, Nevada law contemplates that the Health Care Providers are to be compensated for the costs incurred because of the United's contemptuous behavior. Accordingly, each United defendant entity, jointly and severally, should be ordered to pay for the reasonable attorneys' fees and costs in bringing this motion for contempt, as well as the costs and fees incurred in attempting to enforce the October 27 Order.[13] Additionally, the Health Care Providers respectfully request that the Court issue any other sanctions it deems appropriate.

IV. CONCLUSION

Based upon the foregoing, the Health Care Providers respectfully request that this Court issue its Order to Show Cause why United should not be held in contempt, that it be found in contempt and that, as a sanction, United's Answer and affirmative defenses be stricken from the record. In the alternative, if that sanction is not issued, the Health Care Providers respectfully request that the Court order the United defendant entities, jointly and severally, to pay Health Care Providers' attorneys' fees and costs in connection with this motion, together with any other sanctions deemed appropriate.

DATED this 8th day of March, 2021.

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By: */s/ Kristen T. Gallagher*

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[13] In the event the Court finds the United is in contempt, the Health Care Providers will submit a separate application for the recovery reasonable attorneys' fees and costs incurred in connection with this issue.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on this 8th day of March, 2021, I caused a true and correct copy of the foregoing **PLAINTIFFS' RENEWED MOTION FOR ORDER TO SHOW CAUSE WHY DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT AND FOR SANCTIONS** to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

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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 Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20,

Defendants.

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

ERRATA TO PLAINTIFFS' RENEWED MOTION FOR ORDER TO SHOW CAUSE WHY DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT AND FOR SANCTIONS

Plaintiffs Fremont Emergency Services (Mandavia), Ltd. ("Fremont"); Team Physicians of Nevada-Mandavia, P.C. ("Team Physicians"); Crum, Stefanko and Jones, Ltd. dba Ruby

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Crest Emergency Medicine ("Ruby Crest" and collectively the "Health Care Providers") submits this Errata to Plaintiff's Renewed Motion for Order to Show Cause Why Defendants Should not be held in Contempt and For Sanctions ("Motion") to correct the language on page 8, lines 8-12 of the Motion. The current language is as follows:

> Data iSight Reports: United has not produced Data iSight reports for the period June 2018 through January 31, 2020. Exhibit 12 (extract of Data iSight reports).

The correct language should be (identified in bold):

> Data iSight Reports: United has not produced Data iSight reports for the period **2019** through January 31, 2020. Exhibit 12 (extract of Data iSight reports).

The Health Care Providers hereby incorporate the corrected language into the Motion.

DATED this 12th day of March, 2021.

McDONALD CARANO LLP

By: */s/ Kristen T. Gallagher*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on this 12th day of March, 2021, I caused a true and correct copy of the foregoing **ERRATA TO PLAINTIFFS' RENEWED MOTION FOR ORDER TO SHOW CAUSE WHY DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT AND FOR SANCTIONS** to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

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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 Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20,

Defendants.

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

NOTICE OF ENTRY OF REPORT AND RECOMMENDATION #1

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PLEASE TAKE NOTICE that a Report and Recommendation #1 was entered on March 16, 2021, a copy of which is attached hereto.

DATED this 16th day of March, 2021.

McDONALD CARANO LLP

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on this 16th day of March, 2021, I caused a true and correct copy of the foregoing **NOTICE OF ENTRY OF REPORT AND RECOMMENDATION #1** to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

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DISTRICT COURT

CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD, et al., Plaintiffs, vs. UNITEDHEALTH GROUP INC., et. al., Defendants	Case No.: A-19-792978-B Dept. No.: 27 JAMS Ref. #1260006167 REPORT AND RECOMMENDATION #1

On February 2, 2021, the Hon. Nancy L. Allf entered an Order Granting Defendants' Motion for Appointment of Special Master in the above-captioned matter, and appointed the undersigned to serve as Special Master in these proceedings.

Pursuant to that Order, the Special Master is authorized to address the following areas of potential discovery disputes:

- Motions to compel;
- Number of depositions;
- Confidential designations made under the June 24, 2020 Stipulated Confidentiality and Protective Order;
- Written discovery issues; and
- Other areas of dispute that may be agreed to by the parties and approved by the Court.

Order, p. 3. The Order states that the Special Master's duties are also defined by the provisions of NRCP 53. Further, the Order directs that within seven (7) days of issuing a decision, the Special Master shall prepare a Report and Recommendation for the Court's review. Pursuant to NRCP 53(f)(1), any party may object to a recommendation of the Special Master under the procedures set forth in NRCP 53(f).

On March 10, 2021, a status teleconference was conducted in this matter. Participating were Special Master David T. Wall; Pat Lundvall, Esq., Kristen T. Gallagher, Esq., and Amanda M. Perach, Esq., appearing for Plaintiffs;

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Natasha S. Fedder, Esq., Lee K. Blalack, Esq., Colby L. Balkenbush, Esq., and Brittany M. Llewellyn, Esq., appearing for Defendants.

During the teleconference, the following issues were addressed and Recommendations made by the Special Master:

1. Bringing Issues Before the Special Master:

   a. It was determined that parties seeking intervention of the Special Master need not file a formal pleading, but may file a letter brief outlining the issues to be addressed, the specific request for relief and any authority supporting the request. The letter brief shall also identify any exigency requiring expedited consideration of the request;

   b. In most cases, the Special Master will then provide notice to the parties of a schedule for additional briefs related to the request;

   c. It will be incumbent on the parties to assure that briefs are made part of the official Court record, if applicable.

2. Depositions

   a. After hearing from counsel for both sides, the Special Master hereby recommends that Plaintiffs' request to conduct up to twenty-five (25) depositions, including depositions pursuant to NRCP 30(b)(6) (but exclusive of Expert Witness depositions) be GRANTED. To date, Defendants have not requested an increase of the previously agreed upon ten (10) depositions;

   b. The Special Master further recommends that Defendants' request to delay depositions (other than the scheduled deposition of Dan Rosenthal) until after the April 15, 2021, Document Discovery Cutoff be DENIED;

   c. As a protocol for setting depositions, the party seeking to depose an individual (or to depose an NRCP 30(b)(6) designee) shall provide the adverse party with three (3) potential dates for the deposition. Thereafter, the adverse party shall have four (4) business days to provide the party seeking the deposition with:

      i. Notice as to which of the three (3) dates is acceptable; or

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ii. A description of the reason why none of the dates are acceptable, including, if applicable, any information regarding any family/personal emergency preventing the deponent from appearing on any of the proffered dates;

iii. If the parties, after an opportunity to meet and confer regarding the unavailability of a deponent, are unable to agree on a suitable deposition date, the matter will be brought before the Special Master for determination.[1]

d. The parties have agreed that local counsel need not be present for each deposition, as long as the lawyer taking or defending the deposition has been admitted or associated *pro hac vice* by the Court pursuant to Nevada Supreme Court Rule 42;

e. The parties have agreed that the seven (7) hour limitation for a deposition under NRCP 30(d) shall apply to the depositions pursuant to NRCP 30(b)(6), even if an individual notice includes multiple entities or requires multiple designees.

This Report and Recommendation is presented pursuant to NRCP 53.

Dated this 11TH day of March, 2021.

Hon. David T. Wall (Ret.)

[1] Pursuant to the Court's Order announced in open court on February 25, 2019, the Special Master is tasked with determining the 'reasonable availability' of witnesses to sit for depositions in this matter.

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PROOF OF SERVICE BY E-Mail

Re: Fremont Emergency Services (Mandavia), Ltd. et al. vs. UnitedHealth Group, Inc. et al.
Reference No. 1260006167

I, Michelle Samaniego, not a party to the within action, hereby declare that on March 11, 2021, I served the attached REPORT AND RECOMMENDATION #1 on the parties in the within action by electronic mail at Las Vegas, NEVADA, addressed as follows:

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UMR, Inc. dba United Medical Resources
United Healthcare Insurance Company
UnitedHealth Group Inc.
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I declare under penalty of perjury the foregoing to be true and correct. Executed at Las Vegas, NEVADA on March 11, 2021.

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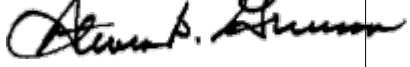

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Plaintiffs,

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

REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER DENYING DEFENDANTS' MOTION TO COMPEL PLAINTIFFS' RESPONSES TO DEFENDANTS' FIRST AND SECOND REQUESTS FOR PRODUCTION

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WEINBERG WHEELER HUDGINS GUNN & DIAL

Defendants UnitedHealth Group, Inc.; UnitedHealthcare Insurance Company; United HealthCare Services, Inc.; UMR, Inc.; Oxford Health Plans LLC (incorrectly named as "Oxford Health Plans, Inc."); Sierra Health and Life Insurance Company, Inc.; Sierra Health-Care Options, Inc. and Health Plan of Nevada, Inc. (collectively, "United" or "Defendants"), hereby submit the following Reply In Support of Defendants' Motion for Reconsideration of the Court's Order Denying United's Motion to Compel Plaintiffs' Responses to Defendants' First and Second Requests for Production. This Reply is made based upon the papers and pleadings on file herein, the following memorandum of points and authorities, and any arguments made by counsel at the time of the hearing.

Dated this 16th day of March, 2021.

/s/ Colby L. Balkenbush

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

United served the Actual Cost Discovery[1] to obtain information about Plaintiffs' costs for rendering the at-issue emergency services and how those costs compare to Plaintiffs' unilaterally set billed charges for those same services. This Actual Cost Discovery is directly relevant and critical to United's defense of this case. Among other things, the Actual Cost Discovery is relevant to show that Plaintiffs' billed charges are unreasonable vis-à-vis their actual costs. United respectfully requests that this Court reconsider its Order denying the Actual Cost Discovery.

First, the Court denied the Actual Cost Discovery based on a misunderstanding of Nevada law governing unjust enrichment/quantum meruit damages. The case law indicates that a party who prevails on a quantum meruit claim is entitled to recover the "reasonable value" of the benefit provided[2] to the defendant. However, in denying United's Motion, the Court erroneously found that "market value" is the only possible measure of "reasonable value." In fact, the Nevada Supreme Court has found that there are four possible measures of "reasonable value" when assessing a quantum meruit claim, of which market value is only one. In *Certified Fire*,[3] which Plaintiffs heavily rely on, the Nevada Supreme Court adopted Section 49(3) of the Restatement (Third) of Restitution and Unjust Enrichment. Section 49 sets forth four potential measures of quantum meruit damages. One of those measures is "market value" but another measure is "the cost to the claimant of conferring the benefit." Restatement (Third) of Restitution and Unjust Enrichment § 49(b)(2) (2011) (emphasis added). Further, Section 50 of the Restatement expressly requires that "the liability in restitution of an innocent recipient of

[1] Unless otherwise indicated, capitalized terms have the meaning United ascribed to them in its opening brief.

[2] To be clear, United is seeking the Actual Cost Discovery to defend itself in the event there is a finding at trial that United received a legally cognizable "benefit" from the Plaintiffs. United continues to contend that an unjust enrichment/quantum meruit claim is inappropriate here as the benefit from Plaintiffs was conferred on the patients they treated, not United.

[3] *Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 381, 283 P.3d 250, 257 (2012).

unrequested benefits may not exceed the cost to the claimant of conferring the benefits in question." *Id.* at § 50(c)(4) (emphasis added). Here, all of the benefits Plaintiffs allegedly conferred on United were unsolicited such that it qualifies as an innocent recipient under the Restatement. Therefore, the discovery Defendants seek via this motion—documentation of the costs the Plaintiff healthcare providers incurred in providing the at-issue medical services—is expressly permitted by *Certified Fire* and Sections 49 and 50 of the Restatement of Restitution. There is thus no basis in Nevada law to deny United the Actual Cost Discovery at this preliminary fact-gathering stage. Plaintiffs have not pointed to a single case in this jurisdiction that forecloses cost-related discovery for implied-in-fact contract or unjust enrichment causes of action, especially when it has not yet been determined by the finder of fact whether United is an "innocent recipient" of unsolicited benefits or not. The Court failed to recognize that how "reasonable value" is measured is entirely dependent on the nature of how and why the benefit was conferred on the defendant and whether the defendant is viewed as a wrongdoer. Since there has been no factual finding on those issues yet, it was error for the Court to limit United to only one of the four permissible measures of "reasonable value" under Section 49 of the Restatement (Third) of Restitution.

Further, Nevada law allows parties to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case[.]" NRCP 26(b)(1). Nevada law also provides that "information within this scope of discovery need not be admissible in evidence to be discoverable." NRCP 26(b)(1). What is more, the relief Plaintiffs seek in their *own* Complaint is framed in terms of reasonable value (which necessarily includes an analysis of cost), and it is disingenuous for them to now retreat from this standard. *See, e.g.*, FAC ¶ 198 ("Under Nevada common law, including the doctrine of quantum meruit, the Defendants . . . impliedly agreed to reimburse [Plaintiffs] at rates, at a minimum, equivalent to the *reasonable value* of the professional medical services provided by [Plaintiffs].") (emphasis added).

In addition, the Nevada Supreme Court has established that proper considerations in determining the reasonable value of services rendered *include* not only "market value," but also a

"previous agreement between the parties," or "any other evidence regarding the value of services." *Las Vegas Sands Corp. v. Suen*, 132 Nev. 998, 2016 WL 4076421, at *4 (2016). Under this broad standard, which does not *exclude* any category of discovery, the Actual Cost Discovery is certainly relevant to determining the reasonable value of the services underlying Plaintiffs' health benefit claims. Cost-based evidence thus constitutes "any other evidence regarding the value of services."

Second, to the extent the Court denied the Actual Cost Discovery based on a finding that the information United seeks is publicly available, the record does not support such a finding. Plaintiffs do not argue that they are publicly traded, and do not dispute that there is little information pertaining to Plaintiffs that is publicly available. The Actual Cost Discovery is thus obtainable only through the discovery process; it is not available, for example, on the Internet or from a Nevada Secretary of State filing.

United respectfully requests that the Court grant this Motion, reconsider its ruling on the Motion to Compel, modify the Order, and compel the production of the Actual Cost Discovery sought.

II. LEGAL STANDARD

"A district court may reconsider a previously decided issue if . . . the decision is clearly erroneous." *Masonry & Tile Contractors Ass'n of S. Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). *See also* EDCR 2.24. The Court should grant a motion to reconsider whenever it has overlooked or misapprehended pertinent facts or law or for some other reason mistakenly arrived at in its earlier decision. *Cf.* NRAP 40(c)(2). Here, United meets the standard for reconsideration because the Court applied an erroneous legal standard to deny the Actual Cost Discovery, and to the extent the Court denied the discovery based on a finding that it is publicly available.

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III. LEGAL DISCUSSION

A. Reconsideration of the Order is necessary because the Court erred in denying the Actual Cost Discovery by applying a "market value" standard

None of the cases cited by any party forecloses the Actual Cost Discovery. All parties cite the following Nevada cases for the legal standard for unjust enrichment, quantum meruit, and breach of implied contract claims: *Las Vegas Sands Corp. v. Suen*, 132 Nev. 998, 2016 WL 4076421 (2016); *Certified Fire Prot. Inc. v. Precision Contr.*, 128 Nev. 371, 283 P.3d 250 (2012); *Flamingo Realty, Inc. v. Midwest Dev., Inc.*, 110 Nev. 984, 879 P.2d 69 (1994). Far from mandating a "market value" standard, these cases confirm that Nevada courts apply the Restatement (Third) of Restitution and Unjust Enrichment to a quantum meruit cause of action. *Certified Fire*., 128 Nev. at 381, 283 P.3d at 257 (adopting Section 49(3) of the Restatement which sets forth four possible ways to measure quantum meruit damages). As discussed *supra*, Section 49 expressly states that the "cost to the claimant of conferring the benefits in question" is the appropriate measure of quantum meruit damages when the benefit has been conferred on an "innocent recipient," which United was here.

Moreover, in determining the reasonable value, courts consider "market value," a "previous agreement between the parties," or "*any other evidence* regarding the value of services." *Suen*, 132 Nev. 998, 2016 WL 4076421 at *4 (emphasis added). Thus, while market value may be *one* consideration under that standard, as the Nevada Supreme Court has made clear, it is *not the sole* consideration.[4]

The market value standard that Plaintiffs urge, and that this Court appears to have applied, contradicts clear and undisputed Nevada Supreme Court precedent. For instance, in *Suen*, the Nevada Supreme Court confirmed that "reasonable value," not "market value," is the legal standard for a quantum meruit claim. The *Suen* court held that the district court properly

[4] Plaintiffs suggest that United's expectation that its expert may discuss market rates, (*see* Jan. 21, 2021 Hrg. Tr. at 12:24-13:5), somehow establishes that United's expert opinion will be "*based* on market value" alone. (Opp'n at 4) (emphasis added). United's anticipated expert disclosures do not and cannot establish market value as the standard for the Nevada common law claims that Plaintiffs have asserted. Furthermore, United does not dispute that evidence of market value is relevant; rather, it disputes Plaintiffs' assertion that it is the *only* relevant evidence.

instructed the jury on a quantum meruit claim when it asked the jury to "determine the reasonable value of [a company's] services, considering the terms of any offers or proposals between the parties or *any other evidence regarding the value of the services*." *Suen*, 132 Nev. 998, 2016 WL 4076421 at *4 (emphasis added) (internal quotation marks omitted). The *Suen* court emphasized that the district court correctly (1) focused the jury instruction on determining the "reasonable value of the services" and (2) permitted the jury to consider "any other evidence" in making this determination. Here, the Actual Cost Discovery constitutes "any other evidence regarding the value of the services" allegedly rendered by Plaintiffs.

Plaintiffs grapple unsuccessfully with *Suen*, asserting that "United infers that *Suen's* reference to 'any other evidence' means cost data, but *Suen* provides no such guidance. Undeniably, 'market value' is the 'other evidence' to which the *Suen* court referred." Opp'n at 9-10 (internal citations omitted). This argument falls flat. ***First***, the broad reach of the word "any" clearly encompasses all evidence relevant to determining the "reasonable value of the services." If *Suen* meant "market data," it stands to reason that the Nevada Supreme Court would have said "market data" instead of "any other evidence regarding the value of the services." ***Second***, while the *Suen* court expressly stated that "'any other evidence . . . necessarily *includes* evidence of the services' market value," the court did not enumerate what if anything it *excludes*. *Suen*, 132 Nev. 998, 2016 WL 4076421 at *4 (emphasis added). Thus, there is no basis in Nevada law for Plaintiffs' assertion that the reasonableness analysis is the one-sided inquiry that Plaintiffs suggest it is—*i.e.*, that Plaintiffs may take discovery into the reasonableness of United's reimbursement rates, but United may not take discovery to probe the reasonableness of Plaintiffs' billed charges.

Plaintiffs also mischaracterize the relevant authority by claiming that *Certified Fire* stands for the proposition that "Nevada law makes it clear that the reasonable value of services does not embody cost considerations, instead focusing on market value." Opp'n at 4. *Certified Fire* announced no such limiting principle. In fact, *Certified Fire* supports United's position that market value is simply one data point in the total "reasonable value" calculus, alongside many other data points, including data on what the provider of the services actually *deserves*. *Certified*

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Fire explains: "A party who plead[s] quantum meruit [seeks] recovery of the reasonable value, or 'as much as he has deserved,' for services rendered." *Certified Fire*, 128 Nev. at 379, 283 P.3d at 256 (quoting *Black's Law Dictionary* 1361 (9th ed. 2009)); *see also id.* 283 P.3d at 256 (citing *Sack v. Tomlin*, 110 Nev. 204, 208, 871 P.2d 298, 302 (1994) ("The doctrine of quantum meruit generally applies to an action . . . involving work and labor performed which is founded on a[n] oral promise [or other circumstances] on the part of the defendant to pay the plaintiff *as much as the plaintiff reasonably deserves for his labor* in the absence of an agreed upon amount.")) (emphasis added). The actual cost of the underlying services is obviously relevant to the determination of the value the plaintiff deserves for his or her labor. For example, if Plaintiffs' cost of providing an emergency medical service was $1, but they charged $1,000 for that service, the $1 actual cost is directly relevant to determining whether Plaintiffs ultimately deserve $1,000. In addition, and critically, the defendant in *Certified Fire* was not an "innocent recipient" but rather had expressly solicited a bid from the plaintiff subcontractor, thus leading the Court to discuss "market value" as a likely measure of damages rather than the costs incurred in providing the services. *Certified Fire*, 128 Nev. at 375, 283 P.3d at 253 ("Respondent/cross-appellant Precision Construction, Inc., a general contractor pursuing a contract for a warehouse construction project in 2005, **solicited bids** from subcontractors for the design and installation of an early suppression, fast response sprinkler system.") (emphasis added). Here, there is no contention by Plaintiffs that United expressly solicited the services Plaintiffs provided.

Plaintiffs' position is not limited to a complex medical-services case such as this, and that is where their reading of Nevada Supreme Court decisions borders on the absurd. Consider if a painter painted someone's house, supplying the paint in the process. When the painter was stiffed for payment, she sued under quantum meruit. *Sack v. Tomlin*, cited by *Certified Fire*, clearly states that the "work and labor" are relevant considerations. *Sack*, 110 Nev. 204 at 208, 871 P.2d at 302. So Plaintiffs here would posit that the painter could present evidence of how much work and labor was done, and presumably the value of that work and labor, but not how much the painter spent to buy the paint. It is difficult to imagine any Nevada court endorsing

such a rule of law, especially when the cost of the paint would clearly constitute "any other evidence regarding the value of the services."

While the *Certified Fire* court identified market value as one possible way to measure unjust enrichment damages, it impliedly acknowledged that market value is not the only possible measure. The court explained that "[t]he actual value of recovery in [quantum meruit] cases is '*usually* the lesser of (i) market value and (ii) a price the defendant has expressed a willingness to pay.'" *Certified Fire*, 128 Nev. at 381 n.3, 871 P.2d at 257. The court thus acknowledged that market value should be considered alongside and compared against other data. The court further explained that "where [an implied-in-fact] contract exists, then, quantum meruit ensures the laborer receives the reasonable value, *usually* market price, for his services." *Id.* at 380 (emphasis added). Here, Plaintiffs interpret the word "usually" to mean "exclusively" in an effort to evade production of cost data that is clearly relevant to United's defenses. *Certified Fire's* characterization of market value as a usual input for the "reasonable value" does not bar cost data from the equation. Indeed, Plaintiffs have not pointed to a single Nevada case establishing that cost is outside the broad bounds of "any other evidence" regarding "reasonable value of the services." *Suen*, 132 Nev. 998, 2016 WL 4076421 at *4. That is because the Actual Cost Discovery is relevant to the determination of "reasonable value."[5]

Plaintiffs' reliance on *Certified Fire* for its alleged "market value" focus is misplaced for two additional reasons: (1) *Certified Fire's* straightforward underlying facts are readily distinguishable from those of this complex case, and (2) the court there lacked the occasion to apply the relevant standard because it found no breach, thus limiting its instructiveness. *Certified Fire* involved a simple contract dispute between a fire protection system subcontractor and a general contractor for warehouse construction. 128 Nev. at 375, 283 P.3d at 253. In stark contrast, the instant dispute involves private equity-backed healthcare providers suing a major managed care company for the difference between the benefit amount that United allowed as

[5] The Actual Cost Discovery is likewise relevant to United's Sixth Affirmative Defense ("Some or all of Plaintiffs' billed charges are excessive under the applicable standards"), among others. *See* Defendants' Answer to Plaintiffs' FAC at 44.

reimbursement for the out-of-network emergency medical services and the "reasonable value" of those services (FAC ¶ 225), which is a concept so complex that both parties anticipate retaining experts to opine on it. These cases are nowhere near analogous.

Indeed, a run-of-the-mill contractor case like *Certified Fire*, which notably included the solicitation of bids, 128 Nev. at 374, 283 P.3d at 253, is a far cry from the instant case, wherein Plaintiffs unilaterally set their billed charges. One way to determine whether Plaintiffs' charges are reasonable is the actual costs of rendering the billed services. It is unsurprising that this data point was not at issue in a commercial contracting case, in which the basis for the charge is not a physician staffing company's black box. Further, the *Certified Fire* court determined that "substantial evidence support[ed] the district court's finding that there was no contract, express or implied for the design work" purportedly completed, *id.*, 871 P.2d at 256, and that the general contractor had not been unjustly enriched, *id.*, 871P.2d at 258. Thus, because the court did not have occasion to apply the test, the case provides little instruction on the standard.

Further, the allegations in Plaintiffs' own Complaint concede that "reasonable value" (not "market value") is the correct standard. *See* FAC ¶ 54 ("a *reasonable reimbursement rate* for [Plaintiffs'] Non-Participating Claims for emergency services is 75-90% of the Health Care Providers' billed charge.") (emphasis added); ¶ 198 ("Under Nevada common law, including the doctrine of quantum meruit, the Defendants . . . impliedly agreed to reimburse [Plaintiffs] at rates, at a minimum, equivalent to the *reasonable value* of the professional medical services provided by [Plaintiffs].") (emphasis added); *see also* ¶ 225 ("[Plaintiffs] sue for the damages caused by the Defendants' conduct and is entitled to recover the difference between the amount the Defendants' [sic] paid for emergency care [Plaintiffs] rendered to its members and the *reasonable value* of the service that [Plaintiffs] rendered") (emphasis added), ¶ G (seeking "[j]udgment against the Defendants and in favor of [Plaintiffs] . . . [for] Defendants' underpayments to [Plaintiffs] for the *reasonable value* of the emergency services provided") (emphasis added). Plaintiffs' opposition brief likewise recognizes that "reasonable value" is the touchstone inquiry. *See* Opp'n at 6 ("Costs Are Not Relevant to Establishing the *Reasonable Value* of Services") (emphasis added).

B. The more persuasive out-of-jurisdiction authority supports United's position that the Actual Cost Discovery is relevant here

Once the correct "reasonable value" standard is applied, along with the mandate that the jury consider "any other evidence regarding the value of the services," the far more factually analogous and better-reasoned authority outside of Nevada becomes all the more persuasive. Plaintiffs, both in opposition to the instant Motion for Reconsideration and the underlying Motion to Compel, downplay *Florida Emergency Physicians Kang & Associates, M.D., Inc. v. Sunshine State Health Plan*, No. CACE19-013026 (07) (Fla. Cir. Ct. Dec. 21, 2020), and for obvious reason: it is on all fours factually with this case and compels production of cost discovery.

In *Florida Emergency*, for instance, other TeamHealth-affiliated plaintiff-providers alleged failure to adequately reimburse for emergency services, and sought recovery on breach of implied contract and unjust enrichment claims. There, the court ordered cost-related discovery to allow the defendant to assess the reasonableness of plaintiffs' billed charges. The court was "not persuaded" by Plaintiffs' position that "providers' costs are irrelevant and not discoverable," reasoning that *Baker County Medical Services, Inc. v. Aetna Health Management, LLC*, 31 So. 3d 842, 845 (Fla. 1st DCA 2010) "did not say it was inappropriate to allow discovery into other areas." *Florida Emergency*, No. CACE19-013026 (07) at 5. Nevada courts—including the *Suen*, *Certified Fire*, and *Flamingo Realty* courts—likewise do not hold that it is inappropriate to allow the Actual Cost Discovery. Accordingly, this Court should follow *Florida Emergency* and compel cost discovery here.

The *Florida Emergency* court further distinguished the case Plaintiffs on which Plaintiffs primarily rely, *Gulf-to-Bay Anesthesiology Associates, LLC v. Unitedhealthcare of Florida, Inc., et al.*, Case No.: 17-CA-011207 (Fla. Cir. Ct., Dec. 21, 2020), and this Court should, too. *Florida Emergency* easily differentiated *Gulf-to-Bay* because it disallowed cost discovery where "defendants did not raise any unreasonable pricing claims, either by affirmative defense or counterclaim." *Florida Emergency*, No. CACE19-013026 at 5. *Gulf-to-Bay* emphasized that it denied the cost discovery in part because "Defendants did not raise any affirmative defenses

challenging the reasonableness of Plaintiff's rates, charges or pricing." Case No.: 17-CA-011207 at 2; *see also id.* at 6 ("Defendants have not raised any unreasonable pricing claims here, either by affirmative defense or counterclaim."). That is not the case here, where United has raised numerous affirmative defenses which the Actual Cost Discovery will support, including that Plaintiffs' billed charges are excessive under the applicable standards (Sixth Affirmative Defense), Plaintiffs have not suffered any damages (Fourteenth Affirmative Defense), and their claims are subject to recoupment based on improper billing practices (Twenty-Fifth Affirmative Defense). *See* Defendants' Answer to FAC at 44, 46, 48. Further, *Gulf-to-Bay*'s analysis focused on a Florida out-of-network compensation statute, for which there is no analog in Nevada. Case No.: 17-CA-011207 at 2; *see also id.* at 3 ("Notably, the *statute* focuses on 'charges.' There is no provision of this *statute* that identifies the provider's 'costs' as a relevant consideration in the analysis.") (emphasis added). Finally, *Gulf-to-Bay* relied on the text of the Florida Standard Jury Instructions in Contract and Business cases to deny the cost discovery, which are inapplicable here. *Id.* at 5. Plaintiffs fail to address any of these key distinguishing features of *Gulf-to-Bay*, simply noting that "United tries to distinguish the *Gulf-to-Bay* case" with no further analysis. Opp'n at 10.

Plaintiffs' failure to engage with the substance of *Giacalone v. Hellen-Ellis Memorial Hospital Foundation, Inc.* is also telling; there, the court allowed cost discovery in a case that maps directly onto this one. 8 So. 3d 1232, 1233-34, 1236 (Fla. 2d DCA 2009). The *Giacalone* court held that "[t]he use of comparative market pricing is only one type of relevant information which may be helpful in establishing a claim of unreasonable pricing" and "the proof of such a claim may also involve inquiry . . . concerning the Hospital's internal cost structure, *in addition* to a comparative analysis of the relevant market." *Id.* at 1236 (emphasis in original). This is consistent with the conclusion that United urges here: market data is one piece of the "reasonable value" puzzle, and actual cost is another. *Giacalone* is analogous because United and the patient-defendant there both asserted defenses of unreasonable pricing, and in both cases, "[t]he central theme of [defendants'] defense[] . . . [is] that [plaintiffs'] charges for its services were unreasonable[.]" *Id.* at 1234. Consistent with *Giacalone*, which was reaffirmed in *Gulfcoast*

Surgery Ctr., Inc. v. Fisher, 107 So. 3d 493, 495 (Fla. 2d DCA 2013), this Court should allow the Actual Cost Discovery, which is material to establishing the unreasonable charges defense that United raises here. *See also Children's Hosp. Cent. California v. Blue Cross of California*, 226 Cal. App. 4th 1260, 1275, 172 Cal. Rptr. 3d 861, 873 (2014) ("[H]ere, Hospital was required to demonstrate the reasonable value, i.e., market value, of the poststabilization care it provided. *This market value is not ascertainable from Hospital's full billed charges alone.*") (emphasis added).[6]

C. Reconsideration of the Order is necessary to the extent the Order is based on a finding that the Actual Cost Discovery is available in the public domain

The Court should reconsider and modify the Order to the extent that it denied the Actual Cost Discovery based on a finding that the information United seeks is available in the public domain.[7] United has presented ***Exhibits 1-3*** to perfect the record and clarify that (1) Plaintiffs are not publicly traded and (2) publicly available information pertaining to Plaintiffs is very limited. Plaintiffs do not contest the evidence that United presented, nor do they present any evidence to the contrary. United does not affirmatively "claim" that the Court grounded its decision on the public availability of information about Plaintiffs, Opp'n at 12; United submits only that *if it did*, such reliance would be erroneous and unsupported by the record.

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[6] *Children's Hospital* is at odds with the California district court authority that Plaintiffs cite for the proposition that cost discovery is not relevant to the reasonable value determination. Opp'n at 10.

[7] *See* Jan. 21, 2021 Hrg. Tr. at 9:9-14; 10:19-23; 34:2-7.

IV. RELIEF REQUESTED

United respectfully requests that this Court reconsider its February 4, 2021 Order Denying Defendants' Motion to Compel Responses to Defendants' First and Second Requests for Production on Order Shortening Time, modify the Order, and compel the production of the Actual Cost Discovery sought.

Dated this 16th day of March, 2021.

/s/ Colby L. Balkenbush

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of March, 2021, a true and correct copy of the foregoing **REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER DENYING DEFENDANTS' MOTION TO COMPEL PLAINTIFFS' RESPONSES TO DEFENDANTS' FIRST AND SECOND REQUESTS FOR PRODUCTION** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

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BEFORE THE HONORABLE NANCY L. ALLF, DISTRICT COURT JUDGE

THURSDAY, MARCH 18, 2021

RECORDER'S TRANSCRIPT OF HEARING
ALL PENDING MOTIONS

Appearing via Videoconference:

For the Plaintiff: KRISTEN T. GALLAGHER, ESQ.
PATRICIA K. LUNDVALL, ESQ.

For the Defendant: COLBY BALKENBUSH, ESQ.

RECORDED BY: BRYNN WHITE, COURT RECORDER

003910

Las Vegas, Nevada, Thursday, March 18, 2021

[Case called at 11:02 a.m.]

THE COURT: Thank you, everyone. Good morning. Calling the case of Fremont versus United. Let's take appearances, starting first with the Plaintiff.

MS. LUNDVAL: Good morning, Your Honor. Pat Lundvall with McDonald Carano here on behalf of the healthcare providers.

THE COURT: Thank you.

MS. GALLAGHER: Good morning, Your Honor. Kristen Gallagher, also here on behalf of the healthcare providers.

THE COURT: Thank you.

MR. BALKENBUSH: Good morning, Your Honor. Colby Balkenbush appearing on behalf of Defendants. And with me also is Dimitri Portnoi, partner in O'Melveny & Meyers Los Angeles office. His petition to be admitted is on the docket today.

THE COURT: Thank you, all. Give me just a second to get booted up here.

I had on calendar that we only had two applications for association pro hac vice counsel under SCR 42. Is that correct, Plaintiff?

MS. LUNDVAL: That's correct, Your Honor. You had the application; one from the Plaintiff and you have one from the Defendant.

THE COURT: Mr. Balkenbush, that's correct?

MR. BALKENBUSH: And that's correct, Your Honor.

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THE COURT: And there were no objections?

MS. LUNDVAL: No, Your Honor. There's no objection as I understand from the Defendant's perspective. But to the application of Justin Fineberg, Mr. Fineberg is on the line today, should you have any questions concerning his application. But since there is no opposition and the application seems to be in order, we would respectfully request that the Court grant our motion to associate.

THE COURT: Good enough. Mr. Balkenbush?

MR. BALKENBUSH: And that's correct, Your Honor. We have no objection to Mr. Fineberg's application. I had a chance to speak with Ms. Gallagher before the hearing and understand that Plaintiffs don't have any objection to Mr. Portoi's application as well, so we would request that you grant that as well.

003912

THE COURT: Good enough. Then for good cause appearing, I've reviewed both of the applications, they're in accordance with SCR 42 and both will be granted. You both indicate that there's urgency, if you get those orders to the TPO, I'll turn them around for you today.

MS. LUNDVAL: Thank you, Your Honor. We will do so.

THE COURT: And while I normally am way too serious in court, I just have to tell you guys, this might be the shortest hearing we've ever had in this case.

MS. LUNDVAL: I think that's great. And I'm not trying to muck it up by suggesting that we have one housekeeping matter for you.

THE COURT: Okay. So --

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MS. LUNDVAL: Now --

THE COURT: -- the housekeeping matter.

MS. LUNDVAL: The one quick housekeeping matter is, if the Court would recall that there was a motion that dealt with the AEO designations --

THE COURT: Right.

MS. LUNDVAL: -- and have been brought by -- by United. And the request to provide redactions to those AEO materials, which were the attorneys' eyes only materials, had been granted by the Court. The -- United asked to submit those redactions to, and to give us an opportunity for objections. Those have been done. It was our understanding that that was going to be an in camera -- in chambers submission, but the calendar clerk had issued a hearing on this. To try to help you and everyone else, we would ask that the Court vacate that hearing.

THE COURT: And the response, please?

MR. BALKENBUSH: Your Honor, we have no objection to vacating the hearing on that. We would just ask that before Your Honor makes a decision, you review a response that we're planning to file this Friday.

THE COURT: and would that be the motion for protective order set for April 21? Or motion to -- I am not sure, because this is housekeeping it's not something I looked at this morning. Can you guys both tell me what hearing we're going to -- to take off calendar and when I can expect the final papers?

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MS. LUNDVAL: All right. Good point as to the date of the hearing.

MS. GALLAGHER: I -- I'm looking now, Your Honor, and I should have that in just a moment. April 21st is the notice of hearing date.

THE COURT: April 21, 9 a.m. Mr. Balkenbush, take a moment just to confirm that for me, please.

MS. GALLAGHER: Oh, you know. I may be incorrect. Apology. April 15th is the date for that, Your Honor.

THE COURT: Is that the motion for leave? 4-15 motion for leave.

MR. BALKENBUSH: That is what I have as well, Your Honor.

THE COURT: All right. So, Nicole McDevitt, on April 15th the motion for leave will go off calendar, but we will put that on the chambers calendar for Tuesday of that week.

Mr. Balkenbush, does that give you sufficient time to file whatever you intend to file?

MR. BALKENBUSH: That does, Your Honor. Thank you.

THE COURT: All right. So, I will look at it -- I normally wouldn't look at it until that week. We're back to doing trials so, I'll do my best to get that decided for you that week.

Now is there anything else --

MR. BALKENBUSH: Thank you, Your Honor.

THE COURT: -- now is there anything else to take up today?

Well to all of you --

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MS. LUNDVAL: Nothing for the Plaintiff, Your Honor.

THE COURT: -- you're entering a really busy phase of this case with the discovery. My best wishes to everyone on both sides to stay safe and healthy during this process.

MS. LUNDVAL: Thank you, Your Honor.

THE COURT: Thank you, both.

MR. FINEBERG: Thank you.

MR. BALKENBUSH: Thank you, Your Honor.

MR. PORTOI: Thank you, Your Honor.

[Hearing concluded at 11:08 a.m.]

* * * * * * *

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.

Brynn White

Brynn White
Court Recorder/Transcriber

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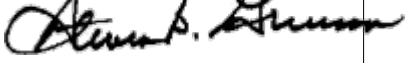

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DISTRICT COURT

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., 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

DEFENDANTS' OPPOSITION TO PLAINTIFFS' RENEWED MOTION FOR ORDER TO SHOW CAUSE WHY DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT AND FOR SANCTIONS

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Case Number: A-19-792978-B

Defendants UnitedHealth Group, Inc.; UnitedHealthcare Insurance Company; United HealthCare Services, Inc.; UMR, Inc.; Oxford Health Plans LLC (incorrectly named as "Oxford Health Plans, Inc."); Sierra Health and Life Insurance Company, Inc.; Sierra Health-Care Options, Inc. and Health Plan of Nevada, Inc. (collectively, "United" or "Defendants"), hereby submit the following Opposition (the "Opposition") to Plaintiffs' Renewed Motion for Order to Show Cause Why Defendants Should Not Be Held in Contempt And for Sanctions ("Motion") submitted by 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"). This Opposition is made and based upon the papers and pleadings on file herein, the following points and authorities, and any arguments made by counsel at the time of the hearing.

POINTS AND AUTHORITIES

I. INTRODUCTION

This motion is nothing more than Plaintiffs' attempt to distract the Court and United from the actual merits of this matter and/or Plaintiff's' own refusal to meaningfully participate in responsive discovery. United has produced relevant and substantive documents to Plaintiffs that are reasonably proportional to the claims at issue in the litigation. United has produced more than 109,398 pages of documents to Plaintiffs. Plaintiffs have only produced a paltry 1,826 documents totaling 9,400 pages of discovery to United. Notwithstanding the vast disparity between the number of relevant documents the parties have produced in this case, United is the subject of this Motion for sanctions from Plaintiffs. This Motion should be rejected because United has substantially complied with the Court's orders of September 28, 2020, October 27, 2020, November 9, 2020, and January 20, 2021, and has produced a massive amount of relevant documents. Since the September and October Orders, United has committed substantial attorney and internal business resources to discovery compliance, and that has resulted in the production of 98,840 pages of documents to Plaintiffs. United's production of documents is a far cry from the "willful noncompliance," concealment of relevant witnesses, and destruction and fabrication

003917

of evidence that Nevada courts have found deserving of sanctions. *See generally Finkelman v. Clover Jewelers Boulevard, Inc.*, 91 Nev. 146, 147, 532 P.2d 608, 608 (1975) ("The general rule in the imposing of sanctions is that they be applied only in extreme circumstances where willful noncompliance of a court's order is shown by the record"); *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990) ("Generally, NRCP 37 authorizes discovery sanctions only if there has been willful noncompliance with a discovery order of the court."). Accordingly, Plaintiffs' request for sanctions is not justified because United's efforts do not meet the extreme criteria required to impose sanctions on a party. In fact, and as explained more fully below, Plaintiffs' assertion of "willful noncompliance" by United strains credulity.

The Motion also claims that United has failed to produce "critical information" and that "substance is lacking" from the various productions to Plaintiffs. As explained further below, Plaintiffs' assertion is fatally flawed. In addition, Plaintiffs attempt to buttress their claim that United's production lacks substance by characterizing certain productions United has made as unconnected to the requests for production ("RFPs") that are the subject of their instant Motion. *See* Mot. at 9 n.11. Notably, United does not have an obligation to identify each and every one of the RFPs to which a given document is responsive. That United has not supplemented its written discovery responses to list each document after every single one of the RFPs to which it is responsive does not render its productions deficient.

Specifically, Plaintiffs propounded a third set of requests for production ("RFPs") on November 13, 2020. These RFPs sought, among other things, United's contracts with an entity called Sound Physicians, and data for Sound Physicians claims. Sound Physicians is not a party to the First Amended Complaint, which does not even mention Sound Physicians. Notwithstanding the fact that Sound Physicians has nothing to do with this case, United engaged in multiple meet and confers and email exchanges with Plaintiffs' counsel, and committed to produce contracts with and claims data for Sound Physicians. On January 10, 2021, February 28, 2021, and March 6, 2021, United produced documents and spreadsheets in response to Plaintiffs' request for Sound Physician documents, which are also responsive to RFPs that are the subject of this Motion, as detailed below. As a prime example of Plaintiffs' blatant disregard

for the burden to which they subjected United in discovery, Plaintiffs subpoenaed Sound Physicians for the very same information they requested from United (United understands Plaintiffs received documents from Sound Physicians in January 2021). Plaintiffs' sham acts that only serve to distract United and divert resources from substantive issues should not be rewarded.

Plaintiffs have also declined to engage in any substantive discussions about proposals United has put forth to advance discovery issues and offer Plaintiffs avenues to obtain some of the requested information. For example, Plaintiffs took nearly over two months to respond to a December proposal by United that was aimed at limiting the scope of the administrative records productions they now dismiss as not "substantive," and failed to respond at all to an October proposal that offered to produce corporate representatives who could describe the processing of the disputed claims. Such testimony would have included the "methodology and sources of information used" to process those claims that Plaintiffs now say are lacking from United's productions. In response to a December 18, 2020 United letter that outlined categories of claims that fall outside the scope of the First Amended Complaint as pled, including claims United believes processed under various provider agreements, *see* **Exhibit 1**, Plaintiffs sent a letter on January 29, 2021 asking ***United*** for additional information about ***Plaintiffs' own agreements***. *See* **Exhibit 2** at 2, ("If you contend that Fremont or any of the other Health Care Providers are subject to a provider agreement with [Las Vegas Sands Company dba the Venetian] or through a third party, please provide a non-AEO copy of any alleged agreement, as well as a copy of the member's insurance identification card that would establish the existence of such agreement."). Plaintiffs would logically be in possession of their own agreements which they could have reviewed prior to placing contracted claims at issue in a case where they are challenging the reimbursement of their ***out-of-network*** claims.

Regarding discovery of electronically stored information ("ESI"), in January 2021, following two months of protracted negotiations, the parties were able to reach agreement on a protocol for the retrieval and production of ESI. Prior to this point, ***neither party*** had made sizeable productions of responsive email correspondence. This is unsurprising, as making

productions of large volumes of ESI at the risk of having to "re-do" them to bring them in line with a later-negotiated protocol makes little sense. Nevertheless, as detailed below, United made substantial email productions prior to January 8, 2021 when the Court entered the parties' stipulated protocol.

United has often articulated its view that the discovery deadlines in this case are unworkable given the discovery requests from Plaintiffs. In fact, United recently represented that it anticipated that ***neither*** side would be finished with document discovery until sometime in April. To date, significant discovery remains outstanding from Plaintiffs. Accordingly, United's representations regarding the case schedule are warranted.

United is undertaking best efforts to complete discovery by the April 15th deadline, and will come to the hearing on this Motion prepared to describe the documents it will have produced between now and then. United respectfully requests that, in light of its substantial compliance with the Court's discovery orders to date, the Court deny Plaintiffs' Motion and reject Plaintiffs' unreasonable demand to strike United's Answer and Affirmative Defenses.

II. UNITED HAS PRODUCED SUBSTANTIVE DOCUMENTS TO PLAINTIFFS AND HAS SUBSTANTIALLY COMPLIED WITH THE COURT'S DISCOVERY ORDERS

To date, United has produced over 109,398 pages of documents in response to the Court's discovery orders, which include the following meaningful and substantive documents:

- 91,808[1] pages of administrative records for the 22,153 health benefit claims Plaintiffs have placed at issue, including plan documents, Explanation of Benefits forms ("EOBs"), Provider Remittance Advice forms ("PRAs"), and claim forms. It bears noting that Plaintiffs are logically in possession of these PRAs, which would have been sent to them at the time of claim processing. Nevertheless, Plaintiffs moved to compel production of these administrative records, following which the

[1] Plaintiffs erroneously calculate this number as 91,800, presumably because Plaintiffs simply subtracted the starting Bates Number from the ending Bates Number of each production. *See* Mot. at 2. This method, however, excludes the first page of each production from the total count.

Court entered and order on November 9, 2020, directing United to produce 2,000 administrative records per month. In an effort to comply with this order, United sought assistance from various teams across its business lines, and even developed a new EOB and PRA lookup technology, devoting countless hours of employee labor to this task to the detriment of its daily business operations.[2] Plaintiffs now dismiss the very records they sought as "lacking" in "substance." Mot. at 2.

- In an effort to make the size of the at-issue claims population more manageable, at an October 8, 2020 hearing, the Court directed the parties to meet and confer to negotiate a claims matching protocol. On October 9 and October 23, 2020, the parties met and conferred in this regard. On the October 23, 2020 meet and confer call, counsel for United verbally explained a counter-proposal to Plaintiffs' February 10, 2020 proposal. Following that conferral, on October 26, 2020, the parties submitted status reports to the Court which contained their separate claims matching proposals; Plaintiffs submitted their original February 10, 2020 proposal with no modifications. Following these submissions, United sent a proposed compromise stipulation and order to Plaintiffs on December 18, 2020. After sitting on this proposal for over two months, Plaintiffs finally responded on February 26, 2021 with a counterproposal that struck United's proposal that its completion of certain more limited productions contemplated under the protocol would satisfy United's obligations with respect to the Court's order compelling production of administrative records.

[2] *See* Declaration of Rosalinda Benevides, attached hereto as **Exhibit 3** at ¶ 17 ("our efforts in this regard are labor intensive, time consuming, and are being documented to the detriment of my other job responsibilities as well as the other job responsibilities of the individuals who are assisting me"), Declaration of Leslie Hare, attached hereto as **Exhibit 4** at ¶¶ 5, 9 ("I do not have any team members whose roles are dedicated to litigation support," "our efforts to identify these claims is very labor intensive, time consuming, and keep my team from performing their normal job responsibilities"), Declaration of Jennifer Shreiner, attached hereto as **Exhibit 5** at ¶ 8 ("I do not have any team members whose roles are dedicated to litigation support… These employees have had to stop their daily work responsibilities").

- Despite the Court's directive, to date, Plaintiffs have declined to agree to any relief that would have allowed United to focus its efforts on collection, review, and production of other categories of documents, which, in Plaintiffs' view, are more "substantive" than the administrative records.

- 774 pages of emails between United and MultiPlan, including attachments, that reflect United's instructions for implementation of out-of-network programs that MultiPlan supports, reporting that MultiPlan provides to United, and whitepapers describing MultiPlan's proprietary Data iSight pricing tool. These emails and attachments also describe backend services that MultiPlan provides through its Data iSight service to support United's Outlier Cost Management ("OCM") program, including negotiations that may take place in the event a provider disputes the reimbursement rate. In particular, United has produced documents pertaining to United's directives to MultiPlan regarding the negotiation ceilings for this program. United made the first of these productions on October 22, 2020, and another on January 6, 2021, prior to January 8, 2021, when the Court entered the parties agreed-upon ESI Protocol.
- 326 pages of emails and native Microsoft Excel Spreadsheets between United and MultiPlan attaching reporting on the OCM backend negotiation services; namely, reporting on provider appeals. United's productions contain reporting that MultiPlan routinely provided to United, including the following types of reports: UHC ASO – DIS Top HCFA Appeals Providers, UHC ASO – DIS State Reports, UHC ASO – DIS Specialty Report, UHC ASO – DIS Situs State Report, UHC ASO – DIS Appeals by Month Summary, UHC FI – DIS Appeals by Month Summary, UHC FI – DIS Situs State Report, UHC FI – DIS Specialty Report, and UHC FL – DIS State Report, UHC FI – DIS Top Appeal Providers.
- 531 pages of emails between United and TeamHealth representatives reflecting negotiations that began at the regional level, culminated in national-level proposals,

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but were ultimately unsuccessful. United made this production on October 30, 2020, also prior to entry of the ESI Protocol.

  - United produced approximately 2,500 pages of ***internal*** emails pertaining to these negotiations on March 8 and March 17, 2021.

- Thousands of claim lines comprising market data for the Sierra, Oxford/Cirrus, UMR, UNET, Student Resources, NICE, and COSMOS claims platforms. This market data is the product of numerous claims data pulls from each of these claims platforms, and consulting expert validation of that data. This market data reflects amounts United allowed on health benefit claims for in- and out-of-network providers in Nevada for the time period from July 1, 2017 through September 30, 2020.
- Claims matching detail flagging disputed health benefit claims that, to date, United has diligently worked to locate in its systems. This detail also identifies categories of claims that processed with Data iSight recommended pricing, and claims that processed at contracted rates, among other categories. This claims matching detail is the product of numerous claims data pulls from United's Sierra, Oxford/Cirrus, UMR, UNET, NICE, and Student Resources claims platforms, and consulting expert validation and analysis of that data.
- Out-of-network provider appeals regarding United's reimbursement of health benefit claims for emergency services. DEF030301– DEF030406.
- Contracts between United and the three wrap/rental networks that applied to the disputed claims:
  - Private Healthcare Systems, Inc. ("PHCS"), DEF030263–DEF030293, DEF030294–DEF030299, DEF030300;[3]

[3] For simplicity's sake, United has included PHCS in its discussion of wrap/rental networks, but notes that PHCS is a preferred provider organization ("PPO") network. A PPO like PHCS is distinct from a wrap/rental network, notably because a PPO would typically offer steeper discounts than a wrap/rental network.

- MultiPlan, Inc., DEF001388–DEF001421, DEF001437–DEF001502, DEF001503–DEF001520, DEF001521–DEF001535;
- First Health Group Corp. Services, DEF011090–DEF011139, DEF011140, DEF011141–DEF011167, DEF011168–DEF011171, DEF011172–DEF011180, DEF011181–DEF011183, DEF011184–DEF011188, DEF011189, DEF011190–DEF011191, DEF011192–DEF011196, DEF011197–DEF011208, DEF011209–DEF011210.

- Contracts between Fremont and each of the following United Defendants:
  - Sierra Healthcare Options, Inc., DEF011295–DEF011321, DEF011380–DEF011382, DEF030231–DEF030249;
  - Sierra Health & Life Insurance Company, Inc., DEF000154–DEF000156, DEF011357–DEF011376, DEF011394–DEF011396, DEF030212–DEF030230;
  - Health Plan of Nevada, Inc., DEF011322–DEF011323, DEF011324–DEF011338, DEF011377–DEF011379, DEF030190–DEF030211.
- Contracts and other evidence of direct agreements between Fremont and United plan sponsor clients, including:
  - MGM Resorts International, DEF011280–DEF011293, DEF011294;
  - Caesar's Entertainment, Inc., DEF011472–DEF011476;
  - Las Vegas Metropolitan Police Department, DEF011472–DEF011476; and
  - Las Vegas Sands Company ("LVSC") d/b/a the Venetian Las Vegas, DEF011477–DEF011479.
- Approximately 340 pages of custodial email and attachments pertaining to United's strategy surrounding implementation of its out-of-network programs, ***including internal email***.

In addition, to address Plaintiffs' numerous duplicative discovery requests regarding the processing of the 22,153 health benefit claims Plaintiffs have placed at issue, United verbally proposed during the October 23, 2020 meet and confer, and subsequently reiterated in its October

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26, 2020, Case Status Report, that United designate corporate representatives to speak to the specific claims platforms on which the at-issue claims processed, and to walk Plaintiffs through the processing details for a sample of disputed claims. Plaintiffs, notwithstanding their penchant for engaging in protracted motions practice, have failed to respond to United's reasonable proposal to advance a discovery issue.

The documents United has produced to date are responsive to one or more of the RFPs that Plaintiffs have identified as lacking sufficient responses. Each of these categories is discussed in more detail below.

a. Rental, wrap, shared savings program or any other agreement that United contends allows it to pay less than full billed charges (RFP Nos. 9, 16) and related financial documents (RFP No. 34)

Plaintiffs' criticisms of the productions United has made in response to these RFPs suggest that Plaintiffs do not understand what wrap/rental networks are, or how they work. Wrap/rental networks establish contractually specified rates for provider services through arms-length negotiations between the rental network and providers on the one hand, and the rental network and health insurance companies on the other. United contracts with third party vendors—here, MultiPlan, First Health, and PHCS—to access their provider networks, which are ancillary to United's own primary networks (in other words, they "wrap" around those primary networks). These third-party vendors contract directly with providers to create such networks. United does not have access to the agreements MultiPlan, First Health, and PHCS have negotiated and entered into with the providers who participate in their networks, which United presumes contain confidentiality provisions and other protections for the negotiated rates. United has access only to its own "network access" agreements with MultiPlan, First Health, and PHCS, which it has produced. United does not receive "compensation" or "invoice" third parties pursuant to these agreements.

For example, the Powerpoint presentation to which Plaintiffs cite, established that United plan sponsor clients may choose to offer their members a "shared savings" program. United's "shared savings" programs include a wrap/rental network component. United has produced to

Plaintiffs claims matching detail spreadsheets flagging disputed claims that processed under a wrap/rental network in accordance with the terms of the applicable health benefit plan. Prior to April 15th, United will produce to Plaintiffs its own claims data for the disputed claims, which will also indicate which disputed claims were processed under a wrap/rental network and identify the applicable wrap/rental network that processed these claims.

Notably, disputed claims that were processed through a wrap/rental agreement—over 400 of them—fall outside the scope of the First Amended Complaint as pled. *See* Am. Compl. ¶ 41 ("[Plaintiffs] have no contract with Data iSight, and *the Non-Participating Claims identified in this action are not adjudicated pursuant to the MultiPlan agreement*."). Had Plaintiffs appropriately investigated the claims they placed at issue prior to bringing this lawsuit, the need for discovery surrounding United's access to various wrap/rental networks could have been obviated.

RFP No. 9 requests any agreements between United and Fremont. United has produced documents responsive to this request. Plaintiffs do not deny that these productions have taken place. Claims that processed under these agreements, which total in the thousands, likewise fall outside the scope of the Complaint as pled. *See* Am. Compl. ¶ 40 (referring collectively to "the reimbursement claims within the scope of this action" as the "Non-Participating Claims.'"). Here again, had Plaintiffs investigated their claims prior to bringing this lawsuit, the need for discovery could have been obviated.[4]

b. Documents related to United's relationship with Data iSight and/or other third parties (RFP Nos. 11, 12 and 21)

First, the amount of detail Plaintiffs provide in the course of criticizing United's MultiPlan/Data iSight-related document productions only underscores the fact that United has made fulsome productions responsive to these RFPs. The fact that these productions do not include all of the documents that Plaintiffs *think* they should have received does not render United's production deficient.

[4] Documents showing that certain claims fall outside the scope of the Complaint as pled are relevant to United's defenses.

Second, Plaintiffs seemingly misunderstand the relationship among United, MultiPlan, National Care Network LLC ("NCN"), and Data iSight. MultiPlan acquired NCN in 2011.[5] As part of that acquisition, MultiPlan acquired NCN's proprietary pricing tool, Data iSight. In 2010, United entered into a network access agreement with MultiPlan—not NCN or Data iSight. In the Spring of 2016, United and MultiPlan amended that agreement to add the Data iSight service. United and MultiPlan negotiated United's access to the Data iSight service years ***after*** MultiPlan's acquisition of NCN, and so it is unsurprising that United has not produced any communications between itself and NCN. Rather, United has produced 1,100 pages of emails and attachments between itself and MultiPlan, described *supra* at 7. This includes the emails exchanged between United and MultiPlan to establish the parameters regarding United's use of the Data iSight service. In addition, United has produced spreadsheets with claims matching detail identifying the disputed health benefit claims that processed with Data iSight pricing.

Email communications between United and MultiPlan detail United's state-specific directives for the Outlier Cost Management ("OCM") program, a program that MultiPlan supports pursuant to its network access agreement with United. MultiPlan/Data iSight reporting United has produced likewise reflects implementation of the OCM program in states across the country, and for services beyond emergency services in accordance with the Court's January 20, 2021 order.

On March 8 and 17, 2021, United produced numerous internal emails discussing its out-of-network programs. These emails reflect both the strategy surrounding and the implementation of those out-of-network programs. They include, for example, Powerpoint presentations laying out the specifics of various programs and the goals those programs are intended to accomplish for United's plan sponsor clients and their members. They also include periodic reviews of United's business, which detail its out-of-network program goals, strategy for achieving them, and data reflecting performance metrics.

Finally, United produced aggregated national market data on March 22, 2021.

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[5] *See* Risk Managers, MultiPlan Acquires NCN – Will PPO's Morph Or Disappear? (2011), http://blog.riskmanagers.us/multiplan-acquires-ncn-will-ppos-morph-or-disappear/.

United's efforts to review and produce any additional documents pertaining to MultiPlan/Data iSight are continuing, and United expects to complete production by the April 15th document production deadline.

c. Documents related to United's decision making and strategy in connection with its out-of-network reimbursement rates and implementation thereof (RFP Nos. 6, 7, 18, 32)

United has made numerous meaningful document productions in response to these requests. The United/MultiPlan communications and internal emails detailed beneath the preceding document category reflect United's decision making and strategy surrounding its out-of-network programs, and its implementation of those programs. The spreadsheets United produced at DEF075426-DEF075428 (AEO), which contain only the redactions this Court authorized covering non-party provider names, list non-par rates that United has paid to other non-participating providers of emergency services in Nevada and other pricing information. Jacy Jefferson, the Associate Director of Network Development & Contracts for Health Plan of Nevada, Inc., used this information to inform his negotiations with Rena Harris, Senior Contract Manager at TeamHealth, regarding Plaintiff Fremont's contract with Sierra Healthcare Options, Sierra Health and Life, and Health Plan of Nevada, Inc., as well as to calculate Nevada median par rates for the Sierra entities and UMR, Inc. That Plaintiffs choose to disparage these documents as not "meaningful" shows that they fail to understand the reimbursement processes used by the Nevada market, though they have noticed Mr. Jefferson's deposition and may use that opportunity to gain a better understanding of this information.

The administrative records United has produced include plan documents that reflect the out-of-network program offerings United's plan sponsor clients have elected to offer their members, as well as claims documentation, EOBs, and PRAs reflecting the exact amounts at which the disputed claims processed under these programs. Again, United offered Plaintiffs an opportunity to select sample claims and depose corporate representatives who could describe the ways those claims processed under particular out-of-network programs, but Plaintiffs never responded to this proposal.

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As for the provider and wrap/rental network agreements United produced, they are clearly responsive to RFP Nos. 6, 7, and 18, which request "Documents and/or Communications relating to [United's] decision to reduce payment" for any at-issue claims, "Documents and/or Communications supporting or relating to [United's] contention or belief that [United is] entitled to pay or allow less than Fremont's full billed charges for any of the CLAIMS," and "Documents and/or communications regarding the rational, basis, or justification for the reduced rates for emergency services proposed to Fremont in or around 2017 to Present." These provider and wrap/rental network agreements are the source of the negotiated rates that applied to the at-issue claims. Plaintiffs agreed to these rates, which necessarily fall below their unilaterally set billed charges; if they did not, there would be no incentive for United, MultiPlan, First Health, and/or PHCS to have entered into them in the first place. United's "negotiation correspondence" with Plaintiffs' representatives is "meaningful" because it provides context around these negotiated rates. Again, if this correspondence is not "meaningful" to Plaintiffs now, then they have every opportunity to explore this issue during the depositions they have noticed.

d. Documents related to United's decision making and strategy in connection with its in-network reimbursement rates and implementation thereof (RFP No. 31); and Documents related to United's communications with other emergency medicine provider groups/hospitals relating to negotiations of reimbursement rates and fee schedules (RFP No. 30).

As detailed *supra* at 8, United has produced thousands of claim lines comprising market data that reflect amounts United allowed on health benefit claims for in- and out-of-network providers in Nevada for the time period from July 1, 2017 through September 30, 2020.

In addition, United has produced contracts with, and claims data for, Sound Physicians Emergency Medicine of Nevada, a provider of emergency services in Nevada that participates in United's network. Consistent with its confidentiality obligations under these contracts, United made these productions with the consent of Sound Physicians.

United's contracts with other providers include similar confidentiality provisions. United is in the process of obtaining the consent of providers of emergency services in Nevada with whom it contracts to produce additional responsive information. Of course, it is worth mentioning

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that United has already produced the analyses of these providers' contracted rates that most of the Defendants that process claims relied upon to negotiate contracts and establish median par rates for the Nevada market (*see* DEF075426-DEF75428), as well as its market data for these providers. Thus, Plaintiffs already have the information from the contracts that could potentially be relevant to this matter—the reimbursement rates themselves.

e. Methodology and sources of information used to determine amount to pay emergency services and care for out-of-network providers and use of the FAIR Health Database (Interrogatory Nos. 2, 3, 10 and 12 RFP Nos. 5, 10, 15).

United offers out-of-network programs to its plan sponsor clients. It explains these out-of-network offerings through sales materials like the ones Plaintiffs describe in their Motion. Once plan sponsor clients make a selection, their particular selection is reflected in the terms of their health benefit plans, and is programmed into the claims logic that drives United's claims platforms. As discussed above, United has produced plan documents as part of its administrative records productions. In addition, United offered to produce businesspeople who could speak to the processing of particular claims, including the methodology and sources of information that were used to price those claims. As United has already noted, Plaintiffs have failed to respond to this proposal.

With respect to Data iSight, it is a proprietary pricing tool offered by a third party. United has not produced information about the pricing tool because it is not in possession of any detailed information that explains the inner workings of the tool. Instead, United has produced the documents it has – whitepapers from MultiPlan that describe Data iSight's pricing methodology. *See e.g.*, DEF080053-DEF080054 and DEF080081-DEF080082.

FAIR Health, for its part, publishes pricing benchmarks that are based on provider billed charges. Providers' steady and unilateral increases of their billed charges has driven up these pricing benchmarks. Not all United claims platforms use FAIR Health pricing benchmarks. As United indicated in a supplemental response to Interrogatory No. 10 that it served on October 30, 2020, however, "certain of the claims Plaintiffs have placed at issue were processed on the Student Resources claims platform, which accesses data provided by FAIR Health in the course of

processing health benefit claims." United produced a First Updated Claims Matching Detail to Plaintiffs at DEF079846, which identifies about 25 disputed claims that processed on the Student Resources claims platform. In addition, United produced market data for the Student Resources claims platform at DEF045765.

United is in the process of completing its collection of data for disputed claims and will produce that data to Plaintiffs on or before April 15th. United notes that it provided Plaintiffs with claims matching detail on December 18, 2020 reflecting that United had located 21,896 of the 22,153 disputed claims in its systems. Plaintiffs responded on March 11, 2021 offering limited additional information pertaining to unmatched claims to assist with United's claims matching exercise.

f. Documents concerning negotiations between United and the Health Care Providers' representatives (RFP Nos. 13, 27, 28).

On October 30, 2020, United made an initial production of documents responsive to these requests. United supplemented this production on March 8, 2021, and again on March 17, 2021. The March productions included internal United emails.

United's efforts to review and produce documents pertaining to its negotiations with Plaintiffs' representatives (i.e., TeamHealth personnel) are continuing, and United expects to complete production by the April 15th document production deadline. United notes, however, that, because Plaintiffs' representatives at TeamHealth are also parties to this kind of correspondence, Plaintiffs are logically already in possession of many of the documents that are responsive to these RFPs.

g. Privilege Log

To date, United has withheld in full or redacted approximately 500 documents under a claim of privilege from productions it made in March 2021 of over 3,000 documents. United is currently working on its privilege log and will provide it as soon as possible before April 15th.

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III. UNITED HAS NOT BLOCKED DEPOSITIONS

To date, the only deposition that is set to go forward in this case is the one Plaintiffs have noticed of a United executive for March 23, 2021. In advance of that deposition, United produced custodial documents and emails for that executive, including internal email correspondence between that executive and other United employees pertaining to United's out-of-network programs and negotiations with TeamHealth.

With respect to other depositions in this case, on March 23, 2021, counsel are scheduled to meet and confer regarding scheduling other 30(b)(1) and 30(b)(6) depositions. This is in addition to numerous other meet and confers United has participated in with Plaintiffs regarding depositions; in particular, the scope of the topics for the 30(b)(6) depositions Plaintiffs have noticed. Notwithstanding these meet and confer efforts, Plaintiffs claim that United is trying to "block depositions from going forward" or to "with[o]ld discoverable information." *See* Mot. at 16. Those claims are not accurate and undermined by United's latest document productions and the March 23rd meet and confer. In addition, United recently proposed a discovery schedule that, in its view, would allow for substantial completion of document productions in advance of depositions. In United's view, the current document discovery and deposition deadlines of April 15th and May 31st, respectively, remain extremely difficult for both parties to meet because of the volume of discovery that remains outstanding from both parties and the number of depositions that would need to be completed before May 31st (as of today's count, at least thirty-four depositions, including twenty-four sought by Plaintiffs). United agreed to those deadlines and would use its reasonable best efforts to comply with the Court's decision on these discovery issues. However, any consideration of extending these discovery deadlines seems appropriate for the benefit of both parties. In sum, United's efforts to seek a revised discovery schedule that should benefit both parties should not be misconstrued as an attempt to "block" depositions or "withhold" discoverable information.

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IV. THE SANCTIONS PLAINTIFFS SEEK ARE EXCESSIVE AND UNSUPPORTED BY THE CURRENT RECORD

A. ANALYSIS UNDER THE *YOUNG* FACTORS

There is no basis in the current record for the Court to strike United's answer and affirmative defenses as Plaintiffs request. To entertain a request for such an extreme sanction, the Court must analyze numerous factors, including:

> [T]he severity of the sanction of dismissal relative to the severity of the discovery abuse, whether any evidence has been irreparably lost, the feasibility and fairness of alternative, less severe sanctions, such as an order deeming facts relating to improperly withheld or destroyed evidence to be admitted by the offending party, the policy favoring adjudication on the merits, whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney, and the need to deter both the parties and future litigants from similar abuses.

Young, 106 Nev. at 93, 787 P.2d at 780. In *Young*, plaintiff Bill Young willfully fabricated evidence during discovery. 106 Nev. at 90, 787 P.2d at 778. He added two sets of notations to his business diaries just before turning the diaries over but claimed that he added the entries over a year prior to production. *Id*., 787 P.2d at 778. The district court offered Young the opportunity to clarify his position, but Young never did. *Id*., 787 P.2d at 778. The district court issued terminating sanctions only after a finding that Young had willfully fabricated evidence and refused to clarify his position. *Id*., 787 P.2d at 778. The development of the *Young* factors was predicated on fraudulent and abusive discovery conduct which sought to severely prejudice the opposing party. None of the *Young* factors weigh in favor of a sanction here.

Striking United's Answer is Grossly Disproportionate to the Alleged Conduct at Issue

As is discussed, *supra*, at §§ II and III, Plaintiffs have misrepresented the discovery record, and Plaintiffs' allegations of discovery misconduct are not based in fact. Any *alleged* actions on the part of United—which, even by Plaintiffs' own narrative were not discovery abuses, but delays in productions—do not warrant a sanction under the *Young* factors. As outlined above, Nevada courts may strike a party's answer when a party's conduct is *willfully noncompliant*. United has expended significant resources to the detriment of its business operations in an effort to comply with the Court's orders. The severity of the sanction of dismissal relative to the severity of the alleged discovery abuse would be inequitable here.

003933

No Evidence has Been Irreparably Lost

No evidence has been irreparably lost. Quite the opposite: United is continuing to respond to Plaintiffs' discovery requests in accordance with the Court's orders on a rolling basis, and has substantially complied with those orders. Plaintiffs essentially concede this point, noting that "it is unknown whether the evidence has been irreparably lost so this factor is neutral." Mot. at 19:22–23. This factor weighs against the imposition of a sanction.

Nevada's Policy Favors Adjudication on the Merits

Plaintiffs entirely ignore *Young*'s acknowledgment of Nevada's policy favoring adjudication on the merits. Striking United's Answer would controvert that policy. This is not a case like *Young* where a party tampered with evidence or entirely destroyed it, which the courts found may warrant outright dismissal. Plaintiffs give no reason why this case—which the parties have been dutifully litigating since only 2019—should not be given the opportunity to be adjudicated on its merits. This is because there is none.

Punishment of a Party for Counsel's Conduct

This factor is inapplicable here as there is no allegation of attorney misconduct at issue in Plaintiffs' motion.

Sanctioning United Will Not Deter Other Litigants Because United Has not Engaged in Discovery Abuses

As is detailed at length in this Opposition, United has produced relevant and substantive documents to Plaintiffs that presently exceed 109,000 pages. In August of 2020, United associated a second firm to assist in day-to-day litigation, and since the September and October Orders of the Court, United has committed substantial additional resources to discovery compliance. There is no "willful noncompliance" or destruction of evidence such that deterrence would be necessary. In addition, Plaintiffs have not been prejudiced, because the discovery deadline was recently extended ***with the agreement of both parties***. Neither expert discovery nor depositions have yet begun. Further, the parties are several months from the current trial date. Therefore, the relevant factors that would support the extreme sanction of striking an answer and affirmative defenses simply do not exist here.

B. OTHER NEVADA CASE LAW FORECLOSES THE APPLICATION OF A CASE-TERMINATING SANCTION HERE

The imposition of a case-terminating sanction is only appropriate in truly extreme circumstances of willful non-compliance, which are glaringly absent here. *See Finkelman v. Clover Jewelers Boulevard, Inc.*, 91 Nev. 146, 147, 532 P.2d 608, 608 (1975) ("The general rule in the imposing of sanctions is that they be applied only in extreme circumstances where willful noncompliance of a court's order is shown by the record"). Other cases where courts dismissed pleadings as a form of discovery sanction involved similarly egregious conduct. *See e.g. Valley Health Sys., LLC v. Est. of Doe by & through Peterson*, 134 Nev. 634, 640, 427 P.3d 1021, 1028 (2018), as corrected (Oct. 1, 2018) (upholding dismissal of an answer where the Defendant was found to have willfully and intentionally concealed the relevance of potential witnesses and the existence of police statements, constituting "an unlawful pattern of suppression and denial over the course of years to [plaintiff's] detriment."), *Foster v. Dingwall*, 126 Nev. 56, 60–63, 227 P.3d 1042, 1045–47 (2010) (the litigants repeatedly failed to appear for their depositions and repeatedly failed to provide verified responses to interrogatories. The Court found this conduct to be "repetitive, abusive, and recalcitrant").

The applicable authority forecloses the extreme sanction Plaintiffs seek. Indeed, the Court expressed a willingness to entertain a motion for an order to show cause only "in the event that there is not an immediate responses to these issues" (*i.e.*, an immediate response by United to the Court's discovery orders and the purported production deficiencies Plaintiffs identified in their prior motion). (Tr. of Dec. 23, 2020 proceedings at 51:16-18.) As detailed above, United has made voluminous productions subsequent to the time when the Court made that statement in December 2020.

Finally, and critically, if the Court is inclined to consider the imposition of a sanction here, the Nevada Supreme Court requires that the district court first hold an evidentiary hearing on the issue of sanctions. *McDonald v. Shamrock Investments*, LLC, 127 Nev. 1158, 373 P.3d 941 (2011) ("the district court abused its discretion in striking [defendant's] answer without holding an evidentiary hearing to consider the pertinent Young factors.")(citing *Bahena*, 126 Nev. at 243,

255, 235 P.3d 592, 600 (2010); *Nevada Power v. Fluor Illinois*, 108 Nev. 638, 645, 837 P.2d 1354, 1359 (1992) ("If the party against whom dismissal may be imposed raises a question of fact as to any of [the Young] factors, the court must allow the parties to address the relevant factors in an evidentiary hearing."); *Young*, 106 Nev. at 93, 787 P.2d at 780 (noting that the case concluding sanction imposed was fair because "a full evidentiary hearing" relating to the discovery abuses was conducted)).

V. PLAINTIFFS ARE DEFICIENT IN MEETING THEIR OWN DISCOVERY OBLIGATIONS

Plaintiffs call for excessive and unwarranted sanctions and allege an assortment of discovery deficiencies by United despite falling woefully short of their own discovery obligations. To date, Plaintiffs have produced only 1,826 documents totaling 9,400 pages. The majority of these productions have taken place over the past two months—***after*** January 8, 2021, when the Court entered the parties' agreed-upon ESI Protocol. The paucity of Plaintiffs' productions has impeded United's ability to defend this case, including its ability to identify appropriate candidates for deposition. For example, in a case alleging breach of implied-in-fact contract, Plaintiffs' productions include either no or very few documents responsive to United's RFPs seeking discovery pertaining to whether Plaintiffs notified United prior to providing medical services to United's members that Plaintiffs expected to be paid by Defendants for the medical services provided to the plan members. Furthermore, Plaintiffs have objected wholesale to broad swaths of RFPs based on an overbroad reading of the Court's February 4, 2021 Order Denying Defendants' Motion to Compel Responses to First and Second Set of Requests for Production, as United intends to raise on a forthcoming motion to compel. In addition, Plaintiffs have applied heavy redactions over apparently responsive information pertaining to negotiations between United and TeamHealth and par/non-par rates/relationships, despite agreeing to reevaluate and remove redactions in response to United's objections to this practice. No Court order authorizes such redactions. Plaintiffs' own discovery deficiencies render their request for sanctions improper.

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VI. CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court deny Plaintiffs' Motion in its entirety.

Dated this 22nd day of March, 2021.

/s/ Brittany M. Llewellyn

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of March, 2021, a true and correct copy of the foregoing **DEFENDANTS' OPPOSITION TO PLAINTIFFS' RENEWED MOTION FOR ORDER TO SHOW CAUSE WHY DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT AND FOR SANCTIONS** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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/s/ Brittany M. Llewellyn
An employee of WEINBERG, WHEELER, HUDGINS GUNN & DIAL, LLC

EXHIBIT 1

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EXHIBIT 1

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December 18, 2020

VIA E-MAIL

Kristen Gallagher
Amanda Perach
Pat Lundvall
McDonald Carano
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102

Re: *Fremont Emergency Services (Mandavia), Ltd., et. al. v. UnitedHealth Group, Inc. et. al.*; Case No. A-19-792978-B

003940

Dear Ms. Gallagher, Ms. Perach, and Ms. Lundvall:

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As you know, Plaintiffs have placed 22,153 health benefit claims at issue in the above-referenced action. Plaintiffs' Amended Complaint refers collectively to "the reimbursement claims within the scope of this action" as the "Non-Participating Claims.'" (Am. Compl. ¶ 40.) The operative pleading states:

> *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.
>
> MultiPlan acts as a Rental Network "broker" and, in this capacity, has contracted since as early as June 1, 2016 with some of the Health Care Providers to secure reasonable rates from payors for the Health Care Providers' non-participating emergency services. The Health Care Providers have no contract with Data iSight, and *the Non-Participating Claims identified in this action are not adjudicated pursuant to the MultiPlan agreement*.
>
> 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*.

(*Id*. ¶¶ 20, 41, 101) (emphasis added).

We write to notify you that, based on our review of the alleged benefit claims identified by Plaintiffs, thousands of the 22,153 disputed claims do not appear to be at issue because they do not qualify

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as "non-Participating Claims" under Plaintiffs' own definitions in the Complaint.[1] In the interest of avoiding needless expense for both sides on summary judgment briefing and associated discovery, we propose that the parties stipulate to dismissal of such claims. To support our proposal, we offer the following:

Fremont Participating Provider Claims

We have produced documents evidencing that Plaintiff Fremont Emergency Services (Mandavia), Ltd. ("Fremont") is a party to provider agreements with entities that include the following:

- Sierra Healthcare Options, Inc., DEF011295–DEF011321, DEF011380–DEF011382, DEF030231–DEF030249;
- Sierra Health & Life Insurance Company, Inc., DEF000154–DEF000156, DEF011357–DEF011376, DEF011394–DEF011396, DEF030212–DEF030230;
- Health Plan of Nevada, Inc., DEF011322–DEF011323, DEF011324–DEF011338, DEF011377–DEF011379, DEF030190–DEF030211;
- Universal Health Networks;
- MGM Resorts International, DEF011280–DEF011293, DEF011294;
- Caesar's Entertainment, Inc., DEF011472–DEF011476;
- Las Vegas Metropolitan Police Department, DEF011472–DEF011476; and
- Las Vegas Sands Company ("LVSC") d/b/a the Venetian Las Vegas, DEF011477–DEF011479.

Based on our review, approximately **7,928** unique commercial matched claims are subject to a contracted rate for participating providers such that they fall outside the scope of this action and should be dismissed.[2] We have updated the Claims Matching Detail we produced at DEF011480 to identify these claims, and produce the First Updated Claims Matching Detail along with this letter at DEF079846.

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[1] Please note that the approximate counts we present in this letter exclude matched claims that appear in multiple source systems. We are in the process of researching those claims, which can be a time and resource-intensive process, and will update these counts as appropriate based on our research.

[2] One of these claims is also included among the approximately 424 unique commercial matched claims that processed under a PPO, wrap, or rental network agreement.

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PPO/Wrap/Rental Network Claims

Based on our review, approximately **424** unique commercial matched claims were processed under a third-party preferred provider organization ("PPO"), wrap/rental network agreement, or other negotiated rates with one of the following entities:

- Private Healthcare Systems, Inc., DEF030263–DEF030293, DEF030294–DEF030299, DEF030300;
- MultiPlan, Inc., DEF001388–DEF001421, DEF001437–DEF001502, DEF001503–DEF001520, DEF001521–DEF001535;
- First Health Group Corp. Services, DEF011090–DEF011139, DEF011140, DEF011141–DEF011167, DEF011168–DEF011171, DEF011172–DEF011180, DEF011181–DEF011183, DEF011184–DEF011188, DEF011189, DEF011190–DEF011191, DEF011192–DEF011196, DEF011197–DEF011208, DEF011209–DEF011210.

These benefit claims are likewise outside the scope of this action and should be dismissed. We have identified these claims in the First Updated Claims Matching Detail, DEF079846.

Government-Funded Claims

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Based on our review, approximately **1,843** unique matched claims relate to government-funded health benefit programs (e.g., Medicaid). These claims are likewise outside the scope of this action and should be dismissed. We have identified these claims in the First Updated Claims Matching Detail, DEF079846.

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* * * *

We presume based on the parties' discussion during our December 11, 2020 meet and confer that Plaintiffs' inclusion of the above-described benefit claims was an inadvertent error, albeit one that has resulted in expenditure of significant resources for United to discover. That said, please confirm that, consistent with your representations during our meet and confer, Plaintiffs are willing to stipulate to dismissal of such claims. To support such a dismissal, Defendants have provided a First Updated Claims Matching Detail, DEF079846, which identifies these claims by category. Additionally, we recognize that the parties are in the process of negotiating a claims matching protocol. The claims described herein are subject to dismissal regardless of any stipulation the parties may enter into pursuant to that protocol.

We look forward to your response.

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O'Melveny

Sincerely,

/s/ Natasha S. Fedder

Natasha S. Fedder
for O'Melveny & Myers LLP

Counsel for Defendants

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EXHIBIT 2

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EXHIBIT 2

McDONALD CARANO

Kristen T. Gallagher
kgallagher@mcdonaldcarano.com

Reply to: Las Vegas

January 29, 2021

Via Email (nfedder@omm.com)

Natasha S. Fedder
O'Melveny & Myers LLP
400 South Hope Street, 18th Floor
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Re: Fremont Emergency Services (Mandavia) Ltd., et al. vs. UnitedHealth Group, Inc., et al., Eighth Judicial District Court, Clark County, Nevada Case No. A-19-792978-B – Litigation Claims

Dear Ms. Fedder:

003945

I write in response to your December 18, 2020 letter wherein you expressed United's position that certain health insurance claims for emergency services provided by plaintiff Fremont Emergency Services (Mandavia), Ltd. ("Fremont") are subject to various provider agreements and/or wrap/rental network agreements and therefore do not fall within the allegations of the First Amended Complaint (as interpreted by United).

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You and I have exchanged several emails in the interim as Fremont asked for additional information, especially with respect to reference to the alleged applicability of a Universal Health Networks agreement. In response to my inquiry about the foundation for United's assertion, United produced DEF080137, which purports to be "a reimbursement schedule that [United] believe[s] reflects" an agreement with Universal Health Network. *See* December 23, 2020 email. You also indicated that United has not located any written agreement with Universal Health Networks that would be applicable to any of the Health Care Providers. I asked for further information about the authenticity of DEF080137 because there is no information contained in the spreadsheet that confirms what United purports it to be, but you have not yet been able to provide further information. I would like to set up a call to discuss United's suggestion that Universal Health Networks has a provider agreement with Fremont. ***Please let me know your availability on the morning of Tuesday, February 2, or Wednesday, February 3, 2021.***

The Health Care Providers have identified a 1994 participating physician agreement between Universal Health Networks and plaintiff Ruby Crest that provided for payment of 95% of billed charges. The Health Care Providers will produce that agreement shortly. The Health Care

Providers' records show that the Universal Health Networks agreement with Ruby Crest terminated on June 30, 2018. Moreover, the arrangement provided for payment of 95% of billed charges which does not match the reimbursement schedule United produced at DEF080137. Further, such claims would not show up on the litigation spreadsheet had they been paid at the contracted rate. As a result, and based on the information currently available, the Health Care Providers dispute that any of the litigation claims are subject to a Universal Health Networks agreement.

The Health Care Providers seek additional information from United with respect to its assertion that UMR is subject to a provider agreement with Fremont. United's First Update to Claims Matching Data (DEF079846) identifies 6,560 UMR claims (both in terms of source and plan name) which appear to be within the first grouping of claims in your letter that are allegedly subject to a participating provider agreement (listed as "Sierra Healthcare Options, Inc."). Please provide more information in this regard so that the Health Care Providers can evaluate United's position, including any alleged arrangement between UMR and Sierra Healthcare Options, Inc. If you contend that Fremont or any of the other Health Care Providers are subject to a provider agreement via UMR, please provide a non-AEO copy of any alleged agreement, as well as a copy of the member's insurance identification card so that the Health Care Providers can evaluate your contentions.

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Similarly, Fremont disputes that any of the litigation claims are subject to an agreement between it and Las Vegas Sands Company dba the Venetian ("LVSC"). The document United relies upon (DEF11477) for this contention does not establish the existence of an agreement. If you contend that Fremont or any of the other Health Care Providers are subject to a provider agreement with LVSC or through a third party, please provide a non-AEO copy of any alleged agreement, as well as a copy of the member's insurance identification card that would establish the existence of such agreement. In addition, if you contend that LVSC has a provider agreement through UMR, please produce the agreement between UMR and the employer group and any agreement you contend was accessed by the employer group through its relationship with UMR.

Further, please produce copies of any applicable written agreement between any United entity and the MGM and Caesar's employer groups to confirm the roles and relationships.

The Health Care Providers are in the process of updating the litigation at-issue claims list. Additionally, certain claims that the Health Care Providers believe to be subject to agreements

McDONALD CARANO

with Sierra Healthcare Options, Inc., Sierra Health & Life Company and Health Plan of Nevada, Inc. will be omitted. An updated spreadsheet will be produced shortly.

Sincerely,

McDONALD CARANO LLP

Kristen T. Gallagher

Kristen T. Gallagher

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EXHIBIT 3

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EXHIBIT 3

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Attorneys for Defendants

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

DECLARATION OF ROSALINDA BENEVIDES IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' RENEWED MOTION FOR ORDER TO SHOW CAUSE WHY DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT AND FOR SANCTIONS

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I, Rosalinda Benevides, declare under penalty of perjury that the following is true and correct:

1. I am employed as a Senior Legal Services Specialist for UnitedHealthcare's Legal, Compliance, and Regulatory Affairs department. My job responsibilities include providing litigation-related paralegal support, at the direction of counsel, for UnitedHealthcare ("UHC") as well as insurers or claims administrators affiliated with it, such as Health Plan of Nevada, Inc., Sierra Health and Life Insurance Company, UMR, Inc. ("UMR"), and Oxford Health Plans LLC.

2. I base my statements contained herein upon my personal knowledge and from information obtained from various sources, including Defendants' corporate and business records and business documents contemporaneously maintained by Defendants in the regular and ordinary course of business, and therefore, except as stated upon information and belief, know these statements to be true.

3. I understand that on or about July 29, 2019, Plaintiffs provided the above-captioned Defendants ("Defendants") with a spreadsheet produced at Bates Number FESM000011 that identified approximately 15,210 claims as at-issue in this litigation.

4. I understand that Plaintiffs made numerous discovery requests that, taken together, sought information in the administrative record for each of the at-issue claims.

5. To produce the administrative record for each claim, the Defendants that processed benefit claims must locate, and to the extent that any of the below listed documents exist, produce the following categories of documents from their records for each individual claim:

a. Member Explanation of Benefits ("EOBs");

b. Provider EOBs and/or Provider Remittance Advices ("PRAs');

c. Appeals documents;

d. Any other documents comprising the administrative records, such as correspondence or clinical records submitted by Plaintiffs;

e. The plan documents in effect at the time of service.

6. The collection of aggregate claims data responsive to Plaintiffs' discovery requests, while complicated, was not the most significant obstacle in producing the administrative record.

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Instead, matching Defendants' claims data to the claims at-issue in this case ("claims matching") was a difficult logistical and labor-intensive task.

7. Claims matching has to occur for each at-issue claim to ensure that Defendants do not violate the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). Under HIPAA, Defendants had to make sure that it preserved the confidentiality of our member data. Defendants cannot disclose data and/or documents related to members and claims that are not related to this lawsuit. Accordingly, I had to ensure that the following processes took place for each of the 15,210 claims at issue in this case:

First, Defendants had to request all commercial claims data for the Plaintiffs be pulled for the relevant time period by their tax identification numbers ("TINs").

Second, Defendants conducted an electronic query to match Defendants' data to Plaintiffs' list of claims by the claim numbers.

Third, for claim numbers that did not align, or where Defendants had a claim number match but the patient name was different from what Plaintiffs provided, Defendants had to manually make additional matches reviewing multiple data elements.

Fourth, for each claim that required manual matching, one of Defendants' employees had to review member demographics within the platform system related to the claim number and specifically compare the patient name, subscriber name, date of birth, and date of service. Then, if further clarification was needed, one of Defendants' employees had to manually review the billing provider and amounts for matches.

Fifth, after performing all these tasks, Defendants still had a subset of unmatched claims, and only later identified that FESM000011 had miscategorized entities, creating substantial additional work to match claims.

8. Because the claims data in FESM000011 was incomplete or had errors, the manual process of matching the initial 15,210 claims was labor intensive. The types of errors in the claims data in FESM000011 included:

a. Incorrect claims numbers or improperly aggregated claims numbers;

b. Patient names listed by subscriber identification numbers but associated with subscribers with different names;

c. Mischaracterization of plan names. For example, Plaintiffs identified UHC as the plan when one of the Sierra defendants or UMR were the actual responsible plan, and vice versa;

d. FESM000011 included total claims whereas UHC's data was at a per line level, so every line had to be added together for a claim;

e. Plaintiffs had different claim numbers for dates of service due to their providers submitting multiple claim submissions or a corrected claim.

9. After having to process so many of the claims matching manually because of missing or miscategorized data, we asked for clarification from Plaintiffs regarding these discrepancies. In response, Plaintiffs provided a new list of claims in a spreadsheet produced on or about October 5, 2020, at Bates Number FESM000344. FESM000344 now listed 22,153 claims as being at-issue, and further delayed Defendants' production of administrative records.

10. Defendants' claims data only captures a moment in time. When Plaintiffs provided FESM000344, the number of claims Plaintiffs were placing at issue increased by 6,943. Defendants then needed to pull a new list of claims using the above-described process to clarify discrepancies. This meant that Defendants had to restart the entire claims data pull and matching process. Additionally, FESM000344 included a significant number of non-commercial claims, which led to even further delays.

11. In fact, because so many man-hours were associated with our efforts to match claims data related to the first list provided by Plaintiffs (FESM000011), when Defendants received the new list, Defendants had to hire a vendor to assist with the claims matching.

12. In particular, the volume of claims disputed by Plaintiffs across different Defendant entities created even more challenges. The Defendants that process claims in this case: UnitedHealthcare Insurance Company; United HealthCare Services Inc.; UMR, Inc.; Oxford Health Plans LLC; Sierra Health and Life Insurance Company, Inc.; and Health Plan of Nevada, Inc., are different corporate entities with different corporate structures.

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13. With respect to commercial health plans, UnitedHealthcare Insurance Company, United HealthCare Services, Inc., and Oxford Health Plans LLC have shared employees, data systems, and processes. UMR, Inc. ("UMR") is a third-party administrator affiliated with UHC, but has separate employees, data systems, and processes. Health Plan of Nevada, Inc. and Sierra Health and Life Insurance Company are Nevada-based companies that are affiliated with UHC, but have separate employees, data systems, and processes. As a result, each of these businesses have a different method of data storage and different corporate practice regarding where the various types of documents and data are kept and for what timeframe. Additionally, even within a line of business, there are different personnel that support processing of participating ("par") vs. non-par (or "out-of-network") claims which made data collection more complex.

14. Because Plaintiffs have requested significant discovery from each of the eight Defendant entities in this case, complying with these discovery requests has created logistical hurdles and required many man-hours from members of each corporation to gather the requisite data and documents. For example, Health Plan of Nevada, Inc. and Sierra Health and Life Insurance Company has a smaller group of employees, uses a different claims platform than the other Defendants, has no staff dedicated to document productions of this type, and access to each type of document or claims required coordination with a separate team of individuals and systems.

15. Even references to documents across entities are often different. For example, the same document is referred to as "Benefit Docs" in Health Plan of Nevada's system, but is referred to as "Plan Docs or SPDs" in UHC's system. Separately, United Healthcare's Provider Remittance Advice ("PRAs") are called Explanation of Payment ("EOPs") at other United entities. UnitedHealthcare Student Resources only sends an Explanation of Benefits ("EOB") to the provider with an email notification to the member, where other platforms send separately PRAs to providers and EOBs to members. The difference in terminology for documents across Defendants has made data collections across these entities very challenging.

16. In order to comply with Plaintiffs' discovery requests, which are broader than any other matter that I have ever supported, at the direction of counsel, I did the following:

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a. Identified teams or individual resources available at each organization to pull claims and documents, none of whom are responsible for supporting litigation or discovery requests in the normal course of business;

b. Matched Defendants' claims data to Plaintiffs' list of claims, using the processes described above;

c. Created shared locations for each organization's team to send documents;

d. Organized, tracked, and transferred data from within each individual organization; and

e. Transmitted data to vendors or outside counsel in preparation for production.

17. Now that Defendants have undertaken the above-described actions, I, and the groups that I organized, are working to produce the administrative records for all of the claims that Plaintiffs placed at-issue before the April 15th discovery deadline. However, our efforts in this regard are labor intensive, time consuming, and are being conducted to the detriment of my other job responsibilities as well as the other job responsibilities of the individuals who are assisting me.

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

Executed on March 22, 2021, in Englewood, Colorado.

/s/ Rosalinda Benevides
Rosalinda Benevides
Senior Legal Services Specialist
UnitedHealthcare

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EXHIBIT 4

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EXHIBIT 4

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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., 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

DECLARATION OF LESLIE HARE IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' RENEWED MOTION FOR ORDER TO SHOW CAUSE WHY DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT AND FOR SANCTIONS

003956

I, Leslie Hare, declare under penalty of perjury that the following is true and correct:

1. I am employed by Health Plan of Nevada, Inc. ("HPN") as the Vice President of Claims Operations. My job responsibilities include managing claims processes from beginning to end for claims that process on the Facets claims platform. HPN and Sierra Health and Life Insurance Company, Inc. ("SHL") use the Facets claims platform. The Facets claims platform is not linked to any other UHC claims platform. Sierra Health-Care Options, Inc. ("SHO") is a third-party administrator, but does not itself process any benefit claims.

2. I understand that Plaintiffs in the above-captioned litigation ("Plaintiffs") claim that there are approximately 22,153 health benefit claims at issue in this litigation which are identified in a spreadsheet produced at Bates Number FESM000344. I further understand that approximately 7,000 of Plaintiffs' disputed health benefit claims were processed on the Facets claims platform.

3. I understand that Plaintiff Fremont Emergency Services ("Fremont") was a party to network participation agreements with HPN, SHL, and SHO. I further understand that claims data pulled from the Facets claims platform reflects that over 1,000 of Plaintiffs' disputed health benefit claims processed under one of these participation agreements.

4. I understand that, on November 9, 2020, the Court entered an order compelling the Defendants in the above-captioned litigation ("Defendants") to produce 2,000 administrative records per month for each of the disputed health benefit claims.

5. I do not have any team members whose roles are dedicated to litigation support. Nevertheless, since October 2020, two or three of my team members have been taken away from their job functions (different team members at varying times) to assist in the time-consuming process of pulling administrative records for the disputed health benefit claims that were processed by HPN and SHL.

6. To pull the administrative record for each claim, my team conducted analytics to identify the claim schedules (i.e., plan documents) that pertain to one or more of the disputed health benefit claims that processed on the Facets claims platform. The analytics my team conducted

included the following: pulling data from Facets based on pieces of information such as claim number; using other pieces of data such as member names, dates of birth, claim service dates, and rendering provider to validate the information found; pulling data such as benefit plan information for reference when pulling plan documents, and providing the 4-5 key pieces of data necessary to identify responsive administrative record documents. My team then conducted a claim-by-claim analysis to identify the Member Explanation of Benefits ("EOB") and the Provider EOB for each claim.

7. To identify the EOB corresponding to an at-issue claim, I, or one of my team members, must input four or five data points into a reporting program that interfaces with Facets data to generate a report. I, or one of my team members, must then wait for the report to generate, pull the report from the system, and save it as a separate document. I, or one of my team members, would then have to repeat this process for each disputed claim to identify the corresponding record of a payment to provider, which is sometimes referred to as a "Provider Remittance Advice" ("PRA").

8. Because this process proved so labor-intensive and was negatively impacting my team's normal business operations, in mid-October 2020, my team used HPN/Sierra's local information technology ("IT") resources to begin developing a Macro technology that would automate the search process for the EOBs and PRAs and generate the requisite reports. It took my team and IT approximately 60 hours to develop and test this technology. Once the Macro technology process was operational, my team members and I were able to invest our human resources in reviewing the documents identified by the Macro technology in a more efficient manner. However, some portion of the process remains manual (e.g., quality control reviews and transferring records to UHC's legal department).

9. I understand that the discovery deadline is April 15, 2021. My team is committing available resources and working to identify the benefit schedules, EOBs, and PRAs for the disputed health benefit claims that processed on the Facets claims platform before the April 15th discovery deadline. However, our efforts to identify these claims is very labor intensive, time consuming, and keep my team from performing their normal job responsibilities. These

responsibilities include automating provider contracts and configuring Facets to process claims according to the terms and benefit of the different HPN and SHL health benefit plans and the various fee schedules that are part of our provider contracts.

10. In addition, as a result of the COVID-19 pandemic, my team has transitioned to full time telecommuting. My team had the added burden of working on these tasks and their other job responsibilities, while dealing with the challenges of developing and using a new technology in a remote work environment.

11. My team does not have access to administrative records related to claims processed by UHC or UMR. I understand that other groups at UHC and UMR are also engaged in the difficult and labor-intensive processes of identifying and producing the administrative records compelled by the Court's November 9, 2020 order.

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

Executed on March 22, 2021, in Las Vegas, Nevada.

/s/
Leslie Hare
Vice President of Claims Operations
Health Plan of Nevada, Inc.

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EXHIBIT 5

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EXHIBIT 5

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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., 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

DECLARATION OF JENNIFER SHREINER IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' RENEWED MOTION FOR ORDER TO SHOW CAUSE WHY DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT AND FOR SANCTIONS

I, Jennifer Shreiner, declare under penalty of perjury that the following is true and correct:

1. I am employed as a Regulatory Adherence Consultant for the UnitedHealthcare Employee & Individual Claim Operations & Benefit Installation ("COBI") team. As part of COBI, my job responsibilities include, among other things, ensuring that UnitedHealthcare's ("UHC") commercial business' claim appeals and grievances processes are following applicable state and federal regulations.

2. I understand that Plaintiffs in the above-captioned litigation ("Plaintiffs") claim that there are approximately 22,153 health benefit claims at issue in this litigation which are identified in a spreadsheet produced at Bates Number FESM000344.

3. I understand that, on November 9, 2020, the Court entered an order compelling the Defendants in the above-captioned litigation ("Defendants") to produce 2,000 administrative records per month for the 22,153 disputed health benefit claims.

4. To produce the administrative record for each claim, Defendants must locate, and to the extent that any of the below listed documents exist, produce the following categories of documents from their records for each individual claim:

a. Member Explanation of Benefits ("EOBs");

b. Provider EOBs and/or Provider Remittance Advices ("PRAs');

c. Appeals documents;

d. Any other documents comprising the administrative records, such as correspondence or clinical records submitted by Plaintiffs;

e. The plan documents in effect at the time of service.

5. With respect to UHC's UNET commercial business and Oxford, these documents are not stored together on one system. Instead, these documents are located on at least four separate and distinct systems within UHC and Oxford. The systems that contain the disputed documents are not automated and are not linked to another UHC system. To locate the requested information, a UHC employee must undergo an arduous and labor-intensive process to manually identify this

information for each individual claim on a claim-by-claim basis. This process is further complicated by the fact that the claims data contained in FESM000344 is sometimes incomplete or incorrect.

6. For example, to determine whether the member was a UHC or Oxford commercial member, as opposed to a different commercial payor or claim administrator affiliated with UHC, employees on my team will have to query the claims platforms to which we have access (e.g., UNET, Oxford) to identify the correct payor (from time to time, the payor listed in FESM000344 is incorrect). If none of those platforms contain the claim, we will have to have the claim redirected to other teams that support different commercial payors or claim administrators affiliated with UHC, such as Sierra or UMR.

7. The collection of EOBs and PRAs for at-issue claims processed on UHC's UNET and Oxford claims platform, of which I have firsthand knowledge, is an example of how time and labor intensive the process of collecting the requested documents on a claims-by-claims basis is for my team and possibly other employees of Defendants.

8. I do not have any team members whose roles are dedicated to litigation support. Nevertheless, since October 2020, two or three of my team members have been taken away from their job functions (different team members at varying times) to assist in the difficult process to collect EOBs and PRAs for the disputed UNET claims. These employees have had to stop their daily work responsibilities—which include reviewing, analyzing, and adjusting claims, reviewing regulatory mandates and incorporating claim platform changes to accommodate, updating internal procedures, monitoring claim processing to ensure they are processing accurately, and supporting market conduct exams—to assist Defendants identify and retrieve the EOBs and PRAs for each of the at-issue claims. As a result, I understand that some of these team members are now behind on their other projects.

9. To identify a relevant EOB, a UHC employee must perform the following process: **First**, the United employee must access UHC's claims system to identify any information missing from FESM000344, such as the identification number of the United member or the date of service.

Second, the UHC employee logs into a document portal called "Doc360," which contains the EOBs and PRAs for UHC's UNET claims.

Third, because Doc360 cannot be searched by claim number, the UHC employee must conduct a search using the UHC member's identification number and date of service. EOBs are issued within two weeks of the date of service, so the UHC employee's search can generate dozens of EOBs depending on how many services the member received in that time period. If FESM000344 misidentified the payor at issue, than the UHC employee will have to check a separate system—such as the system used by Oxford—to identify the correct payor.

Fourth, the UHC employee must manually review every EOB generated by the search to identify the EOB that corresponds to the at-issue claim listed in FESM000344, using information such as the date of service, services billed, and provider identification information obtained from FESM000344 or from the claims platform (if the required information was incorrect or otherwise not provided by Plaintiffs).

Fifth, the UHC employee isolates the responsive EOB and uploads the EOB to a central database. Because the central database is so heavily populated by this work, there are frequent crashes that further delay the process.

10. Once the UHC employee has identified the EOB corresponding to the at-issue claim, the UHC employee must conduct the following process to identify the corresponding PRA:

First, the UHC employee must access UHC's claims system to identify the check number used to pay the provider, information which is absent from FESM000344. In some circumstances—such as when a member's allowable payment is entirely applied to a deductible or co-payment—there is no check number for the claim because no check was issued.

Second, the United employee logs into Doc360 and conducts a search by check number to find the PRA. If there is no check number, the UHC employee must search for all PRAs issued to a provider on a given date.

Third, the UHC employee must manually review the PRAs generated by the search to ensure that the claim number matches the number of the at-issue claim listed in FESM000344.

Fourth, the UHC employee isolates the responsive PRA and uploads the PRA to a central database, where again there are frequent crashes that further delay the process.

11. Until recently, the UHC employee also had to conduct an additional step with each of these processes: redacting the document so that no protected health information ("PHI") was inadvertently produced in violation of UHC's obligations under the Health Insurance Portability and Accountability Act ("HIPAA"). However, in an attempt to improve the efficiency of this process, I understand that United retained contract attorneys to collect, redact PHI, and produce administrative records.

12. Identifying the EOB and PRA that corresponds to a single claim listed in FESM000344 can take up to an hour depending on the number of EOBs that must be manually reviewed pursuant to the process described in paragraph 9; it may take longer in situations where Plaintiffs' information in FESM000344 is inaccurate or incomplete.

13. My group is working to identify all of the EOBs and PRAs for the UNET claims Plaintiffs have placed at issue before the April 15 discovery deadline. However, our efforts in this regard are highly labor intensive, time consuming, and a burden to my group because these tasks are being conducted and prioritized to the detriment of my group's other job responsibilities.

14. My team does not have access to administrative records related to claims processed by Sierra or UMR. I understand that other groups at UHC and at Sierra and UMR are engaged in similar processes to identify and produce the administrative records compelled by the Court's November 9, 2020, order.

15. I understand that my team investigated, twice, whether there was any way to develop any technology—such as a script or Macro—to automate any portion of the retrieval process from UHC's systems, as described above. We were unable to develop any such technology.

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

Executed on March 22, 2021, in Egg Harbor Township, New Jersey.

/s/
Jennifer Shreiner
Regulatory Adherence Consultant
UnitedHealthcare Employee & Individual Claim
Operations & Benefit Installation

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

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003967

BEFORE THE HONORABLE NANCY L. ALLF, DISTRICT COURT JUDGE

THURSDAY, MARCH 25, 2021

RECORDER'S TRANSCRIPT OF HEARING
ALL PENDING MOTIONS

Appearing via Videoconference:

For the Plaintiff: PATRICIA K. LUNDVALL, ESQ.

For the Defendant: COLBY BALKENBUSH, ESQ.

RECORDED BY: DELORIS SCOTT, COURT RECORDER

003967

Las Vegas, Nevada, Thursday, March 25, 2021

[Case called at 10:01 a.m.]

THE COURT: The next matter is Fremont versus United. We have two motions to -- for association. Let's have appearances, please, starting first with the Plaintiff.

MS. LUNDVAL: Good morning, Your Honor. Pat Lundvall from McDonald Carano, here on behalf of the healthcare providers.

THE COURT: Thank you.

MS. LUNDVAL: With me this morning, I've got Rachel Leblanc as well as Matt Lavin, is on the line. Both of these are the applicants, pro hac vice.

THE COURT: Thank you, and welcome. Appearances for the Defendant, please.

MS. LEBLANC: Good morning, Your Honor.

COURT RECORDER: Who said, morning, Your Honor? What's her name?

THE COURT: Was that Ms. Leblanc?

MS. LEBLANC: Yes, ma'am.

THE COURT: Thank you. And for the Defendants, please.

MR. BALKENBUSH: Good morning, Your Honor. Colby Balkenbush for the Defendants.

THE COURT: Thank you.

Do we have any other appearances this morning? Okay. This --

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MR. BALKENBUSH: No one else from the Defendants, Your Honor.

THE COURT: Good enough.

Mr. Balkenbush, I didn't see an opposition, but I want to make sure that you have the ability to -- to raise one orally, if you choose to. I set in on shortened time.

MR. BALKENBUSH: I appreciate that, Your Honor. But, no objection to either of the pro hac vice petitions.

THE COURT: All right. So, Ms. Lundvall I reviewed both petitions for Matthew McGill Lavin and Rachel Holladay Leblanc, and they were in order. They can be granted.

And if you guys --

003969

MS. LUNDVAL: Thank you, Your Honor.

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THE COURT: -- can get that order to the TPO, I'll sign it today.

MS. LUNDVAL: Thank you, Your Honor. We will send over the order to process accordingly.

THE COURT: Good enough. Was there anything else to take up today in this case?

MS. LUNDVAL: Not today, Your Honor.

THE COURT: Mr. Balkenbush?

MR. BALKENBUSH: And nothing from the Defendants either, Your Honor. Thank you.

THE COURT: All right, guys. Then see you soon. You guys --

003969

MS. LUNDVAL: Thank you, Your Honor.

THE COURT: -- are frequent fliers.

MR. BALKENBUSH: Thank you.

THE COURT: See you soon.

[Hearing concluded at 10:03 a.m.]

* * * * * * *

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.

Brynn White

Brynn White
Court Recorder/Transcriber

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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	Case No.: A-19-792978-B Dept. No.: XXVII **NOTICE OF ENTRY OF REPORT AND RECOMMENDATION #2 REGARDING PLAINTIFFS' OBJECTION TO NOTICE OF INTENT TO ISSUE SUBPOENA DUCES TECUM TO TEAMHEALTH HOLDINGS, INC. AND COLLECT RX, INC. WITHOUT DEPOSITION AND MOTION FOR PROTECTIVE ORDER**

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
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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 Report and Recommendation #2 Regarding Plaintiffs' Objection to Notice of Intent to Issue Subpoena Duces Tecum to TeamHealth Holdings, Inc. and Collect RX, Inc. Without Deposition and Motion for Protective Order was entered on March 29, 2021, a copy of which is attached hereto.

DATED this 29th day of March, 2021.

McDONALD CARANO LLP

By: */s/ Kristen T. Gallagher*
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Kristen T. Gallagher (NSBN 9561)
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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 March, 2021, I caused a true and correct copy of the foregoing **NOTICE OF ENTRY OF REPORT AND RECOMMENDATION #2 REGARDING PLAINTIFFS' OBJECTION TO NOTICE OF INTENT TO ISSUE SUBPOENA DUCES TECUM TO TEAMHEALTH HOLDINGS, INC. AND COLLECT RX, INC. WITHOUT DEPOSITION AND MOTION FOR PROTECTIVE ORDER** to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

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Hon. David T. Wall (Ret.)
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DISTRICT COURT

CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD, et al., Plaintiffs, vs. UNITEDHEALTH GROUP INC., et. al., Defendants	Case No.: A-19-792978-B Dept. No.: 27 JAMS Ref. #1260006167 REPORT AND RECOMMENDATION #2 REGARDING PLAINTIFFS' OBJECTION TO NOTICE OF INTENT TO ISSUE SUBPOENA DUCES TECUM TO TEAMHEALTH HOLDINGS, INC. AND COLLECT RX, INC., WITHOUT DEPOSITION AND MOTION FOR PROTECTIVE ORDER

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On February 2, 2021, the Hon. Nancy L. Allf entered an Order Granting Defendants' Motion for Appointment of Special Master in the above-captioned matter, and appointed the undersigned to serve as Special Master in these proceedings.

On March 12, 2021, Plaintiff filed an Objection to Notice of Intent to Issue Subpoena Duces Tecum to TeamHealth Holdings, Inc., Without Deposition and Motion for Protective Order. A similar Objection and Motion was filed regarding a subpoena duces tecum for Collect Rx, Inc. Plaintiff's requests indicated that the matter should be referred to the Special Master for determination.[1] On March 19, 2021, Defendants filed a timely consolidated Opposition to both Motions.

[1] Although it appears that Notice of Hearing was issued by the District Court for these matters, counsel for all parties agreed, during a teleconference with the Special Master on March 22, 2021, to have this matter determined by the Special Master.

003974

This matter was presented for telephonic hearing on March 25, 2021. Participating were the Special Master, Hon. David T. Wall, Ret.; Pat Lundvall, Esq., Kristen T. Gallagher, Esq., Rachel H. LeBlanc, Esq. and Justin C. Fineberg, Esq., appearing for Plaintiffs; Colby L. Balkenbush, Esq., Dimitri D. Portnoi, Esq. and Brittany M. Llewellyn, Esq., appearing for Defendants.

Pursuant to NRCP 53(e)(1), the Special Master hereby sets forth the following Findings of Fact and Conclusions of Law and Recommendation:

FINDINGS OF FACT

1. The Hon. Nancy L. Allf has determined, in multiple Orders in this matter, that the allegations in Plaintiffs' First Amended Complaint do not involve the "right to payment" and, in connection with the breach of implied contract and related claims, the Plaintiffs only seek the proper reimbursement rate, making this a "rate-of-payment" case. (See, October 26, 2020 Order Denying Defendants' Motion to Compel Production of Clinical Documents for the At-Issue Claims and Defenses and to Compel Plaintiff to Supplement Their NRCP 16.1 Initial Disclosures on Order Shortening Time ("10/26/20 Order"), ¶1; February 4, 2021 Order Denying Defendants' Motion to Compel Responses to Defendants' First and Second Requests for Production on Order Shortening Time ("2/4/21 Order"), ¶1.)

2. In its 2/4/21 Order, the Court stated in ¶11:

> "The Court concludes that corporate structure, finances, and how the Health Care Providers' charges are determined are not relevant in this case. Further, financial information that United seeks with regard to the Health Care Providers' business and operations to purportedly establish the Health Care Providers' charges are excessive, as well as and United's monopoly argument, are not relevant to the claims or defenses in this case. None of the information sought by United in the Motion will lead to discovery of relevant information."

3. On March 2, 2021, counsel for Plaintiffs and Defendants conducted a meet and confer regarding Defendants' intent to serve subpoenas on TeamHealth Holdings, Inc. and Collect Rx, Inc. Counsel for Plaintiffs communicated Plaintiffs' objections to all of the items sought in the TeamHealth subpoena, with the exception of items 14 and 51, and all of the items sought in the Collect Rx subpoena, with the exception of items 5 and 6.

4. On March 12, 2021, Plaintiff filed an Objection to Notice of Intent to Issue Subpoena Duces Tecum to TeamHealth Holdings, Inc., Without Deposition and Motion for Protective Order, arguing that the

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subpoena includes categories of documents the Court has already considered and ruled are not relevant to this case, including the following:

a. Ownership, acquisition and due diligence documents, corporate structure documents (Nos. 1-13, 15, 20-22, 43, 54-58);

b. Cost-related and charge-related documents (Nos. 16-19, 23-24,28, 30-31, 35);

c. Billing/charges to non-commercial patients and complaints (Nos. 32-34, 52);

d. Hospital facility contracts and credentials (Nos. 45-50);

e. Provider participation agreement and wrap/rental network agreements (Nos. 25-27)[2];

f. Balance billing and appeals (Nos. 37-42, 44, 53).

5. With respect to Collect Rx, Plaintiffs objected to the following categories of documents for the same basis as set forth above regarding TeamHealth:

a. Ownership, corporate structure and relationship documents (Nos. 1-4);

b. Collection and balance-billing related documents (No. 12-17);

c. Scripts (Nos. 7-11)

6. Any of the foregoing factual statements that are more properly considered conclusions of law should be deemed so. Any of the following conclusions of law that are more properly considered factual statements should be deemed so.

1. CONCLUSIONS OF LAW

7. Pursuant to NRCP 26(b)(1), parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

8. The scope of allowable discovery also applies to third-party discovery under NRCP 45, and a party may object to a third-party subpoena if the party believes its own interest is jeopardized by discovery

[2] Within this category, Plaintiffs did not object to Nos. 14 and 51.

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sought from a third party. NRCP 45(c)(3); First American Title Insurance Co. v. Commerce Associates, LLC, 2017 WL 53704, *1 (D. Nev. Jan. 3, 2017).

9. The subpoena duces tecum for TeamHealth contains some of the identical categories of documents previously determined by the Court to be irrelevant to the core issue of rate of reimbursement and therefore not discoverable, or otherwise determined by the Special Master to not be relevant and discoverable, as follows:

   a. Documents related to ownership, acquisition and due diligence, pre-acquisition and corporate structure documents (Nos. 1-13, 15, 20-22, 43, 54-58), which category the Court in its 2/4/21 Order determined was not discoverable;

   b. Cost-related and charge-related documents (Nos. 16-19,23-24, 28, 30-31, 35), which category the Court in its 2/4/21 Order determined was not discoverable;

   c. Documents related to billing/charges to non-commercial patients and complaints (Nos. 32-34, 52), which category the Court in its 2/4/21 Order determined was not discoverable, given that this rate-of-payment case concerns the amounts United reimbursed (document request relates to amounts TeamHealth charges/collects from private pay patients);

   d. Hospital facility contracts and credentials (Nos. 45-50), which refer to cost-related and charge-related documents, which category the Court in its 2/4/21 Order determined was not discoverable;

   e. Provider participation agreements and wrap/rental network agreements (Nos. 25-27), seeking provider participation agreement documents and internal TeamHealth communications about negotiating a provider participation agreement with United, which is not relevant to reimbursement rates as determined by the Court to be the primary allegations in Plaintiffs' First Amended Complaint;

   f. Documents regarding balance billing and appeals (Nos. 37-42, 44, 53), which are essentially cost-related and charge-related documents and information related to billing matters, which category the Court in its 2/4/21 Order determined was not discoverable.

10. The subpoena duces tecum for Collect Rx contains some of the identical categories of documents previously determined by the Court to be irrelevant to the core issue of rate of reimbursement and

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therefore not discoverable, or otherwise determined by the Special Master to not be relevant and discoverable, as follows:

a. Documents related to ownership, relationship and corporate structure documents for Collect Rx (Nos. 1-4), which category the Court in its 2/4/21 Order determined was not discoverable;

b. Collection and balance billing related documents (Nos. 12-17), which relate to cost, which the Court in its 2/4/21 Order determined was not discoverable;

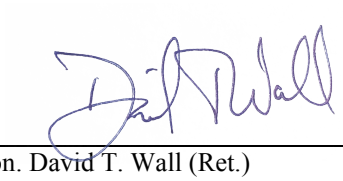
c. Documents related to scripts (Nos 7-11), which relate to the manner in which charges are collected. These are not limited to geography, are not limited to the at-issue claims, are not limited to the Health Care Providers herein, are not limited to emergency medicine services and generally seeks collection information not relevant to the allegations in Plaintiff's First Amended Complaint.

11. Having considered all of the arguments by both parties, it is the recommendation of the Special Master that the documents and information sought by Defendants in these Subpoenas Duces Tecum are not relevant and not discoverable, as they will not lead to the discovery of relevant information.[3]

RECOMMENDATION

12. It is therefore the recommendation of the Special Master that Plaintiffs' Objections are meritorious and that Plaintiff's Motions for Protective Order should be GRANTED in their entirety.

Dated this 11TH day of March, 2021.



Hon. David T. Wall (Ret.)

[3] As set forth herein, the Special Master has relied in part upon the determinations of the Court in its Orders, including the 2/4/21 Order. Should the Court reconsider any of the provisions set forth in that Order, such reconsideration may affect one or more of the Recommendations herein.

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PROOF OF SERVICE BY E-Mail

Re: Fremont Emergency Services (Mandavia), Ltd. et al. vs. UnitedHealth Group, Inc. et al.
Reference No. 1260006167

I, Michelle Samaniego, not a party to the within action, hereby declare that on March 29, 2021, I served the attached REPORT AND RECOMMENDATION #2 REGARDING PLAINTIFFS' OBJECTION TO NOTICE OF INTENT TO ISSUE SUBPOENA DUCES TECUM TO TEAMHEALTH HOLDINGS, INC. AND COLLECT RX, INC., WITHOUT DEPOSITION AND MOTION FOR PROTECTIVE ORDER on the parties in the within action by electronic mail at Las Vegas, NEVADA, addressed as follows:

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Team Physicians of Nevada - Mandavia P.C.

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Amanda M. Perach Esq.
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Sierra Health-Care Options, Inc.
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United Healthcare Insurance Company
UnitedHealth Group Inc.
UnitedHealthCare Services Inc dba UnitedHeal

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United Healthcare Insurance Company
UnitedHealth Group Inc.
UnitedHealthCare Services Inc dba UnitedHeal

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I declare under penalty of perjury the foregoing to be true and correct. Executed at Las Vegas, NEVADA on March 29, 2021.

Michelle Samaniego
JAMS
MSamaniego@jamsadr.com

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Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

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

BEFORE THE HONORABLE NANCY L. ALLF, DISTRICT COURT JUDGE

THURSDAY, APRIL 1, 2021

RECORDER'S TRANSCRIPT OF HEARING
MOTION TO ASSOCIATE COUNSEL ON OST

Appearing via Videoconference:

For the Plaintiff: KRISTEN T. GALLAGHER, ESQ.

For the Defendant: COLBY L. BALKENBUSH, ESQ.

RECORDED BY: BRYNN WHITE, COURT RECORDER

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Las Vegas, Nevada, Thursday, April 1, 2021

[Case called at 11:00 a.m.]

THE COURT: Fremont Emergency versus United Healthcare. Appearances, please, starting first with the Plaintiff.

MR. BALKENBUSH: Good morning, Your Honor. This is Colby Balkenbush for the Defendants. If I may, I just received an e-mail from Plaintiff's Counsel saying that they had not received the BlueJeans login information. And I just sent it to them just now, so I believe they may be logging in any minute here.

THE COURT: Thank you, Mr. Balkenbush. We'll give them just a minute then to get here.

[Colloquy between the Court and Court Recorder]

THE COURT: So, Ms. Gallagher, I see that you've joined us. Do you expect others from your team to make an appearance today?

COURT RECORDER: I don't know if she's fully joined yet. It still says joining.

MS. GALLAGHER: Hi, good morning. It's Kristen Gallagher, with McDonald Carano on behalf of the Plaintiff.

THE COURT: Thank you. Do you expect other people from your team to join us today?

MS. GALLAGHER: I do not, Your Honor. I apologize for the delay; we were having trouble identifying the link. Thank you.

THE COURT: No. I think it was our error.

All right. Let me go ahead then and call the case of Fremont

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versus united. Appearances first from the Plaintiff, and then from the Defendants.

MS. GALLAGHER: Kristen Gallagher on behalf of the Plaintiff healthcare providers.

THE COURT: Thank you and for the Defendants, please.

MR. BALKENBUSH: Good morning, Your Honor. Colby Balkenbush for the Defendants. And also on the line are I believe three of the out of state counsel who are on the docket today to be admitted; Hannah Dunham, Paul Wooten, and Jeff Gordon.

THE COURT: Thank you, all.

Is there going to be any objection to the pro hac admission of these lawyers?

MS. GALLAGHER: No, Your Honor. There is no objection by the Plaintiff.

THE COURT: Good enough. All right so I believe, though, today was the Plaintiffs had two motions to associate counsel. Is that correct?

MS. GALLAGHER: Your Honor, the minute order indicates that they're on calendar for April 8th, so next week --

THE COURT: Oh, okay.

MS. GALLAGHER: -- is my understanding.

THE COURT: So, you know, I -- I'm out of town this week, and so I wanted to make sure I didn't hold up your case, so I'm not as well prepared as normally. But they are pro hacs, I've reviewed them, the Law Clerk's reviewed them, and they're in order. So, they can go

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ahead and be granted today.

And the ones that are on for calendar next week on April 8th, is there going to be an objection to those?

MR. BALKENBUSH: There is not, Your Honor. We would be fine with the Court granting those today as well, to expedite the process.

THE COURT: Good enough. Then I -- let's take the two off calendar for April 8th, and go ahead and submit orders. I do have my laptop with me; I'll sign your orders today.

MS. GALLAGHER: Thank you, Your Honor. --

THE COURT: If you'll submit all of those --

MS. GALLAGHER: -- We will definitely submit it. Yeah.

THE COURT: Good enough.

MS. GALLAGHER: Thank you.

THE COURT: And then, the last thing that I wanted to bring up is that, we've got a number of things coming up on the 8th. If you think you're going to need a special setting, contact my office. I'm traveling this week. Karen Lawrence, the JEA, is actually chosen for jury so she's on jury selection this week. So, let us know Monday if we need to make some adjustments to that calendar, because you're just on a stacked calendar on the 8th.

MS. GALLAGHER: Your Honor, I think I can say from the Plaintiff's perspective, I would request a special setting, just given the amount of information in the -- in the motions that are pending, and would appreciate some extra time if that's available for Your Honor's calendar.

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THE COURT: And Mr. Balkenbush, I'll ask you to get together with your team and Ms. Gallagher and call the office on Monday, because Karen's still on jury duty. And I was hoping for later, but go a little early tomorrow. So --

MS. GALLAGHER: We will do so Monday.

THE COURT: -- let us know Monday, and we'll do our best to accommodate a time that's most reasonable for everyone.

MS. GALLAGHER: Appreciate that, Your Honor. Thank you.

THE COURT: It looks -- it looks as though I already have special settings next Wednesday and Thursday. But, you know, that Tuesday and Friday would still be available if that works for you guys.

MS. GALLAGHER: Thank you, we'll discuss with Defendants and then contact chambers on Monday.

THE COURT: All right, everybody. So, for those of you who are joining from out of state, welcome to practice of law in Nevada. And I hope you'll enjoy working on this case. And everybody stay safe, stay healthy, until I see you next week.

MS. GALLAGHER: Thank you so much. Same to you, Your Honor.

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MR. BALKENBUSH: Thank you, Judge.

[Hearing concluded at 11:07 a.m.]

* * * * * * *

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.

Brynn White

Brynn White
Court Recorder/Transcriber

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Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA) LTD., Plaintiff(s), vs. UNITED HEALTHCARE INSURANCE COMPANY, Defendant(s).	CASE NO: A-19-792978-B DEPT. XXVII

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE
FRIDAY, APRIL 9, 2021

RECORDER'S TRANSCRIPT OF PROCEEDINGS
RE: MOTIONS

APPEARANCES (Attorneys appeared via Blue Jeans):

For the Plaintiff(s): PATRICIA K. LUNDVALL, ESQ.
KRISTEN T. GALLAGHER, ESQ.
AMANDA PERACH, ESQ.
RACHEL LeBLANC, ESQ.
JUSTIN FINEBERG, ESQ.

For the Defendant(s): COLBY L. BALKENBUSH, ESQ.
LEE ROBERTS, ESQ.
DIMITRI PORTNOI, ESQ.
PAUL WOOTEN, ESQ.
BRITTANY M. LLEWELLYN, ESQ.

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

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LAS VEGAS, NEVADA, FRIDAY, APRIL 9, 2021

[Proceeding commenced at 1:30 p.m.]

THE COURT: Thank you. Hello, everyone. Let's call the case of Fremont versus United. I'll take appearances from the plaintiffs first.

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

MS. LUNDVALL: Good afternoon, Your Honor. Pat Lundvall with McDonald Carano, here on behalf of the plaintiff Health Care Providers.

Is Ms. Perach with us today?

MS. PERACH: Good afternoon, Your Honor. This -- Your Honor, this is Amanda Perach. I'm on listening mode today, Your Honor.

THE COURT: Thank you. Then was there one more appearance for the plaintiff?

MS. LeBLANC: Yes, Your Honor. This is Rachel LeBlanc, on behalf of Health Care Providers as well.

THE COURT: Any other counsel for --

MR. FINEBERG: Okay. Good afternoon, Your Honor, Justin Fineberg, F-I-N-E-B-E-R-G, also on behalf of the plaintiff --

THE COURT: Thank you.

MR. FINEBERG: -- Health Care Providers. Good afternoon.

THE COURT: Okay. Did that exhaust the plaintiffs'

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counsel?

Then let's -- let's --

MS. GALLAGHER: I believe so, Your Honor.

THE COURT: Thank you. Let's hear from the defendants then.

Mr. Roberts.

MR. ROBERTS: Yes. Good afternoon, Your Honor. Lee Roberts, for the defendants.

MR. BALKENBUSH: And good afternoon, Your Honor. Colby Balkenbush, also for the defendants.

THE COURT: Thank you.

MR. PORTNOI: Your Honor, this is Dimitri Portnoi, for defendants.

THE COURT: Thank you.

MR. WOOTEN: And Your Honor, this is Paul Wooten, for the defendants. Good afternoon, Your Honor.

THE COURT: Thank you.

Is Ms. Llewellyn with us today?

MS. LLEWELLYN: Yes. Good afternoon, Your Honor. I -- I'm just listening in on the hearing today.

THE COURT: Thank you.

Ms. Fedder?

MR. PORTNOI: I don't believe Ms. Fedder will be joining today.

THE COURT: Okay. Any other appearances for the

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defendants? Okay.

MR. PORTNOI: I don't believe so, Your Honor.

THE COURT: And as a matter of disclosure, the Special Master texted me earlier this week. He indicated that he would try to join, although he had a prior commitment this afternoon as a matter of disclosure.

And one other thing I want to address before we get into the motions is does -- there was a motion this morning to associate Siegelaub, a new attorney. The hearing was requested before the 21st. We went ahead and set it for the 21st. But if there's not going to be any objection, I would consider doing it next week or granting it today.

Is it too early for the parties to comment?

MS. LUNDVALL: Mr. Roberts and Mr. Balkenbush, any opposition to Jonathan Siegelaub and his motion that associate that was served earlier this morning?

MR. ROBERTS: Your Honor, we don't have any objection to the motion to associate. I haven't reviewed it yet, but, you know, plaintiffs have been, you know, amenable to our *pro hac* petitions, so we have no objection to grant it today.

THE COURT: Good enough. So the -- that order then can be sent to the TPO. Wait until Monday, so that if Mr. Balkenbush reviews it and sees an issue, he can bring it to our attention.

Okay.

MS. LUNDVALL: Thank you, Your Honor.

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THE COURT: Thank you all.

I'd like to take the Defendant's Motion to Reconsider first.

MR. BALKENBUSH: Thank you, Your Honor. And I'll be arguing that on behalf of the defendants.

First, I just want to say thank you for granting us this hearing. I'm aware that, you know, often with motions to reconsider, they're often either not granted a hearing, just heard on a -- a chambers basis. So thank you for giving us another opportunity to discuss some of the issues that we feel there is with the Court's prior order.

There are two primary reasons we brought this motion. The first is that the cost discovery we sought in particular has emerged as an important piece of information that defendants feel they need to defend the case.

In interviewing potential experts, Your Honor, many of them have repeatedly indicated that a significant input they would like to consider in assessing or determining what is a quote/unquote reasonable rate of reimbursement is the costs the plaintiff providers incurred in providing the emergency services that are at issue. So that's part of the motivation behind this motion.

The motion only takes issue with a discreet aspect of the Court's prior order, barring the discovery of actual cost. This particular motion does not challenge the other aspects of the order, like corporate structure information, information on plaintiffs' relationship with Team Health, or on plaintiffs relationship with the

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facilities, the hospitals where their physicians work. We're only focused on the cost discovery here.

And the second reason we brought this, in addition to the fact that our experts need it, is we felt that whether or not cost discovery is relevant in this matter is a really important issue of law for the Court to give reconsideration to and perhaps consider modifying its prior order.

There was a lot of discovery requests considered in the last motion. And we had some concern that, you know, the cost discovery may have gotten lost in the shuffle, and so we wanted to focus on that here.

And in particular, we wanted to focus on what *Certified Fire*, the Nevada Supreme Court's decision in *Certified Fire*, and what the restatement of restitution says about how you calculate damages when an unjust enrichment claim has been asserted. And here, we really belief that plaintiff's assertion of the unjust enrichment claim has opened the door to this type of cost discovery.

Both sides agree in their briefing papers that *Certified Fire* sets forth the standard for measuring unjust enrichment damages in Nevada. And both sides agree that the restatement third of restitution has been adopted in Nevada and should govern here when determining what the proper measure of damages is when assessing an unjust enrichment claim.

Plaintiffs cite to the restatement of restitution third in pages 8 through 11 in their opposition, so I don't think there's any

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dispute that applies and is essentially law in Nevada. The dispute is over how to interpret it. And so that's what I wanted to primarily focus on here in discussing our request for reconsideration.

In plaintiffs' opposition, they cite to *Certified Fire*, and in particular, they cite to Footnote 3 of that decision. And it's important because Footnote 3 of the decision references market value as a potential measure of damages. But it then goes on to state that Section 49 of the restatement also lists other measures of damages when assessing an unjust enrichment claim. So there's no question that there are other measures of damages that are permitted when assessing an unjust enrichment claim, other than market value.

And if you look at Section 49 of the restatement, which we pretty extensively discussed in our reply, it lists four measures. One, the value of the benefit in advancing the purposes of the defendant; two, the cost to the claimant of conferring the benefit, what we are focused on; three, the market value of the benefit, what plaintiffs are focused on; and then, four, the price the defendant has expressed a willingness to pay if the defendant's assent may be treated as valid on the question of price -- which essentially goes to plaintiff's implied in fact contract type.

And the restatement goes on to state that which of those four measures you use depends on the facts of the case and whether or not the defendant should be viewed as a culpable wrongdoer or as an innocent recipient.

Now, it's clear from plaintiff's complaint that obviously

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they view defendants as wrongdoers. They've asserted a RICO claim.

But defendants obviously dispute that, and there has been no finding to date that United has committed wrongdoing or that it solicited the benefit to the defendant and the plaintiffs conferred on it. And I think that's important because if you look at Section 50 of the restatement, which we cite in our replay, it states that when the recipient of a benefit is sued for unjust enrichment, if the recipient did not solicit the benefit and is not guilty of wrongdoing, then unjust enrichment damages are measured by the measure in Section 49 that -- one of the four measures that yields the least amount of liability.

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Now, here we haven't received the cost discovery that were taken from plaintiffs, but it's certainly our contention that if that cost discovery shows that the costs incurred are lower than all the other measures, including market value, that United is an innocent recipient since it didn't expressly solicit the benefits conferred and that it -- the plaintiffs would only be entitled to recover the costs they incurred in providing the services.

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And so the crux of our motion, I think, Your Honor, is that in our view there has been no factual finding yet that United is a wrongdoer who solicited these medical services from plaintiffs. There's been no finding that United somehow engaged in any conduct that would have caused the plaintiffs to render these services. And in fact, by the allegations of plaintiffs own complaint,

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the allegation is that it was defendant's plan members who went to these hospitals and were treated on an emergency basis, not that defendants expressly solicited these services from plaintiffs.

And so at least at this stage, prior to summary judgment, costs remain a relevant factor in determining the unjust enrichment damages, if any, that plaintiffs are entitled to.

And so we believe because there's been no factual finding of United is a wrongdoer, it was erred by the Court to refuse to allow the actual cost discovery.

And so I think that is the core of our argument.

There's a number of cases that both sides have cited.

Plaintiffs cite to a number of cases, including *Certified Fire* and *Suen*. They discuss market value as being a common measure of unjust enrichment damages. But I think, again, it's important to look at the facts of each case, because in both of those cases, the Court was not dealing with an innocent recipient receiving unsolicited benefits; right?

In *Certified Fire*, it was a contract between a general contractor and a subcontractor, a potential contract to provide a fire sprinkler system. There was no allegation that the benefit had been essentially gratuitously provided without the general contractor soliciting the services. The services had clearly been solicited. And so the Court employed a market value standard, and it wasn't necessary to get into the costs incurred.

And the same in the *Suen* case, Your Honor, where the

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Court -- the Nevada Supreme Court also referenced market value as a measure when determining the reasonable value of the benefit conferred in assessing an unjust enrichment claim. You know, there the dispute was between Las Vegas Sands and a number of individuals who helped it secure procurement permits and permission to operate in Macao, and whether or not those individuals should be entitled to some compensation for the services they provided.

There was no dispute that in that case, the Las Vegas Sands, for example, had, you know, actively engaged in soliciting the services from these individuals. And so it was appropriate to assess the market value of the services and not necessarily look to the four other measures that Section 49 of the restatement sets out as possible measures of unjust enrichment.

And so I think what we would appreciate from -- and I guess we'll hear from plaintiffs here in a minute. I don't think there's been any contention here that United has been adjudicated at this point, as a matter of fact, to not be an innocent recipient or to be a wrongdoer who solicited benefits.

And perhaps the plaintiffs are going to argue that their complaint does allege that. But if all that was needed was a complaint that alleges wrongdoing associated with an unjust enrichment claim, then that would render superfluous, the four -- the other three measures of damages listed in Section 49 of the restatement.

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In that case, as long as you accused another party of being a wrongdoer when you assert an unjust enrichment claim, you would effectively prohibit them from conducting any discovery on the other three measures of damages, other than market value listed in Section 49.

And so we believe it's appropriate for the Court to take a second look at *Certified Fire*, and in particular sections 49 and 50 of the restatement. You know, plaintiffs focus on Restatement Section 51, so they agree that the restatement applies. But what they don't note in their papers, Your Honor, is that Restatement Section 51, by its own terms, specifically only applies to entities that have committed wrongdoing in receiving the benefit conferred.

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And in fact, it states in Comment A of that section restatement that plaintiffs rely on. It says, By contrast a defendant without fault who is unjustly enriched by the misconduct of a third person may be an innocent recipient whose unjust enrichment is measured by the rule of Section 50, rather than the rule of this section.

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And so the issue is that as a matter of fact it has not been determined yet what type of recipient United is. And until that decision is made by Your Honor at the Motion for Summary Judgment stage or by the jury as a matter of fact, it would be inappropriate to preclude actual cost discovery pursuant to the restatement.

In addition, Your Honor, even if this Court does -- setting

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aside my prior argument there -- does decide that market value is the only measure of damages for unjust enrichment claim in Nevada -- which, again, we disagree with -- we believe costs are still a factor that need to be considered as part of determining market value here.

It's clear that we're not dealing with a standard willing buyer/willing seller here, and we can just look at the market price that is paid and accepted by the parties, or by other payers, other providers, to determine an appropriate rate of reimbursement.

By plaintiffs' own allegations in the complaint, they admit that there are laws that require them to treat patients that show up at their facilities, regardless of the patient's ability to pay, regardless of insurance status, and laws that actually prohibit them from requiring a prior authorization from the defendant health plans before treating the patients.

So we're not dealing with a standard willing buyer/willing seller, arm's-length transaction here, like we would be, for example, if we're just looking at a stock market transaction. We're dealing with an inefficient, nonstandard market. And therefore, in our view, it is important to look at other factors in assessing market value, and those factors should include the costs incurred.

And in addition, we believe that there may be other factors impacting the prices that other providers and other payers are willing to pay and accept here. I think those can include the size of other providers, the contracts they may have with other payers -- you know, whether or not a particular provider essentially is the

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one-stop shop, the only -- the only facility in an area to which patients can go.

And so, again, costs are an important factor that we think it is necessary to look at, even if this Court does determine -- which we can tell would be erroneous -- that market value is the only measure of, quote/unquote, reasonable value in assessing an unjust enrichment claim.

So for all those reasons, Your Honor, we would request that you reconsider that narrow portion of your prior ruling, barring our actual cost discovery; that you consider the sections of the restatement we cited; and that plaintiffs have effectively to wanted by citing to repeatedly in their papers. And find that, at least at this stage, until it's been found that United is not a recipient, that we be permitted to conduct some actual cost discovery so that our experts can have, you know, all the inputs they believe they need to come up with a proposed reasonable rate of reimbursement there.

Thank you, Your Honor.

THE COURT: Thank you.

And the opposition, please.

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

So what I take from United's reconsideration motion and its presentation is that it does not disagree that market value is a measure of the value of services.

I think they misstate what your order indicated. I don't

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think Your Honor held that market value is the only measurement available under Nevada law, but it is the appropriate measurement in this case.

So what United seems to argue is that it wants the Court to allow United a chance to define the Health Care Providers measure of damages.

In this case they would like Your Honor to adopt a cost-based model. But this is not how the Health Care Providers have disclosed their measure of damages in their calculation of damages; and this is not how United purportedly determined those reimbursement rates.

United did not answer the Health Care Providers interrogatories about methodology, which are numbers 2 and 3, about their reimbursement rates to indicate that any methodology is cost based. Instead, United indicated that it points to its plan documents.

So then what do we look to next, which is the plan documents. And United's interpretation of what the plan documents mean to them, as it relates to payment of out-of-network providers.

And I would refer Your Honor to Defendants' 98419, which is quoted as -- in quotes, paid at plan benefit, also known as billed charges. So in other words, United itself interprets its own plan documents, which it points to in terms of methodology, as paying billed charges.

And that is until Your Honor, United implemented what

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