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

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CERTIFICATE OF SERVICE

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

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has been referred to as its Outlier Cost Management program, that manipulated reimbursement rates to a lower threshold in order to boost their revenue under a shared savings program.

Some of this material we'll discuss in the motion for order to show cause, so I'm going to make reference to the reply brief in respect to the motion order to show cause at Exhibit 9 in support of some of these arguments.

But the payment of billed charges that United itself points to in its interrogatory responses is consistent with what the restatement just said. It's consistent with *Certified Fire*. It's also consistent with the other cases that we pointed to in our opposition, the *NorthBay Healthcare Group* case, the *Regents* case, and the *Children's Hospital* case. All of those contemplate that market value, billed charges, and not costs, are indicative of this type of industry. *NorthBay, Regents*, and *Children's Hospital* are instructive because they all deal with the provision of medical services, unlike *Certified Fire*, which has a little bit different construct in the sense that it's within the construction industry.

But *NorthBay, Regents,* and *Children's Hospital*, they all acknowledge that costs are not relevant to a determination of value.

We also cited to *Massachusetts Eye and Ear*, which is another medical-based case. That too held that fair market value is a well-accepted measure of unjust enrichment in this particular industry.

I think it's important to also note *Children's Hospital* had a

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really good analogy that I think is appropriate here, and it analogized provider fees to a determination of reasonable attorney's fees -- something that we're all very familiar with. When we go into court and we have to, you know, pursue attorney's fees, we seek our market value, stating that courts have rejected a cost-plus approach, finding that basing the CM cost is neither appropriate nor practical is how *Children's Hospital* came out on that issue.

So when I read United's reply, an assertion that it, United, was an innocent recipient of the emergency services and care received by its members, I was honestly a little bit in disbelief -- given the characterization and given the statutory obligations that the Health Care Providers are required to provide emergency care both under EMTALA and under Nevada's counterpart statute 439B.410.

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So what United is doing is it's essentially conceding. It is using this framework as a way to pay less than the reasonable value of the services that are provided -- here, the market rate. And in turn, United is obligated to pay for those services by virtue of having to provide emergency services under its plan benefits.

So this led me to take a closer look at the framework under the restatement third, because United's attempt to cast itself as this innocent recipient is one that requires the Court look at the unrequested benefits piece of it where services were conferred by mistake, under Section 50C.

So that doesn't bear out here because we're not dealing

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with a situation that might -- that some of the examples and the restatements offer, such as, you know, somebody made a repair that nobody asked for, but happened to be there. This is not the framework that an innocent recipient would ever imagine United to fall within.

So the threshold inquiry under that particular restatement requires United to have committed no misconduct in the transaction, and it also requires that it bear no responsibility for the unjust enrichment in question.

So in other words, the restatement requires United to -- to be -- what's considered to be, quote, legally blameless. These arguments certainly don't depict this particular circumstances that exist here, Your Honor. We're dealing with a different type of structure.

So instead, Section 49 of the restatement provides a list of the potential -- potential measurements. And that's important, because it makes clear that not all of the different measurements are available in all cases. And basically what it says is that the case itself is driving what is the measurement.

So if you look further to Section 49, comment A, it talks about the present section does identify six potentially different standards of measurement. But then it goes on to say because, quote, the circumstances of a given transaction will usually eliminate most choices, leaving only one or two means by which enrichment might be plausibly measured.

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So while cost-based restitution may exist in some context, like a construction situation, that framework here does not have applications in the case. United has not once stated that its reimbursement methodology is cost based. So it now cannot try to transform the Health Care Providers' claims of reasonable value or unusual customary rate into something different than the market rate.

Respectfully, the Court can use *NorthBay* as a guide. There the plaintiffs did not seek damages on a cost-based model, like the Health Care Providers here. And the Court indicated because of that, cost-based discovery was irrelevant. Based on that, the Court -- we request that the Court deny the motion for reconsideration.

We also want to point out that this discussion about an expert saying that cost-based materials are relevant -- if I overlooked it, my apologies that I did not see that in any of the briefing on this particular point.

And so when United brought this motion, it had nothing new, Your Honor, with respect to the Court's evaluation of the restatements and its applicability in this particular case.

I don't believe that the order indicated that market value is the only measure of damages in any case in Nevada. I think Your Honor was thoughtful and considerate in terms of what the Health Care Providers have -- have set forth in their calculation of damages, how they have specifically structured this case, United has -- has not come to the Court and said, we pay on a cost-based

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structure, and out-of-network benefits. And in fact, they're own document disclosures suggest quite the opposite, that they do indeed pay billed charges.

And so for those reasons, we think that Your Honor got it right the first time. And we would respectfully request that Your Honor deny any cost-based discovery in this case.

Thank you.

THE COURT: Thank you.

And the reply, please.

MR. BALKENBUSH: Thank you, Your Honor.

So let me just start with the argument that I think Ms. Gallagher started with, which is that, you know, United has contend -- sorry -- United has contended that it pays out out-of-network emergency services based on the amount set forth in its plan documents. And you know, therefore, it's somehow, you know, disingenuous for United to now argue that -- it should be at least entitled to argue that, you know, the value of these services is more accurately measured by the costs incurred by the plaintiff providers.

So Ms. Gallagher is correct. We have contended all along -- we continue to contend that the only relevant document in this case should be the plan documents and what they state the defendants stated they would pay for out-of-network emergency services.

And that argument was set forth in our motion to dismiss,

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which this Court denied, and is set forth again also in the writ petition that is still pending with the Nevada Supreme Court. So that's correct. We still do contend that.

But clearly, this Court has rejected that argument. And we are now in a different universe where the state law claims that plaintiffs have asserted this Court has found that they are not preempted by ERISA. And we have to assess what measures of damages those state law claims indicate are appropriate.

And it's undisputed that you -- you heard Ms. Gallagher state a minute ago that there are multiple measures of damages under section 49 of the restatement, when an unjust enrichment claim has been asserted. And which measure of damages is appropriate varies from case the case.

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And you know, Ms. Gallagher cited to some comments from Section 49 of the restatement. I think it's important to look at the -- the end -- the very last paragraph of section A, as comment A. There was a section above that, which Ms. Gallagher quoted, which states that oftentimes it's not necessary to look to multiple measures of damages for an unjust enrichment claim because they may yield the same result. But the comment also states that when the measures do yield different results -- quote, when they do, the choice between them is dictated by general principles of unjust enrichment, turning chiefly on the innocence or blameworthiness of the defendant, end quote.

And so the issue here is we can't even determine -- that

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the Court's order prohibiting the cost discovery prohibits the defendants from even being able to determine whether or not the four separate measures of damages set out in Section 49, would yield different results or not. The first step is we need to know if they would yield different results, and then at some point, either this court in a motion for summary judgment or the jury will determine the blameworthiness of the defendants, that is whether they are innocent recipients or not.

Now, you heard quite a bit of argument from Ms. Gallagher kind of expressing disbelief that the defendants could be contending that they're innocent, that it's essentially undisputed that, you know, United has engaged in some kind of misconduct here.

But those are all arguments, Your Honor, that are more appropriate in a trial setting or in a Motion for Summary Judgment. There's been no partial Motion for Summary Judgment or Motion for Summary Judgment filed here or adjudicated by the Court. So as it stands, United has not been adjudicated to be either an innocent recipient or a wrongdoer. And therefore, it's our belief, Your Honor, that we should be entitled to conduct discovery into all four measures of damages set out in the restatement.

Ms. Gallagher also cited to a number of cases that plaintiffs contend support their decision. And in particular, focused on Children's Hospital and some statements in there, indicating that costs are not relevant to determining the reasonable value of

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medical services.

But again, just like with the *Certified Fire* case and the *Suen* case, Your Honor, it's important to look at the facts of the case, because the facts of that case clearly indicate that the insurer there, the health plan, preauthorized the services that the providers provided. There was a phone call or communication, and the services were authorized.

So the Court there wasn't dealing with an innocent recipient that received services without any action by itself.

And that is the case here. So it makes sense that in some of these cases, like Children's Hospital, the Courts do refer to market value, because clearly, yes, if the services were solicited and the recipient is guilty of wrongdoing, then their statement is fairly clear that market value is the preferred measure of damages. But that has not been determined here as a matter of fact.

A number of the other cases that plaintiffs rely on, they're also distinguishable, Your Honor, because they rely on statutes where states other than Nevada have actually enacted a scheme that states you only -- it effectively states in certain circumstances, you only measure the value of medical services by market value.

And so what the Court said there is, look, the statute says I have to look to market value. I don't get to look to other measures of value. The legislature has made the decision that market value is what governs, and, therefore, you are not entitled to cost discovery.

But both parties agree, Your Honor, that Nevada does not

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have a rate of reimbursement statute dictating what measure of damages should apply when an out-of-network provider contends that a health plan has paid an unreasonably low rate.

So again, for that reason, Your Honor, because there has not been an adjudication as a matter of fact that United is a wrongdoer or an innocent recipient either, there's been no adjudication, in fact, whatsoever in this case.

We do request, respectfully, that you reconsider the prior order and consider permitting some actual cost discovery to go forward here.

Thank you, Your Honor.

THE COURT: Thank you.

This is the defendant's motion for reconsideration. It's now under submission.

I'm going to deny the motion to reconsider for the simple reason that there were no new arguments presented. The argument with regard to the defendant wanting to look at other ways to determine what the reasonable value is, just -- it just isn't appropriate here.

The plaintiff doesn't have a cost-based structure for its rate setting. If it did, the -- the response would be different. But you can't look at their profitability. It's unrelated to the reimbursement rates.

You can't say you don't owe them any money due to their profitability or lack of profitability. It just isn't relevant in this case.

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So the cost of providing services simply is not relevant based upon the damages and the way they have been presented by the plaintiff. There's -- I considered all of these arguments in the first motion. And I wanted to give you a chance to argue in case I missed something. But it -- nothing I heard today causes me to reconsider, so the motion will be denied.

Ms. Gallagher to prepare the order. Mr. Balkenbush to review and approve the form of that.

Any questions?

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

THE COURT: All right.

So let's now take the plaintiff's motion for order to show cause.

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

So our litigation system in the United States is premised on the adversarial presentation of contracting evidence and cross-examination in order to allow a trier of fact to discern the truth.

To drive that search for the truth in Nevada, following the federal system adopted broad discovery disclosure obligations designed to require parties to put their cards on the table face up, and to allow adversaries a robust opportunity to determine if some of their cards were being withheld. Why? Because when a party does not properly participate in the discovery and disclosure process, then the search for the truth is denied.

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When Bill Young in the Johnny Ribeiro case took a pen to his business diary, he fabricated evidence. The determination that that conduct amounted to a fabrication was easy.

In this case, we are also dealing with a fabrication of evidence -- a very sophisticated form of fabrication of evidence that requires a detailed presentation to appreciate that fabrication. But rest -- but rest assured, it is a fabrication and has been since the beginning of the case.

We plan to highlight the details found in our briefs which will allow the Court to understand that United is attempting to present a half truth in this case. And we know that a half truth is the same thing as an intentional misrepresentation, the same thing as a fabrication.

Now, does United have a motive the fabricate? Absolutely, Your Honor. What we have learned with the bits of information produced and the testimony so far is that as part of its administrative services only business for self-insured employers, United charges fees for their services, including, quote, a variety of fees associated with the administration of programs, we package those programs together, and there is a fee associated with that, end quote, per Mr. Rosenthal at his deposition.

Part of the offered programming is a shared savings program for out-of-network providers, like the Health Care Providers, which is calculated as the difference between the billed charge on the top end and the amount that a provider will receive as payment

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on the bottom.

United implemented its cost -- Outlier Cost Management program, known as its OCM program, with the help of MultiPlans, in order to lower that bottom threshold even further. So United as a self-insured employer share in those savings, with United generating internal operating income that averages about 33 percent of the savings that it generates. And this is no small amount of revenue, Your Honor. As much as $1.3 billion in ASO fee revenue was generated in 2018 alone. That program was principally directed to emergency room providers who are backed by financial investment firms of which nationally there are two, Team Health and Envision. We believe that program, when examined in the full light of day, amounts to the tort violations the Health Care Providers asserted in the first amended complaint, including the RICO violations that have been alleged.

So does United have incentive for that program not being examined in full? The answer is yes.

So let me present the details specific to this renewed motion, Your Honor.

Today's hearing is the culmination of more than a year of the Health Care Providers' efforts to obtain United's discovery participation, its responses to written discovery, in furtherance of those allegations that have been pled in the first amended complaint.

Your Honor, United's fabrication is not found on one or

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two small failings in this case, but is a full-scaled disregard of multiple orders of this court. United cannot adequately explain their decision to disobey the Court with excuses offered in opposition.

They suggest now it's too hard or its production is merely delayed, and it now characterizes that they are doing the best they can. But this is a ruse and a deflection from what has happened.

Because this is a motion for sanctions and not a motion to compel, the Court need look no further than United's admissions in its opposition to confirm that it has not complied with the orders of this Court that required compliance in October of 2020.

Unfortunately, United has not been guided by its discovery obligations or the tools available within the discovery, like meet and confer efforts, or even by the Court's multiple orders that have compelled it to fully and completely respond to the discovery at issue.

The Court's orders and the discovery requests themselves were focused on the allegations in the first amended complaint. They stem from United's manipulation of reimbursement rates, it's failure to allow for reimbursement at market rates, and related to United's alleged deceptive trade practices and civil racketeering, with help from MultiPlans.

We're here today because the most -- the Court's most recent admonition and directives in considering the motion for order to show cause, which was three months ago at the December 23rd hearing, did not move United off of its continuing failure to abide by

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the Court's September 28th, the November 9th, or the January 20th orders. The effect of United's disregard of the orders for this period of time cannot be denied and is recognized to be presumptively prejudicial under *Foster versus Dingwall*.

United does not, because it can't, dispute that it has not complied with the Court's compulsion orders. Instead, the response strategy is to rewrite history, reinterpret the orders as mere guidance, and characterizing its failures now as mere delays.

But what can be discerned from United's submission of new declarations about the undue burden of producing administrative records is just this, the delay. But the Court has already overruled United's objections in this regard long ago and ordered documents outside of the administrative record produced on the schedule set forth in the -- in the November 9th order.

If United now claims is that all outstanding documents are contained in the administrative record, well that would be a representation that I would imagine United may be prepared to make to the Court today.

But what the Health Care Providers understand from discussions and from the subset of documents selected for production so far, this is definitely not the case. United's attempt to recast its compliance as merely delayed, however, is the consistent with the two-pronged discovery strategy approach we've seen throughout, which is delay and obstruction.

The Court has already had occasion to consider these

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issues and rule on both prongs of United's effort.

First, the delay. This prong started when United removed, forwarding a meritorious position that discovery must proceed while the federal district court considered a motion to remand. Prior to remand, seeking more time to respond to discovery, and then lodging objections based on an undue burden declaration that the administrative record cannot be produced in less than a three-year timeframe.

Importantly, United then objected with near uniformity that the administrative record housed every document that would be relevant to this dispute. We have since learned otherwise.

Prior to remand, United promised production of agreements between United and MultiPlans, and acknowledged the multifaceted nature of the relationship. After remand, United bore the position that all proceedings before the federal district court should be wiped clean, and that they should start anew, including its attempt to recognize the initial complaint as the operative scheme and disregard the first amended complaint.

After remand, United also adopted a contrary position that discovery should be stayed this time, until the Court adjudicated its Motion to Dismiss.

And then later when it filed a writ possession in connection with the Court's order denying the Motion to Dismiss.

These early efforts, coupled with the initial delay resulting from removal has resulted in cumulative delays.

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After then, this slow march over discovery-related meet and confer efforts began. Starting in May, continuing on in June, on the 9th, the 15th, and the 23rd; July 20th, the 21st, and August 3rd. All of these meet and confers resulted in little to no movement in terms of any United document production.

The Health Care Providers have also combatted United's e-mail protocol, which would have resulted in more delay if implemented, and defended against United's attempt to expand the scope of the case to a right-to-payment case.

The Health Care Providers have described additional delays in its renewed motion and supporting reply, including United's recent attempt to obtain a four-month extension of all deadlines in trial, first by trying to leverage the Health Care Providers agreement, and then while blocking depositions, and then moving to implement its plan through motion practice that the Health Care Providers had to respond to.

In connection with these delay efforts, the Court has already made the following findings: 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.

That's contained in the Court's September 28th order.

The Court has also found United has not participated in discovery with sufficient effort and has not taken a rational approach to its discovery obligations. In the event United does not meet the

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deadlines of the Court, the Court will have no choice but to make negative inferences. That's in connection with the Court's October 27th order.

The Court also found that United's discovery conduct in this action is unacceptable to the Court, that in a September 28th order.

And recently the Court has found it inappropriate for United to state that it would not voluntarily produce witnesses and considered it to be a demonstration of an unwillingness to move the case forward. And that was during a February 25th hearing.

The other prong of United's efforts in discovery have been obstructionist. The meet and confer efforts would often result in circular discussions. For example, what is United's definition of the administrative record, we would ask. It would include everything -- all e-mails, as explained by United in one call. In the next, United would indicate that e-mails might be in Outlook as well. And then in the next call, we would learn that no one looked to know one way or the other, because United was resting on the undue burden declaration that the Court would later overrule.

But the next example I'm going to discuss provides the typical example of the discovery abuses that the Health Care Providers have endured, and its diversion, or worse, concealment is a discussion that lasted months regarding United's MultiPlans and Data iSights documents. Given the nature of the relationship, and the production of the network access agreement, the Health Care

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Providers sought all documents relating to the relationship and Data iSights involvement.

United would ask what the Health Care Providers thought might exist, and then would limit any discussion to the example provided. For example, closure reports or performance reports. In early discussions, United took the position that it would have to look for the reports.

Then United acknowledged the existence of a closure report or a performance report, but did not know whether there were any other documents, quote, pertaining to United's relationship with Data iSight that are potentially relevant, other than performance reports and contracts. And that can be found at the Renewed Motion Appendix Exhibit 5, 095.

When asked directly, United could not explain how the reports were delivered from MultiPlans to United. Not until January 15th, 2021, when United filed -- served a supplement did United produce a document that revealed reporting was done to a dedicated e-mail, UHCClosureReports@UHC.com, which was then being moved to an FTP process.

Even more incredible, United has only produced what appear to be rolling quarterly reports, yet the reporting between these companies was so important, so voluminous, apparently, that it required daily reporting of United's fully insured and administrative services only business.

This can be found at defendant's 091151, Your Honor.

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The weekly reporting, with respect to United's shared savings contract and fee negotiations programs were also being done of which has not been produced in this case.

United has not produced the daily reporting either. We have not seen specific reports to the eight Health Care Providers, which can certainly be done by pin or entity name.

With respect to United's attempt to obstruct the discovery process, the Court has made these findings: United shall not impose a geographic limitation in connection with Data iSights related questions; the Court has also found 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.

The Court has also had occasion to find United's proposal to employ statistical sampling require the parties to employ experts to attempt to match the party's claims data, and/or require the parties to produce documents relating to a smaller set of the at-issue claims does not sufficiently address discovery needed for the Health Care Providers to prosecute this case.

Yet, none of these comments or orders have moved United off of its two pronged approach, Your Honor. United has used every discovery to case and tactic to delay and obstruct from learning about what we alleged to be deceptive and coercive conduct, that is bringing in billions of dollars of revenue in the process.

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While United will undoubtedly point to the number of pages, that does not tell the story of the untold documents that have not yet seen the light of day.

So what tools does the Court have left? The Court has warned United already. The Court cannot measure United's assertions it's doing its best. The Court can only measure the current circumstances which are black and white. United is not compliant.

The Health Care Providers have been prejudiced by this noncompliance. And with document discovery closing next week, United's concessions of noncompliance lead to only one remedy, and that remedy should be for the abusive and unreasonable discovery conduct, striking United's answer and affirmative defenses, because that sanction is available given the seriousness and repeated disregard for this Court's orders.

Anything short of this sanction would acknowledge and authorize United's attempts to take control away from this Court. As set forth in the renewed motions and reply, the Health Care Providers have established that the document United -- the document production United has made is incomplete and prejudicially so.

We have set forth in full the noncompliance in our moving papers and reply, but perhaps a summary of these categories is best served briefly.

United has not produced anything with respect to its

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shared savings program and related financial document -- a sum total of zero. It didn't even address or deny this fact in the opposition. The information was required to be produced by October 22nd. It's important to the Health Care Providers' claims, because United earns higher fees, the lower its reimbursement rate because of the shared savings program. It's relevant to our deceptive and coercive trade practices and racketeering allegations. And we don't have that was.

United's document production related to United's relationship with Data iSight and other third parties also remains incomplete. This is the category that I started out with the example of efforts to conceal reporting. So United hasn't completed its production given the small amount of information that it has chosen to produce. The relationship is extensive. It's built on proposals, analyses, strategy, and that has not fully been produced as United acknowledges.

Despite an October 26 deadline, United waited to produce a spreadsheet containing aggregated national market data on March 22, 2021, the day it filed an opposition to this renewed motion.

Documents relating to United's decision making and strategy in connection with its out-of-network reimbursement rates and its implementation of that strategy, United points to some spreadsheets, however, it's redacted a lot of information. Health Care Providers don't know whether it's commercial or

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noncommercial or government data -- again, not providing information with the cards face up.

Given the Court's prior order, United looked to admit such information in response to the request for production. And this inclusion appears to be directly defiant to that Court's direction.

Critically, these spreadsheets also do not satisfy United's obligations. The Health Care Providers' claims include strategy and decision making, surrounding the implementation of this program to reduce reimbursement rates. It is simply not conceivable at this -- that this program does not have more -- beginning with idea formation, planning, development, changes. And plan documents, as United contends, do not provide information about their reimbursement strategy.

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Documents relating to United's decision making about in-network reimbursement falls under the same incompleteness, Your Honor.

In opposition, United points to market data and contracts. That does not satisfy the Court-ordered productions. United has produced some documents that recent productions after the filing of the renewed motion were made -- they don't capture the same proposal, consideration, and valuation of the various programs that comprise what United calls its playbook and its multiyear strategy to reduce reimbursement rates.

The Health Care Providers are not obligated to identify the name of meetings, the name of projects, or other internal shorthand

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or descriptions in order to trigger United's compliance. But this is the theme that started back in June 2020, with Data iSight performance reports.

The plan documents also do not house the methodology and sources of information used to determine how much United will allow for emergency services and care. United points to MultiPlans white papers at Defendant's 080053; however, the state of those documents suggest there's more information. They expressly allow United to provide client-elected overrides to the methodology that may be applied.

There are also some e-mails, but not a robust production that indicate there -- there is significant e-mail traffic between these entities discussing methodology considerations and programming.

With respect to United's document production concerning negotiations between United and the Health Care Providers representatives, this noncompliance is undeniable. This is the set of documents that since June 2020 United has stated through its counsel it had provided 100,000 e-mails to review. Included in these requests are documents specification to Mr. Rosenthal. United refused to produce any Rosenthal custodial documents until just in advance of its March 23rd deposition, even though they were required to do so by October 26, 2020.

Given United's sophistication, these circumstances are not by chance, and they are not isolated, but they are merely part of this two-pronged discovery strategy. And United's recently filed motion

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to compel that Judge Wall will hear on Tuesday, United continues to posture for extension of the discovery deadlines and has already forecasted its belief that the October firm trial setting is in jeopardy.

United concedes that there are unproduced documents relating to certain communications with emergency medicine provider groups, but its objections and reasons for not producing them so far are simply not valid. United blames confidentiality issues with other providers. Not only does the protective order address this, but the existence of the court order compelling production addresses that issue, and the Court actually already overruled United's contention that the contracts were trade secret. This is yet one more example of the blatant disregard for this Court's orders.

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And finally, concerning is United has not produced a privilege log. It has indicated it has withheld or redacted 500 documents. Earlier in this litigation, we know that United proposed a 90-day delay to produce a privilege log. The Health Care Providers objected. The Court did not adopt United's proposal. Nevertheless, we are here without a privilege log. The withholding or redactions of 500 documents in this amount of time after production is not supported and the Health Care Providers belief constitutes a waiver of that privilege.

This failure to provide a privilege log is an unmistakable tactical decision. It's designed to place disputed issues after the close of discovery, while United continues to withhold documents

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while depositions proceed, and knowing that the process will take time. This is yet another example of this two-pronged discovery strategy -- another example denying the Health Care Providers access to the truth, and leaving the cards face down.

Your Honor, based on the foregoing and the record in this case, there is more than sufficient foundation for sanctions under Rule 37. The Health Care Providers request that you strike United's answer and its affirmative defenses.

Thank you.

THE COURT: Thank you.

And the opposition, please.

MR. PORTNOI: Yes, Your Honor. I'll be speaking to this issue.

Your -- you heard at the beginning a promise that the plaintiffs would lay out wrongdoing akin to fabrication, which is an extreme accusation, not only going to the honesty of our complaint, but going to the honesty and integrity of every single lawyer that is currently on this call and that has represented United in this case. Fabrication is internal lying, which is what has been -- what accusation has been put against us.

And then at the end, no actual fabrication was alleged. No actual -- what we heard was things have been delayed; things have taken too much time. And most importantly, that what plaintiffs need to succeed in this case are documents amounting to a smoking gun, amounting to some document that showed -- that -- wherein

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United admits wrongdoing, and that we haven't produced that yet.

What this is showing is that with fulsome discovery that has been provided, that is still being provided, with depositions already started and upcoming, plaintiffs' strategy in this case is to realize that no matter how many documents United is going to provide to them, they don't have a winning case. So the only way that they can win this case is by making it about discovery and making it about -- about United's discovery behavior in this case, as opposed to anything that represent relates to actual -- the actual merits of any claim that they currently have.

And the discussion of United having moving targets. There have been moving targets throughout this as well from plaintiff. Indeed, if one were to note -- if one to take a look at plaintiff's motion for sanctions here, and then take a look at plaintiff's reply. You would see that the reply seeks sanctions on issues totally not referenced in the motion. In fact, almost the entire reply is based on conduct that is not discussed in the motion. And much of what has been argued for today at oral argument is not discussed in the motion or the reply.

There's a focus today on daily Data iSight reports, something that we're not aware of. I would ask Your Honor to simply open -- open the motion, open the opposition, open the reply. Search for daily Data iSight reports. It's not there. It does not -- these -- these are not things that have previously been raised.

Sorry, just one moment, Your Honor.

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Ultimately, there's no basis in Nevada law to impose the extreme terminating sanctions that plaintiffs now seek, in light of what is substantial compliance. United at no time admits noncompliance; United at no time admits discovery misconduct -- no matter how many times that is repeated by my colleagues on the other side. There has been a voluminous production of responsive documents in this case.

The numbers -- numbers are not the only issue. Ms. Gallagher is absolutely correct. Though it is the case that at the end of this -- at the end of discovery, there -- discovery is not going to be measured in thousands of pages of documents; it's not going to be measured in tens of thousands of documents; it's going to be measured in hundreds of thousands of pages of documents. That necessarily has incurred some delays. It has incurred delays because of the many different issues in discovery and because of the priorities that have been placed on by plaintiffs, for instance, the priorities that it was necessary to provide the administrative records, even though as we indicated the administrative records were -- would take time.

And this -- and at the same time, we continued to make further productions, and the discovery period is not over. And the discovery period will end next week, and by that time, there will be further substantial productions.

Your Honor should deny the plaintiff's motion in its entirety for what it is -- a frivolous attempt to evade a decision on the

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merits and distract the Court from plaintiff's own woefully deficient productions.

You know, there's no evidence of witness concealment. Plaintiffs have been asking for depositions of witnesses. We've been moving forward, cooperatively, in our meet and confers to schedule those witness depositions.

No evidence of evidence destruction. There's evidence that there -- there's simply the fact that plaintiffs wish that there are documents demonstrated wrongdoing right on their face. There's no evidence of severe misconduct that Nevada courts have previously found would justify sanctions.

Let's think about what we haven't heard from plaintiffs. We haven't heard that -- that, in any sense, today that the Young factors have been met. And yet what we do know is that what the Nevada Supreme Court sources said in McDonald. There it said, The district court abuses its discretion in striking an answer without holding an evidentiary hearing to consider the pertinent Young factors. We had neither an evidentiary hearing, nor a statement from Ms. Gallagher today regarding even one of the Young factors, much less all of them. And simply put, that's because plaintiffs meet none of the Nevada Supreme Court's Young factors to allow sanctions here.

Recognizing that, plaintiffs retreat from Young. They choose to take binding Nevada Supreme Court authority and silence it today in this court and admit that no evidence has been irreparably

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lost and that no evidence has been destroyed.

Nevada courts favor adjudication on the merits. And no allegations of attorney misconduct have ever been present until attorneys were accused of fabrication of evidence today.

Plaintiffs point to no case permitting sanctions on the mere accusation made today and representations made in attorney argument about what may have happened in meet and confers. Plaintiffs claim that United's honest representation that it substantially complied with the Court's discovery or is a concession that United has not complied at all. It's a gross mischaracterization. We all know what substantial compliance is. And we know that it is a term of art demonstrating near total compliance and that compliance -- and that in this case it demonstrates that compliance will be done before the discovery period has been completed.

There is no dispute that United has been diligently and consistently making productions consisting of hundreds of thousands of documents. Plaintiffs asked for those and that takes attorney time. It takes time to redact patient health information. It takes time to redact third-party information. This all takes time. And as a result, unfortunately, yes, there have been delays. But delays -- but delays are not fabrication, no matter how we equate those issues.

Plaintiffs accusation of willful noncompliance is totally unfounded and has no evidentiary basis, much less as is supported by an evidentiary hearing, and nor could it be supported by an

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evidentiary hearing when you consider the tremendous meaningful document productions.

United has gone to extraordinary lengths to comply and respond to the wide-ranging and ever-evolving discovery demands.

Much of what has been discussed today, for instance, are things that plaintiffs have not met and conferred regarding. They are issues that plaintiffs have not moved to compel on. There's a discussion of ASO agreements today. They say that this might be responsive to RFPs 9, 16, and 34, but none of these RFPs mention ASO agreements. And plaintiffs have never, until their reply brief, suggested that ASO agreements were considered responsive.

We know that plaintiffs did not believe that they -- believed so, because just this week, plaintiffs served untimely deposition -- document subpoenas, which necessarily can only be answered after the document discovery period has ended, requesting ASO agreements.

We are not the ones. Defendants are not the ones suggesting and demanding document discovery occur after April 15th. It is plaintiffs who are now serving document subpoenas that cannot possibly be answered before the period is over.

Also irrelevant, those ASO motions [indiscernible] no appear -- ASO agreements, not only did they not appear in the meet and confer, not -- not only did they not appear in a motion to compel, they did not even appear in the motion for sanctions that we are hearing today. They are appearing solely in the reply, so that

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plaintiffs have an ability to sandbag and to ambush plaintiff -- defendants, knowing that we are not entitled to a surreply.

Despite plaintiff's vague assertion to the contrary, those agreements, by the way, would not be relevant. We have not had the opportunity to explain this, but as -- what plaintiffs suggest those would show is how United splits certain profits with its ASO clients.

But as plaintiffs repeat often, this is a rate of payment case. Plaintiffs are arguing that this may show how profitable the program is. Well, this Court just said, at the urging of Ms. Gallagher, profitability is not relevant. This is a rate of payment case.

And yet what they want to seek discovery on is profitability and how profits are allocated while not answering any discovery about the profitability of their organization or the costs of their organization, which is necessarily part of profit, or how they share profitability with other organizations or other entities.

If this is a rate of payment case, why are -- why is profitability the focus of plaintiffs discovery attempts?

Plaintiffs further misconstrue the impact of the shared savings program, and they also misconstrue the shared savings program. They point to a $1.3 billion payment amount, which they say is the figure that is at issue in this case. You go to the deposition where they actually mention that, that's not what -- what anyone said and not what the document says.

What was said is that $1.3 billion is the revenue -- not the profit -- the revenue for United's entire ASO program, not the shared

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savings program, in the United States -- not the profits of this program, based on the shared savings program in Nevada. They focus on this because they want this case to not be a rate of payment case. They want it to be a rate of payment case, when they're answering discovery. They want it to be a profitability case when they're propounding discovery.

In addition, we've heard now in oral argument again that what they want is communications can Data iSight. And we have explained in meet and confer after meet and confer, Data iSight is not an entity. We have produced documents that demonstrate our communications with MultiPlans.

As an analogy, Microsoft is a company that makes Windows. What they're suggesting is it's inconceivable that we -- since we use Windows -- since United uses Windows in the office, that we're not e-mailing windows every day. But it's simply not the case that we would -- that -- that you e-mail tools, that you e-mail entities that do not exist.

If United is convinced that Data iSight is a company, it can subpoena that company. It can -- it can seek to depose a corporate representative from that company. It can provide us any evidence -- any evidence, Your Honor, that Data iSight is a company -- is an entity to which -- with which we would communicate.

They also make a point of -- in their motion -- but then perhaps abandon it, not clear -- that we haven't produced communications with NCN. NCN is a company that was acquired by

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MultiPlans in 2011, long before any of the at-issue claims in this case occurred. Plaintiffs -- plaintiffs say we should have been communicating with NCN even though it was a defunct corporation.

Plaintiffs, in addition, have thought that, well, perhaps what we'll do is we'll go around and we'll get the -- and AO -- we'll go ahead and get the -- we'll go to NCN itself. So they subpoenaed NCN. And then they had their case for a subpoena dismissed for a wont of prosecution. Why? I don't know. And maybe they'll -- they maybe they will let you know. But obviously it was not a high priority to be subpoenaing a defunct corporation in another state with which we have never had communications.

Ultimately, MultiPlans is a third-party vender. MultiPlans, for instance, there's so much about how we have not produced documents related to United's shared savings program.

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United does not have a shared savings program. MultiPlans has a shared savings program. MultiPlans has a shared savings program, and it has a platform that it offers not just to United, but to many other insurers. What they are asking for is akin to asking for us to provide the software code for Microsoft Windows when we are not Microsoft. The fact is it is a tool that we -- it is a tool that we -- that we -- that MultiPlans uses and MultiPlans alone.

As a result the shared savings program and Data iSight are not something that the -- that United -- and we've made this point from the beginning, Your Honor, from the beginning of meet and confers. This is not something that we chose to wait on and

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sandbag at the last minute. We've repeatedly made the point that MultiPlans is a third-party entity. And further -- and -- and as a result, certainly, we've produced thousands of pages of documents that reflect our communications with MultiPlans.

We've provided -- we've provided documents that reflect our instructions for implementation for our out-of-network programs. There's no dispute about that. We talked about that in our opposition. It's not disputed.

We've also provided descriptions of back-end services that MultiPlans provides through Data iSight to support United's OCM program. There's no dispute about that. Nor there -- is there any dispute that any of that is fabricated.

We've provided evidence regarding the negotiations that may take place in the event a provider disputes the reimbursement rate. That also is MultiPlans documents that were in our possession so we produced them. United has produced documents pertaining to United's directives to MultiPlans regarding negotiation ceilings in this program. We've produced them. We pointed that out in -- in our opposition brief. There's nothing until the reply that says that something -- that those were not sufficient.

There was discussions about redactions that maybe mean that they're not readable. They can meet and confer on that. They -- nobody here has been shy to file motions about redactions.

But instead of meeting and conferring on these issues and then filing a motion related to these issues, they're skipping all the

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way to the end and not -- and raising issues not even in a motion for sanctions -- in a -- for the first time in a reply brief on a motion for sanctions, and in some cases in the first time in oral argument on a motion to -- motion for sanctions, on a motion that the Nevada Supreme Court says cannot be granted on motions alone. It requires an evidentiary hearing. And all we are instead getting are arguments at oral argument for the first time.

Plaintiffs, as I've said, want a smoking gun to prove a grand conspiracy. And they won't be satisfied until they find one, even if it doesn't exist.

They're looking for a -- you know, they are -- they are looking for a needle in a haystack. And there's no needle, but we keep giving them it will haystack. And they keep demanding that there be some kind of -- that there be some kind of smoking gun that we have to have.

But it may just be, Your Honor, that there was no wrongfulness for United. It may, for instance, be that this might be a rate of payment case, and not a profitability case, and not a RICO case. It may just be a benefits case. And it may simply be a disagreement about how much they should be paid, and there is simply a -- and -- and at that disagreement, we have provided records that show how much we paid; we provided the plan documents. And we've pointed to MultiPlans as the entity that negotiates these for us, using the Data iSight program, and using other -- using the shared savings program, and using other

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programs that are at MultiPlans.

And multiple MultiPlans witnesses have been, I believe, I'm not certain how many, or -- or what the process is there because MultiPlans is a separate entity -- but I believe multiple MultiPlans witnesses have been subpoenaed. And that perhaps multi-task it as well.

Obviously plaintiffs don't have to -- don't have to believe me based on simply what I say that MultiPlans was the one that operated Data iSight. They can ask MultiPlans. They've waited until the end of the discovery period to do so, even though we have repeatedly said that MultiPlans was -- is important to this case. And notwithstanding the fact that MultiPlans is all over their first amended complaint, they still have only -- are only just starting to scratch the surface, as far as I understand, recently subpoenaing MultiPlans witnesses.

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The fact that plaintiff can describe United's productions in such great detail cuts against their position that United's productions are deficient. It only highlights the fact that the productions contain not just hundreds of thousands of pages of documents, but documents that are relevant to this case and describe our programs and describe our strategies and contain our communications with MultiPlans.

Yes, more documents as a result of the rate negotiation of the ESI protocol are going to be produced in the next week. I believe plaintiffs are also going to make some productions in the next week.

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And there may be motions that -- that follow that, follow those productions, that United will be making.

The role we believe plaintiffs are seeking here is excessive and unsupported. They ask for the ultimate sanction, breaking defendant's answer in affirmative defenses without an evidentiary hearing, based on arguments made late in the day -- and such sanctions foreclosed by Nevada law and for good reason. It would produce wildly inequitable results.

As a result, Your Honor, I thank you. And I urge you to deny the motion in its entirety.

THE COURT: So Mr. Portnoi, I have a couple of questions for you.

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MR. PORTNOI: Absolutely.

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THE COURT: In your brief you said that your client had substantially complied.

MR. PORTNOI: Yes, Your Honor.

THE COURT: And where, from zero to a hundred, are we on that?

MR. PORTNOI: We are in a place right now, where we -- you know, the document discovery deadline is April 15. And it's our belief that we're going to have completed our -- you know, that we are -- we are doing our absolute best to get there. And my hope is that we will.

THE COURT: That didn't answer my question.

How much have been provided of the entirety that will be

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provided, when this motion was filed? Half? Three-fourths?

MR. PORTNOI: I'm afraid I may still not be understanding your question. And I -- my volume is turned all the way up, but I also -- I apologize, my system is having you very soft. If you would please repeat the question.

THE COURT: All right. I have such a soft voice. So let -- I feel like I'm screaming at you now, but I'm not screaming at you. So when this motion was filed --

MR. PORTNOI: Mm-hmm.

THE COURT: -- you guys responded by providing more documents in response --

MR. PORTNOI: Mm-hmm.

THE COURT: -- to motion. And in your brief you said you were in substantial compliance.

MR. PORTNOI: Yes, Your Honor.

THE COURT: Quantify that for me.

MR. PORTNOI: Your Honor, we had already provided at that time answers to, as we believe, all of the RFPs. We were engaged at that time solely in the -- the -- as I believe plaintiffs are right now as well -- complying with the ESI protocol, which contemplated further productions on the basis of custodial searches. And that's what we were in the progress of and are in the progress of.

I disagree, Your Honor, with the characterization that documents were produced in response to the motion. We have been

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making rolling productions very frequently. And those productions, you know, continued at that time.

And in addition, we made a commitment to Your Honor and to plaintiffs that we would produce Mr. Rosenthal and that we would produce custodial documents for Mr. Rosenthal in advance of that time, and we did. And that also resulted in more documents being produced after this motion was filed, I believe. The. Timing is a little -- is a little iffy.

We did have meet and confer efforts with plaintiffs regarding the -- you know, regarding the custodial documents. Plaintiffs at one time proposed that all ESI be produced, I believe, five days before each deposition. Ultimately plaintiffs and defendants did reach an agreement on that. So our anticipation has been the goal to have all of the ESI pieces produced, prior to the April 15th document discovery deadline.

But with respect to the RFPs, our production is at this time complete.

THE COURT: Okay. So then you said that you will use best -- meaning you, meaning your client, not the lawyers.

MR. PORTNOI: Yes.

THE COURT: You will use best efforts to finish all of the production by April 15th.

MR. PORTNOI: Your Honor, it is the lawyers. It is not our client. Our client has put substantial -- substantial bodies of documents in our hands. And that then requires, as in any ESI, to

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apply search terms to that, which to then process those documents, de-duplicate those documents, thread those documents, have attorneys look at documents that answer the search terms to ensure that they actually are responsive to the case, to -- as we've said redact patient health information, to make decisions about whether a document is confidential or needs to be marked attorney's eyes only, to redact third-party payer information as this Court has indicated we can, and as we are required to by contract very often with those third-party providers.

And then to, you know, quality check that production to ensure that we're not missing something, to ensure that we're not withholding something that we should not be withholding, as -- as, you know, this goes up and -- and further QC is done by associates or senior associates, and then eventually partners.

But no, Your Honor, this is -- this is not something that it is our client at this time making best efforts. It is our -- it is us the lawyers at this time.

The one exception I will say to that is that Your Honor had ordered an ongoing 2000 administrate record per month production, and that will continue to be ongoing as your -- that -- that order had contemplated that that production would continue after April 15, because it was at -- at a rate of 2,000 per month. And I believe at a rate of 2,000 per month, that that still pushes forward beyond April.

THE COURT: Okay. And you have four business days left before the close of the discovery, and you haven't provided a

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privilege log with over 500 documents. I need an explanation.

MR. PORTNOI: Your Honor, it's -- you know, and I'll -- understanding that I'm *pro hac'd* in here. But having discussed this as well with Mr. Roberts, with Mr. Balkenbush, as in other jurisdictions, privilege logs often -- usual -- often follow the production. And our production is coming. And our hope is that our production privilege log will be, you know, will be produced shortly thereafter.

THE COURT: Okay. Have -- has your client --

MR. PORTNOI: I mean, you're --

THE COURT: -- ever produced any information with regard to reimbursement strategy with these plaintiffs?

MR. PORTNOI: Yes, Your Honor, we have.

And there are substantial PowerPoints, for instance, e-mails that relate to that. We don't -- haven't produced reimburse -- documents relating to reimbursement strategy that include some smoking gun where we say that what we're trying to do is defraud our -- defraud providers, but we have been.

There are, we believe, going to be substantial proprietary documents that are in the hands of MultiPlans, that they are the ones that -- that ultimately contracted with us.

The way to think about this, Your Honor, is maybe you -- maybe the Court has a -- an outside vender that does the janitorial services at the courthouse. The Court may not have the -- the Court may not be in possession of the records of how often the trash is

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leaving the -- leaving the building or how often people are sweeping the floors, because that's in the outside -- possession of an outside vendor.

The reason we pay MultiPlans, the reason many other insurers pay MultiPlans -- this is not something that is unique to United -- is that they can do this work for us. And that ultimately this is a case about the work that MultiPlans does for United.

THE COURT: Has -- have the defendants provided any data to the plaintiffs on disputed claims?

MR. PORTNOI: Yes. We've provided substantial data. We continue to -- to the extent that we have been able to identify claims matching, we continue -- most of the claims have been matched. We've done our -- we've done our best to -- certain claims we simply believe are not United's. And we continue to ask for more information so we can locate them.

But this is what is contained, especially in the admin records. When we -- we, for instance, never said that the admin records would contain everything that is relevant to the case.

What we stated was that they contained everything that was related to the specific claims, and that is contained in there. There certainly was a -- you know, a discussion that that would instead be replaced by the claims-matching protocol. Plaintiffs have -- we -- that claims matching protocol discussion is broken down, even with the assistance of the Special Master. So we continue -- so that is what the -- that data concerning the specific

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claims, that is the administrative records and we are making that production with that pace.

THE COURT: Did your client provide national data as requested and compelled?

MR. PORTNOI: I believe we have.

THE COURT: And can you explain the omission of the Data iSight reports from January 1, 2019, through January 31, 2020? Or do you dispute and say that they were provided?

MR. PORTNOI: We -- at this time, we have turned over Data iSight reports that are in our possession. We -- it is not necessarily the case that -- that we received Data iSight reports like at -- because again, those are MultiPlans reports. It's not the case that these are United reports. These are reports that are created by MultiPlans. There may be reports that are not in our possession. And it may be that -- so that is -- you know, at this time. And we could investigate further and we're happy to meet and confer on that issue.

But our brief outlines the kinds of reports that we have received, that we have -- that -- that exist in our clients' database, that exist in our clients' custodial directive records, and that we have turned over.

THE COURT: Is -- is it true that documents for the Rosenthal will deposition were served the night before his deposition?

MR. PORTNOI: Some documents were served the night

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before the deposition, Your Honor. That was a -- related to the discovery by us that our outside -- our outside vendor had excluded a body of documents from our production.

THE COURT: Okay.

MR. PORTNOI: As soon as we learned about it, we alerted plaintiffs. And we worked -- I --

You know, Your Honor mentioned that there were four business days until the end of discovery. No one on our team, none of the lawyers on our team are working on business days. I can assure you. We are working weekends. We are working holidays. I'm looking at -- at Mr. Wooten and remembering having conference calls with him as he was preparing his Passover dinner.

This occurred -- you know, people worked through the night to rectify that situation.

THE COURT: Okay.

Thank you, Mr. Portnoi.

We've been going about an hour and a half. Is everybody good to go forward or should we take a short break?

If we were in the courtroom, I would ask you to take a 5-minute break. Are you -- break? Yeah. All right. Let's take a break. We'll be back at 3:05.

[Recess taken from 2:57 p.m., until 3:05 p.m.]

THE COURT: Thank you all.

Let's have the reply argument, please.

Ms. Gallagher, if you'll unmute yourself, please.

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MS. GALLAGHER: Yes, Your Honor.

So, Your Honor, I think what struck me the most from the presentation is just the admission, really, throughout of the lack of compliance with the Court's orders.

Early in the presentation, there was a confirmation that United had -- intends to still make a substantial document production between now and next week.

I think, Your Honor, when you asked a direct question about whether or not or what the -- the substantial compliance percentage is by United, you did not get a response to that answer -- that request, Your Honor.

I think having a lack of ability to tell the Court what substantial compliance means in terms of a percentage should be taken as a negative inference in these circumstances, Your Honor.

What I heard was excuses for why United has not complied with the orders of this Court. These are not orders that were issued five days ago or two weeks ago. These are orders that were issued in October of 2020, and after significant meet and confer efforts to try and gain compliance without the Court's interference. These discovery requests that are the subject of this order to show cause have been pending since December of 2019 and have been under court order since October.

I think Your Honor was correct in asking the questions about what documents have been produced since the filing of the motion for order to show cause. A substantial amount of documents

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in terms of where we were before. But what we see are half productions, partial productions, selected productions because we know more exist, because we can glean that from those particular documents.

When Mr. Portnoi indicates that he had no idea we would talk about e-mails and closure and performance reports, Your Honor, that is in our initial motion for order to show cause. It's in our reply. And all you need to do is look at the document that is attached as Exhibit 11. The appendix of exhibits in support of a motion for order to show cause, to see that there are daily and weekly reports -- and this is at Defendant's 91152. And these are their documents, Your Honor; these are not MultiPlans documents. These are reporting that goes direct to an e-mail that United set up for closure reports.

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I -- you probably hear the frustration in my voice because we spent months where United did not acknowledge this document, until we pretty much hit on the word closure in terms of discussing it. And so it's the production of a closure report that is not complete, as we sit here today.

There were daily reports. There's also apparently another e-mail, UHCprojects@UHC.com that receives information.

The discussion about National Care Network and MultiPlans being distinct companies is a little bit confusing to me in terms of we have a National Care Network LLC that's a Texas entity. It's still an -- organized under the laws of Texas and has attorneys

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representing it in response to a subpoena. So I'm a little bit confused by that argument. And it really doesn't bear, though, on what we're here today for, Your Honor.

We have set forth the record in terms of noncompliance. If United is not in compliance today, that is the end of the analysis. If they were not compliant at the time that we filed three motions, there is sufficient record to hold them in contempt and issue sanctions because of those failures in disregarding the Court's orders.

They were also noncompliant when we first raised this, and Your Honor gave them a secondary chance, telling them they must have immediate production. That was in December. And now we are sitting here in April.

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And there is admissions throughout their -- their document in their opposition, and certainly in this presentation today that suggests that there is a substantial amount of documents that haven't been produced. To suggest that the hundred thousand e-mails that were sitting with counsel, or United represented were sitting with counsel, back in June of 2020, and to suggest that they're still reviewing them, frankly, I don't think is an accurate depiction.

What is happening is a strategy, a strategy that was employed to delay and obstruct. And here we are at the end, and United has still not complied and plans to continue this, as long as it can. It came here today, and it couldn't answer the Court's about whether or not it had produced national data. The answer was, I

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think so. It couldn't answer the questions about whether or not January 1, 2019, to January 2020, Data iSight reporting has been produced. It hasn't.

And so to suggest that that information sits with MultiPlans is disingenuous and is not accurate, given the documents that United has selectively produced. It was getting reporting on a daily basis, Your Honor. We don't have those daily reports.

Mr. Portnoi suggested that we're looking for a needle in the haystack. We're entitled to the needle if it's there. And so to suggest that they can select and place some of their cards up and the rest of it down, or maybe even not on the table, is simply not the way discovery and disclosure obligations work, especially when there's a court order.

And so what I want to -- to also touch on is the evidentiary piece of this, Your Honor. We have not asked for case-terminating sanctions. And so there is not an evidentiary hearing required for that.

Bahena indicates that evidentiary hearings are not required, as long as it's not case concluding, especially where there is not a disputed issue of fact. Here there is no disputed issue. United comes to this Court and confirms it is not compliant and doesn't know even if it will be next week, Your Honor, which is especially troubling.

With respect to an evidentiary hearing, we welcome that. We welcome the opportunity to put United representatives under

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oath so that they can answer the questions that you have asked today, that you weren't able to get an answer to. And we think that the Young factors are not -- we don't have to meet the Young factors with respect to the sanctions we're seeking, which is striking the affirmative defense as an answer. We still would have to prove up the claim, subject to the Court's order.

But the Young factors are also here. The discussion that I had early, with respect to the meet-and-confer process, wasn't to reopen. We don't need to reopen the meet-and-confer process. We've gone down that road. United did not prevail. Their objections were overruled. They were ordered to produce documents.

To suggest today that shared savings programs, they had no idea about, is just simply not believable, Your Honor. Mr. Rosenthal was under oath. He identified shared savings programs. It's a program between United and its self-insured employer clients. It has nothing to do with MultiPlans.

Now, MultiPlans may arrange and work with United to re -- to unilaterally produce those reimbursement rates. And that's the allegation we have with respect to the racketeering, but it is United program. To suggest they had no idea is simply not believable, Your Honor.

So the willfulness is what I was discussing with respect to the history and the obstacles that United has put up time and time again -- both in delay and obstruction in the merits of this case. Time and time again they tried to limit the amount of witness

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opportunity we would have and the document -- the scope of documents. So given the willfulness that we've identified, we've met that factor in Young.

We also think that given the delays and the length of time that United was provided an opportunity to respond that they admit they have not met, that we would be prejudiced with any less sanction than what we have asked. *Foster versus Dingwall* makes it clear. Any delay resulting in violation of a court order is presumed prejudicial. Certainly here, with admissions that there's significant document discovery still to come, it simply is untenable at this point in the litigation, Your Honor.

The feasibility and fairness of alternative less sanctions simply isn't an option under these circumstances. This alternative argument about anything short of an alternative that allows United to reap the benefits of its conduct, failing to produce relevant proportional documents, simply end of insulating United from its alleged scheme and racketeering scheme.

It also prevents the Health Care Providers from getting the evidence that must be derived from United documents, along with MultiPlans. But to suggest that they won't produce, quote, a needle in the haystack, is a signal that they haven't looked, Your Honor.

The Nevada Supreme Court has also recognized that a policy to hear cases on the merits has to be set aside when we see conduct like this. When a party is unresponsive and has engaged in abusive litigation practices that caused delay, even an entry of

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default judgment would be appropriate. We think the circumstances here rise that to level as well.

The need to deter United is clear and palpable, Your Honor. Coming today on an order to show cause and not being able to answer the questions about what has been produced is simply untenable.

Each of these factors equates to a sanction that results -- that should result in striking the affirmative defenses. What I would say, in short, Your Honor, to sum up this evidentiary hearing, and I -- or this hearing -- and I appreciate you and your staff, because I know this is a long day -- but I think to sum it up, a half truth is a misrepresentation. A misrepresentation is a fabrication.

The Health Care Providers request that the Court grant the renewed motion in full, and strike United's answer and affirmative defenses based on the record in this case, Your Honor.

Thank you.

THE COURT: Thank you, both.

This is the Plaintiff's Motion for an Order to Show Cause requesting the striking of the answer and the affirmative defenses.

And, you know, this case next week will be two years old. And the defendant -- and let me make this really clear -- this comment does not go to any of the defense lawyers who I believe have been diligent, but the comment really goes to the defendants. They have shown a consistent pattern of practice of delay and obstruction in this case. And I don't fault the lawyers in any way.

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And I want to make that really clear.

But to be two years out with four days remaining for discovery, and to only be in unquantifiable substantial compliance, frankly, is just shocking.

MR. PORTNOI: Your Honor, may I be heard on that comment?

THE COURT: No. Let me finish my ruling, and I'll give you a chance.

MR. PORTNOI: Thank you.

THE COURT: So, you know, I've looked at this. I've lived with the case -- not at the detail that you guys do, but I've lived with it too for two years. And I looked at 37(b)(1) to see what was the most fair way to craft some relief for the plaintiff.

And you know, I've looked at the degree of willfulness. There has been a pattern of noncompliance. By omission, there's an effort by the defendant to keep the plaintiff from discovering information and having access to witnesses.

I don't believe there's been any destruction of evidence or fabrication of evidence. And for that reason, I won't grant the motion in its entirety. But I am going to fashion some relief for the plaintiff.

Now, the willfulness, if any, is with the client, not the lawyers. But I find that this is a place that I still need to let go forward on the merits as much as we can. I don't think that there has been a destruction or fabrication of evidence. And I don't intend

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to penalize the defendant, although you might feel penalized when you hear the ruling.

I'm going to make some findings with regard to the deficiencies in discovery.

First, RFP 34, the supplement was due on October 22, 2020. There has been no meaningful supplement. No agreements were produced with employer groups about the shared savings -- no invoices, no documents with regard to compensation.

With regard to RFPs 11, 12, 21, that deadline was also in October of 2020. Again, no reports. But it's just simply -- and I realize that the defendants have a contract with MultiPlans, but because of that contract, they have access to information that has not been provided. They provided no documents with regard to National Care Network.

With regard to RFP 671832, these -- and then 31, because these are out-of-network and in-network, again, no information was provided with regard to the decisions made or the reimbursement strategy or the methodology with regard to data services or documentation.

That also includes Interrogatories 2, 3, 10, RFPs 5, 10, and 15.

RFPs 13, 27, 28, the response was deficient. And the Rosenthal e-mails -- which, and I appreciate, Mr. Portnoi, your explanation about a third-party vendor, but your client still has to take responsibility for that -- that the plaintiffs did not get those

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e-mails until the night before.

RFP 30, there's been an insufficient production with regard to communications with other ER providers, groups, or hospitals, with regard to reimbursement rates and fees.

The fact that there's no privilege log at this point is shocking to me, because that is something that should have been maintained along the way and also provided on a rolling basis.

So while I'm not going to strike the answer in affirmative defenses, I am levying sanctions against the defendant as follows:

One, the defendant will not be allowed to seek additional extensions of any discovery cutoffs.

Number two, anything not provided by 5 p.m. on the 15th, there will be a negative inference, which may be -- which may be asked witnesses at the time of trial with regard -- the example would be, This information was requested. Did you ever provide it? No. And then there would be a jury instruction saying that the jury should infer that the information would be harmful to the position of the defendant.

So anything not produced by the 15th, negative inference.

The next thing is that with regard to the privilege log, should the plaintiff choose to challenge the privilege, that could be considered by separate motion.

The plaintiff will be awarded the attorney's fees for the bringing of this motion, as well as any costs.

The defendant will be sanctioned the amount of $10,000 to

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be paid to a Nevada legal services provider of its choice.

And lastly, upon -- I'm very concerned with the fact that the plaintiff has taken a number of depositions without all of the documents being produced.

So should, after the May 31 deadline, plaintiff may apply to the Special Master to retake depositions, based upon new information provided. And if he allows that, the expense of those depositions, including travel, will be borne by the defendant.

Now, Mr. Portnoi, you had a question.

MR. PORTNOI: Well, I wanted to simply clarify and honestly state that this delay, if it -- the delay that is in this case, if it is to be borne by United, it is also to be borne by its attorneys who have been -- as I said, I -- working for -- working day and night, working weekends, since -- you know, from -- for a year or more of that to get through these documents.

The fact is, is that they are -- these are -- you know, these are things that are not easy to find. They are often in large quantities of -- of other -- you know, other documents that are not relative to this case and that contain private information. And if we were to provide them in large measure, we would be accused of not pointing to -- but of flooding the plaintiffs with irrelevant information.

It has been the work of the attorneys. And to the -- you know, to the extent that Your Honor is -- was stating that, you know, this is -- that she is -- that you are making comments only about United and not about its attorneys, I simply would -- would comment

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that I -- you know, anything that -- any comment that is to be made about United is to also be made about us.

And if there are deficiencies, you know, those are deficiencies that stand with its lawyers as well.

THE COURT: I -- thank you for falling on your sword, but I don't buy it. I know the quality of the work Mr. Roberts and Balkenbush and Ms. Llewellyn. I don't know about the *pro hac* lawyers. But I am certain that they would never have increased the -- the waste or the time and resources in this case.

So I refuse to accept that, Mr. Portnoi. It just has been needless, just needless waste of time and resources by not complying with these court orders.

So that's the ruling.

Were there any other questions or comments?

MR. PORTNOI: I have one question, Your Honor.

THE COURT: Sure.

MR. PORTNOI: With respect to your order that the -- that the Special Master, you know, may -- may allow for depositions to be reopened, I don't take Your Honor to be altering the traditional good cost standard under Nevada law, but I wanted to clarify that with Your Honor.

THE COURT: I don't intend to alter Nevada law.

MR. PORTNOI: Cool -- or alter Nevada law, but suggest that as a sanction a lower standard is to be applied.

THE COURT: It -- I think it's a unique circumstance here.

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And I would trust the Special Master to make that decision within the bounds of Nevada law.

MR. PORTNOI: I appreciate that, Your Honor. Thank you for the clarification.

THE COURT: Okay. So Ms. Gallagher and your team to prepare -- you may include findings that are consistent with your papers and with my findings today.

And, Mr. Portnoi, who on your team will be the point person for reading and approving the form of order?

MR. PORTNOI: Mr. Balkenbush can be the point person.

THE COURT: All right. So, and as always, no competing orders. If there are objections to the form of order, bring that to my attention through the law clerk or the JEA. She and I will review it, and we will either sign, interlineate, or ask for a telephonic.

And thank you all.

MS. GALLAGHER: Thank you, Your Honor.

MR. PORTNOI: Thank you, Your Honor.

THE COURT: Everybody stay safe and healthy.

MR. PORTNOI: You, as well.

MS. GALLAGHER: Thank you.

MR. BALKENBUSH: Thank you, Your Honor.

MR. ROBERTS: Thank you, Your Honor.

[Proceeding concluded at 3:26 p.m.]

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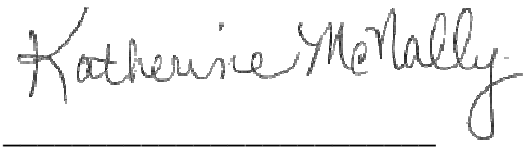
ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



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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

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

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

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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.

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"), by and through their attorneys of record, WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC, object to the Recommendation and Order ("Recommendation") submitted by Special Master Hon. David T. Wall (Ret.) on March 29, 2021.

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This objection is supported by the accompanying Memorandum of Points and Authorities, all pleadings and filings of record, and any oral argument the Court may allow.

Dated this 12th day of April, 2021.

/s/ Colby L. Balkenbush

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On March 29, 2021, the Special Master submitted a Recommendation to the Court that proposes that Plaintiffs' Objections to (1) Notice of Intent to Issue Subpoena Duces Tecum to TeamHealth Holdings, Inc., Without Deposition and Motion for Protective Order, and (2) Notice of Intent to Issue Subpoena Duces Tecum to Collect RX, Inc., be granted in their entirety. Defendants respectfully request that the Court not follow the Recommendation. The Recommendation is based on the Court's October 26, 2020 and February 4, 2021 Orders denying Defendants' motions to compel, which did not unequivocally prohibit discovery on all of the requests contained in the subpoenas at issue. Certainly, a number of these third party requests do not mirror the party discovery that was at issue in Defendants' prior motions to compel, and so should be considered separately on their merits. Additionally, the Court concluded in its February 4, 2021 Order that "the relevant inquiry in this action is the proper rate of reimbursement." Plaintiffs allege that the reasonable reimbursement rate is 75 to 90 percent of their billed charges. The subpoenas seek information relevant to this inquiry, including, for example: the rates at which Plaintiffs expect to be reimbursed, the reimbursement rates that Plaintiffs receive, and mechanisms by which Plaintiffs negotiate reimbursement. This discovery would reveal Plaintiffs' subjective beliefs as to the proper rate of reimbursement, what Plaintiffs charge other payers, and it is an error to preclude evidence of what Plaintiffs believe is the fair and reasonable value for their services. For these reasons, Defendants object to the Special Master's Recommendation.

II. LEGAL STANDARD FOR OBJECTIONS TO A SPECIAL MASTER'S REPORT AND RECOMMENDATION

NRCP 53(f) governs a district court's review of a special master's report and recommendation. Pursuant to that rule, a party may file and serve objections to a recommendation no later than 14 days after being served with it. The at-issue Recommendation was served on March 29, 2021 and therefore this Objection is timely. NRCP 53(f)(2) provides that a district court has 3 options when reviewing a master's recommendation: (1) adopt, reverse

or modify the master's ruling without a hearing, (2) set the objection for a hearing, or (3) remand the matter to the master for reconsideration or further action. When a district court reviews a master's recommendation, the master's findings of facts are reviewed under the "clearly erroneous" standard and conclusions of law are reviewed *de novo*. *Venetian Casino Resort, LLC v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 118 Nev. 124, 132, 41 P.3d 327, 331–32 (2002). Because the at-issue Recommendation was entirely based on the master's legal interpretation of the Court's prior orders, Defendants submit that the entire Recommendation should be reviewed *de novo* by this Court.

III. LEGAL ARGUMENT

A. The Court Should Modify the Recommendation of the Special Master With Respect to the Collect RX Subpoena Duces Tecum

The Recommendation derives from Plaintiffs' overbroad reading of the Court's October 26, 2020 and February 4, 2021 Orders denying Defendants' motions to compel, which did not unequivocally prohibit discovery on the requests contained in the subpoena at issue. Collect RX is a billing and collection company utilized by TeamHealth. All of the documents that Defendants seek by the subpoena to Collect RX are relevant to determining the fair market value of out-of-network emergency services as permitted by the Courts' prior rulings.

In the subpoena, Defendants seek the production of various documents: contracts between Plaintiffs and Collect RX, TeamHealth, and TeamHealth affiliates, scripts distributed to Collect RX employees to collect or negotiate various charges, and documents related to billing policies and procedures. The requested items are relevant and discoverable and were not prohibited by the Court's prior Orders. These requests squarely fall within the relevant inquiry in this action regarding the proper rate of reimbursement.

1. The Relationship between Plaintiffs and Collect RX: Requests 1–4

The first set of requests seeks documents relating to agreements or contracts with Plaintiffs, with TeamHealth, and with TeamHealth affiliates. This relationship informs many issues, including the identification of the entities(s) who have decisional input concerning, for example, whether to accept an amount below billed charges. To date, Plaintiffs have only

produced a two-page document relating to their relationship with Collect RX. If additional agreements exist, these documents are relevant and probative of what Plaintiffs consider to be the fair market value for the services that they provide. These documents were not at issue in Defendants' Motion to Compel, and the Recommendation is therefore erroneous to the extent it is based on the Order denying Defendants' Motion to Compel.

2. Documents related to "scripts": Requests 7, 9–11

Requests Nos. 7 and 9-11 seek information regarding scripts that may be distributed to Collect RX employees to follow for the collection of charges submitted to Defendants, payors, and other networks. Defendants are entitled to understand the nature of Plaintiffs' business relationship with Collect RX, the claims resolutions process, and the reimbursement rates that Plaintiffs receive. How Collect RX directs its employees to collect and negotiate claims has a direct bearing on the issues in this dispute. If Collect RX assists Plaintiffs in determining the rates that will be accepted, that information is discoverable because it is probative of the fair market value for the services and the reasonableness of the charge. For example, if the scripts indicate that Plaintiffs will accept a reasonable reimbursement rate of 50 percent of their billed charges, that is directly relevant to the inquiry regarding the proper rate of reimbursement. For out of network providers, there is often a negotiation; how Collect RX goes about this negotiation and the reasons that it provides for the payment at the rates that it proposes is probative of the value of the services and how one evaluates the fair market value for the services. Because the direction to its employees to collect and negotiate claims is relevant to the amounts that Plaintiffs authorize Collect RX to accept, Defendants are entitled to seek these documents from Collect RX in the subpoena. Further, these documents were not at issue in Defendants' Motion to Compel, and the Recommendation is therefore erroneous to the extent it is based on the Order denying Defendants' Motion to Compel.

3. Documents related to "scripts" for collections from self-pay members: Request 8

Request No. 8 seeks information related to scripts distributed to Collect RX employees or that Collect RX employees follow to collect for charges for patients that are self-pay. This

information is necessary to understand whether Collect RX charges or accepts different amounts depending on the Payer. If Collect RX has a policy to charge some patients less—or to accept less as payment from some payers or patients—then that is probative of the issue of what an arm's length transaction looks like and whether the charges are in line with fair market value. Again, this discovery is related to the proper rate of reimbursement which was expressly permitted by the Court.

4. Communications related to collections from private payors: Request 12

Request No. 12 seeks documents regarding collecting medical charges from private payors, such as United, or from self-pay patients. Again, this information is necessary to understand whether Collect RX charges or accepts different amounts depending on the Payer. If Collect RX has a policy to charge some patients less—or to accept less as payment from some payers or patients—then that is probative of the issue of what an arm's length transaction looks like and whether the charges are in line with fair market value. These documents were not at issue in Defendants' Motion to Compel, and the Recommendation is therefore erroneous to the extent it is based on the Order denying Defendants' Motion to Compel.

5. Communications related to negotiations and accepted amounts: Request 13

Request No. 13 seeks communications between Collect RX and TeamHealth regarding negotiations with payors or patients and amounts or percentages Collect RX is authorized to accept for medical charges. Both the amount Collect RX and TeamHealth expect to be paid *and* the amount they would accept for the service provided are relevant to the key issue in dispute: the proper rate of reimbursement. If there are internal documents or communications that shed light on what Collect RX or TeamHealth were willing to accept, that may be evidence of the fair market value of the services, and Defendants are entitled to discover that information pursuant to the Court's prior Orders.

6. Communications with TeamHealth related to negotiations and accepted amounts or percentages: Request 13

Request No. 13 seeks communications between Collect RX and TeamHealth regarding

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negotiations with payors or patients and amounts or percentages Collect RX is authorized to accept for medical charges. Both the amount Collect RX and TeamHealth expect to be paid *and* the amount they would accept for the service provided are relevant to the key issue in dispute: the proper rate of reimbursement. If there are internal documents or communications that shed light on what Collect RX or TeamHealth were willing to accept, that may be evidence of the fair market value of the services, and Defendants are entitled to discover that information.

7. Communications with Plaintiffs related to negotiations and accepted amounts or percentages: Request 14

Request No. 14 seeks communications between Collect RX and *Plaintiffs* regarding negotiations with payors or patients and amounts or percentages Collect RX is authorized to accept for medical charges on behalf of Plaintiffs. Both the amount Collect RX and Plaintiff(s) expect to be paid *and* the amount they would accept for the service provided are relevant to the key issue in dispute: the proper rate of reimbursement. If there are internal documents or communications that shed light on what Collect RX or Plaintiffs were willing to accept, that may be evidence of the fair market value of the services, and Defendants are entitled to discover that information.

8. Communications, policies, and procedures for excusing payment and balance billing: Requests 15–16

Requests Nos. 15 and 16 seek all policies, procedures, and communications regarding balance billing or for excusing payment for services Collect RX provided to Plaintiffs or TeamHealth, as well as discussing the use or threatened use of this practice in negotiations. This information is necessary to understand whether Collect RX charges or accepts different amounts depending on the Payer. If Collect RX has a policy to charge some patients less—or to accept less as payment from some payers or patients—then that is probative of the issue of what an arm's length transaction looks like and whether the charges are in line with fair market value, which is commonly understood to be the price that a willing buyer would pay and a willing seller would accept in an arm's length transaction. Again, this discovery would is relevant to the proper rate of reimbursement which was expressly permitted by this Court in its prior Orders.

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9. Policies and procedures for seeking automatic appeals: Request 17

Request No. 17 seeks Collect RX's policies and procedures for seeking automatic appeals or other administrative remedies for services Collect RX provided to Plaintiffs or TeamHealth. Both the amount Collect RX expects to be paid and the amount it would accept for the service provided are relevant to the key issue in dispute: the proper rate of reimbursement. If there are internal documents or communications that shed light on what Collect RX or TeamHealth were willing to accept without pursuing an appeal, that may constitute evidence of the fair market value of the services, and Defendants are entitled to discover that information pursuant to the Court's prior Orders.

B. The Court Should Modify the Recommendation of the Special Master With Respect to the TeamHealth Holdings Subpoena Duces Tecum

The information Defendants seek from TeamHealth is relevant to the issue of determining the proper rates for emergency services as permitted by this Court. Defendants object to the Recommendation to grant Plaintiffs' Motions for Protective Orders in their entirety.

1. Documents related to ownership interests: Requests 1–4, 19[1]

The first set of requests seek documents seek information relating to TeamHealth's ownership interest in each of the Plaintiff entities, and Blackstone's interest in TeamHealth. As explained in further detail above, the relationship between Plaintiffs, TeamHealth and Blackstone, informs many issues in this case, including identification of the entities(s) who have decisional input concerning the setting of rates and decisions concerning whether to accept an amount below billed charges. Whether TeamHealth—or Blackstone—has a financial incentive to influence the rates or the amounts of payment Plaintiffs would accept calls into question the reasonableness and objectivity of the charged amounts. It is necessary to understand TeamHealth's ownership interest in the Plaintiff entities (and Blackstone's interest in TeamHealth) to evaluate what interest was acquired and whether that interest ultimately grants

[1] Defendants concede this category of requests is likely barred under the reasoning of the Court's prior orders denying Defendants' motions to compel. Defendants nonetheless include this category of requests in their Objection to ensure they have preserved this issue for appeal and perfected the record.

TeamHealth (and Blackstone) unfettered discretion in increasing rates exceeding the fair market value of the rates for the services.

2. Documents related to acquisition: Requests 5–11, 21[2]

This set of requests seeks information regarding TeamHealth's acquisition of the Plaintiff practices, and other emergency practices. It is believed and understood that United and TeamHealth began national rate negotiations *following* TeamHealth's acquisition of the Plaintiff entities that initiated this litigation. The rate proposals exchanged during these negotiations are certainly relevant to whether Plaintiffs' billed charges are usual and customary. It necessarily follows that any analyses that may have been conducted by TeamHealth or Blackstone regarding any of Plaintiffs' existing rates and/or contract(s) with United are also relevant. Information regarding the acquisition of *other* emergency practices is relevant for many issues, including any financial incentives Plaintiffs might have had in determining their charges.

Request No. 8 specifically seeks Blackstone documents referring or relating to TeamHealth. As described in further detail above, the relationship with other entities, including Blackstone, is relevant. Any documents reflecting Blackstone's decisional input concerning setting rates or accepting amounts below billed charges is relevant. For example, it is anticipated that TeamHealth collects a "management fee" that is the equivalent of any profits generated by Plaintiffs, that may ultimately be funneled to Blackstone. Since TeamHealth apparently sets Plaintiffs' rates—which have increased year over year—responsive records are probative of whether the rates are indeed fair market rates or, alternatively, rates that have steadily increased to create profits for Blackstone or TeamHealth.

3. Documents related to provider participation agreements: Requests 12, 13

Requests 12 and 13[3] seek information regarding the analyses of Plaintiffs' provider participation agreements with United prior to their acquisition by TeamHealth. Any documents reflecting TeamHealth's analyses of the rates Plaintiffs charge are relevant to Plaintiffs' setting

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[2] *See* fn. 1, *supra*.

[3] And Request 14, which is conceded to be relevant by Plaintiffs.

of rates and the decisions concerning whether to accept an amount below billed charges. This falls squarely within the inquiry regarding the proper rate of reimbursement. United is entitled to probe the analyses of these provider participation agreements, as they are probative of what Plaintiffs (or TeamHealth) consider to be the fair market value for the services that they provide. Further, these documents were not at issue in Defendants' motions to compel.

4. Documents and communications related to Chargemasters: Requests 15, 16

Requests 15 and 16 seek documents and communications relating to analyses of the rates that Plaintiffs charge, i.e. Plaintiffs' Chargemasters. Providers typically set Chargemaster prices at many times the amount for which they are reimbursed by insurers. This allows providers to set an artificially high starting point for negotiations with health insurers. United should be permitted to obtain the Chargemasters in order to obtain the data or information that Plaintiffs relied upon to set their prices. This information is probative of what Plaintiffs (or TeamHealth) believe to be the proper rate of reimbursement, which is discoverable pursuant to the Court's prior Orders.

5. Documents and communications with Blackstone relating to Plaintiffs' charges or rates: Request 17

Request 17 seeks documents and communications by and between TeamHealth and Blackstone generally relating to Plaintiffs' charges or rates. As described in further detail above, the relationship with other entities, including Blackstone—the private equity firm that owns TeamHealth—is relevant. Further, United is entitled to test the notion that Plaintiffs' billed charges are "fair," and one of the ways that this can be done is by examining TeamHealth's documents and communications with Blackstone that may discuss and examine the reasonableness of the charges from their perspective. Additionally, these documents were not at issue in Defendants' motions to compel and are outside the scope of what was previously precluded from production.

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6. Documents and communications with Blackstone relating to maximizing

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reimbursements: Request 18

Request 18 seeks information between TeamHealth and Blackstone relating to maximizing reimbursements from payor(s). As described in further detail above, the relationship with other entities, including Blackstone, is relevant. If an entity assists TeamHealth in determining the value of services, or setting the Chargemaster pricing and/or billed charges, that information is discoverable because it is probative of any basis or rationale for the charge, as well as the reasonableness of the charge. To the extent that TeamHealth and Blackstone discussed maximizing reimbursements from Payors, these documents are probative of the fair market value of the services at issue and the proper rate of reimbursement as previously determined by the Court.

7. Documents related to disbursement of profits, TeamHealth relationship with Plaintiff providers: Requests 19, 20[4]

Requests Nos. 19 and 20 probe the relationship between TeamHealth and the Plaintiff provider entities. Request No. 20 seeks information regarding whether the physicians who provided services at issue in this case are TeamHealth employees. This information is relevant to determining whether TeamHealth has any bias or financial incentive in Plaintiffs' pursuit of this case, and the actual costs incurred by Plaintiffs to determine whether their rates are reasonable. With respect to Request No. 19, documents and communications relating to the disbursement of profits from Plaintiffs to TeamHealth, or TeamHealth to Blackstone, may also inform the reasonableness of Plaintiffs' rates. Plaintiffs' costs, including how physicians are compensated by TeamHealth, is probative of the reasonableness of their charges

8. Documents relating to other practices using Plaintiffs' provider participation agreement(s) with United to bill for services: Request 22

Request No. 22 seeks documents relating to other emergency practices using Plaintiffs' provider participation agreement(s) with United to bill for services. Plaintiffs have argued that the termination of the provider participation agreement is relevant to the instant case. Its

[4] *See* fn. 1, *supra*.

argument that this information is irrelevant now when United seeks the similar information from TeamHealth is simply not credible. Additionally, these documents were not at issue in Defendants' motions to compel, and were not precluded by the Court.

9. Documents relating to the setting or amending of new chargemasters: Requests 23–24:

Requests Nos. 23–24 seek information relating to the setting or amending of new chargemasters for Plaintiffs and other TeamHealth emergency providers, analyses of cost-to-charge/profits based on set charge levels, and comparison of set charges levels to competitors or other benchmarks. Providers typically set Chargemaster prices at many times the amount for which they are reimbursed by insurers. This allows providers to set an artificially high starting point for negotiations with health insurers. United is entitled to see how Plaintiffs' charges compare to other TeamHealth-owned practices, especially ones that were being reimbursed at much lower rates.

10. Documents relating to the negotiation of provider participation agreements: Requests 25–28:

Requests Nos. 25–28 seek information relating to communications between TeamHealth and United regarding negotiations toward provider participation agreements. Information concerning the negotiations over the provider participation agreement(s) is important to determine whether TeamHealth has a financial incentive to influence the rates or the amounts of payment Plaintiffs would accept, and calls into question the objectivity of the charged amount and whether the charges are set in good faith, or instead calculated solely to generate maximum profits. These requests are probative of fair market value for the benefit claims at issue and the proper rate of reimbursement. Further, these documents were not at issue in Defendants' motions to compel, and were not precluded by the Court.

11. Communications, including internal communications, relating to the setting of charges for services for TeamHealth Practices applicable to Nevada: Request 29, 31:

Request No. 29 seeks communications, including internal communications, relating to the setting of charges for services for TeamHealth Practices applicable to Nevada. This request is

reasonably narrowed to the geographic area in question, and seeks communications underlying Plaintiffs' setting of rates. Request No. 31 seeks communications comparing set charge levels to competitors or other benchmarks in Nevada. These communications are undoubtedly relevant, as they likely contain discussions of the Nevada market, evaluation of relevant benchmarks, and reasonable rates for emergency services performed in Nevada.

12. Communications regarding cost-to-charge/profit: Requests 30, 36:[5]

Requests Nos. 30 and 36 seek information relating to the cost to perform emergency services. A provider's internal cost structure is relevant to the reasonableness of the charge and ultimately to what is the fair market value for the services.

13. Data relating to the amounts that TeamHealth practices bill, charge, and collect: Requests 32–35:

Requests Nos. 32–35 seek data relating to amounts that TeamHealth Practices bill, charge, and collect from private pay patients and patients covered by Medicare or Medicare Advantage plans. This data is necessarily probative of whether TeamHealth charges or accepts different amounts depending on the type of health plan, if any, that covers a patient. If TeamHealth has a policy to charge some patients less—or to accept less as payment from some payers or patients—then that is probative of the issue of what an arm's length transaction looks like and whether the charges are in line with fair market value.

The Special Master's recommendation that Plaintiffs' Objections are meritorious is in error since the issue of Medicare and Medicaid was not before the Court on Defendants' prior motions to compel, and is not addressed in the Court's February 4, 2021 Order. The Court *struck* language from Plaintiffs' proposed Order Setting Production and Response Schedule that "United's attempt to include managed Medicare and Medicaid data is rejected as unrelated to [Plaintiffs'] claims" when it entered its November 9, 2020 Order. What is more, Plaintiffs themselves have acknowledged the relevance of these comparisons in the course of the

[5] *See* fn. 1, *supra*.

negotiations that gave rise to this dispute: at that time, Plaintiffs consistently presented their proposed reimbursement rates as a percentage of Medicare service rates.

14. Documents related to balance billing, billing practices, audits: Requests 37–40, 44:

Requests Nos. 37–40, and 44 seek information regarding TeamHealth's policies and procedures for excusing payment and balance billing, billing practices, as well as audits of billing practices. This information is necessary to understand whether TeamHealth charges or accepts different amounts depending on the Payor as defined in the Subpoena. If TeamHealth has a policy to charge some patients less—or to accept less as payment from some payers or patients—then that is probative of the issue of what an arm's length transaction looks like and whether the charges are in line with fair market value, which is commonly understood to be the price that a willing buyer would pay and a willing seller would accept in an arm's length transaction. Audits of TeamHealth's billing practices inform the accuracy (or inaccuracy) and appropriateness (or inappropriateness) of TeamHealth's billing, which has direct bearing on the validity of the amounts sought by Plaintiffs in this case. These documents were not at issue in Defendants' Motion to Compel, and the Recommendation is therefore erroneous to the extent it is based on the Order denying Defendants' Motion to Compel.

15. Documents related to TeamHealth's policies and procedures for determining minimum threshold amounts, audits: Requests 41–42:

Requests Nos. 41–42 seek documents regarding TeamHealth's policies and procedures for determining minimum threshold amounts for automatic appeals and other administrative remedies for TeamHealth Emergency Practices. Both the amount that TeamHealth expects to be paid and the amount it would accept for the service provided are relevant to the key issue in dispute: whether Plaintiffs were paid appropriate amounts for the benefit claims at issue. Throughout Plaintiffs' First Amended Complaint, Plaintiffs allege that they were not paid the "usual and customary rate" for their services. *See, e.g.*, FAC ¶¶ 21, 57, 62, 69. If there are internal documents or communications that shed light on what TeamHealth was willing to accept, that is potentially evidence of the fair market value of the services, and United is entitled

to discover that information. Finally, these documents were not at issue in Defendants' motions to compel, and were not precluded from discovery.

16. Documents related to collection agencies: Requests 43, 55–56:

Requests Nos. 43 and 55–56 seek documents relating to collection agencies in which TeamHealth has an ownership interest or which TeamHealth controls, as well as contracts for billing, collections, and revenue-cycle management. If an entity assists TeamHealth in determining the value of services, or setting the Chargemaster pricing and/or billed charges, that information is discoverable because it is probative of any basis or rationale for the charge, as well as the reasonableness of the charge. United expects that there are documents between TeamHealth and its third party vendors providing instructions or detailing the work that these vendors provide to TeamHealth and Plaintiffs. Further, communications between TeamHealth and collection agencies regarding their efforts to negotiate higher reimbursements are probative of the fair market value of the services at issue. These documents were not at issue in Defendants' Motion to Compel, and the Recommendation is therefore erroneous to the extent it is based on the Order denying Defendants' Motion to Compel.

17. Documents related to agreements and contracts that TeamHealth has with hospitals/facilities in Nevada: Requests 45–47:[6]

Requests Nos. 45–47 are appropriately limited in geographic scope, and seek documents, including agreements and contracts, that TeamHealth has with hospitals/facilities in Nevada. United is entitled to understand the nature of TeamHealth's business relationships with the facilities where TeamHealth renders its services, including (without limitation) information that surrounds any subsidies that TeamHealth receives. For instance, United is entitled to know what if any subsidies or payments that TeamHealth received for hospitals. This information is relevant to determine the fair market for services charged by TeamHealth in Nevada.

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[6] *See* fn. 1, *supra*.

18. Documents between TeamHealth and hospitals/facilities regarding balance billing: Request 48:[7]

Request No. 48 seeks documents between TeamHealth and hospitals/facilities regarding balance billing, other remuneration, utilization, or compensation. If TeamHealth or the hospitals/facilities it contracts with have a policy to charge some patients less—or accept less as payment from some payers or patients—this is relevant to determining whether the charges constitute fair market value.

19. Documents relating to compensation received by, or paid to, TeamHealth Practices by hospitals and/or facilities: Requests 49–50:[8]

Requests Nos. 49–50 seek documents showing compensation paid by, received by, or paid to TeamHealth Emergency Practices by any hospitals/facilities where at-issue services were rendered. United is entitled to understand the nature of TeamHealth's business relationships with the facilities where Plaintiffs render their services, including (without limitation) information that surrounds any subsidies that Plaintiffs receives. For instance, United is entitled to know what if any subsidies or payments that TeamHealth received for hospitals. This information is relevant to determine the fair market for services charged by Plaintiffs and the proper rate of reimbursement.

20. Documents evidencing complaints regarding the amount charged by any TeamHealth Practices in Nevada: Request 52:

Request No. 52 seeks documents reflecting complaints by patients or hospitals/facilities regarding the amount charged by TeamHealth Emergency Practices. Complaints about amounts charged are an indication that the charged amount does not reflect the fair market value. This information goes to the reasonableness of the amounts that Plaintiffs demand for emergency services. These documents were not at issue in Defendants' Motion to Compel, and the Recommendation is therefore erroneous to the extent it is based on the Order denying Defendants' Motion to Compel. Further, this request mirrors a written discovery request that Plaintiffs submitted to United, and for which the Court permitted discovery.

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[7] *See* fn. 1, *supra*.

[8] *See* fn. 1, *supra*.

21. Documents relating to allegations of billing or coding fraud against TeamHealth: Request 53:

Request No. 53 seeks information relating to allegations of billing or coding fraud against TeamHealth or any TeamHealth Emergency Practice. This information goes to reasonableness of the amounts Plaintiffs demand for emergency services as well as TeamHealth's common pattern and practice of billing. Again, these documents were not at issue in Defendants' motions to compel, and were not precluded from discovery.

22. Current health plan documents for TeamHealth employees: Request 54:

Request No. 54 seeks TeamHealth's health plan documents for its employees since 2017. One of the primary issues in this case is whether Plaintiffs (affiliates of TeamHealth) are entitled to additional payments from United for emergency services rendered to persons covered under health plans that are issued, operated, or administered by United. Thus, a request for documents related to TeamHealth's health plans is proper because this request will likely lead to the discovery of admissible and relevant evidence—namely how TeamHealth's own employee health plans choose to reimburse out-of-network emergency services. These documents were not at issue in Defendants' Motion to Compel, and the Recommendation is therefore erroneous to the extent it is based on the Order denying Defendants' Motion to Compel.

23. Documents, including any prospectus, relating to the market share of all entities that TeamHealth controls: Request 57:[9]

Request No. 57 seeks documents relating to TeamHealth's market share of entities it controls for the emergency medicine market. United is entitled to documents illustrating how TeamHealth's billed charges compare to reimbursement rates it accepts through its contracts and how this affects TeamHealth's overall control of the emergency department medical market. This information may also show that TeamHealth or Plaintiffs have a financial incentive to influence the rates or the amounts of payment Plaintiffs would accept and calls into question the objectivity of the charged amount and whether the charges are set in good faith, or instead calculated to generate a return.

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[9] *See* fn. 1, *supra*.

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24. Documents relating to the reasons that any laws or regulations prohibiting the corporate practice of medicine do not apply to TeamHealth: Request 58:

Request No. 58 seeks documents relating to the reasons why laws or regulations prohibiting the corporate practice of medicine do not apply to TeamHealth's ownership interest or control of Plaintiffs or any TeamHealth emergency practice. United is entitled to this information to support its defenses in this case. United is also entitled to explore issues of standing, real party in interest and possible additional defenses should it prove that Plaintiffs are violating any existing regulations as a result of the control being exerted by corporate entity TeamHealth. Finally, these documents were not at issue in Defendants' Motion to Compel, and the Recommendation is therefore erroneous to the extent it is based on the Order denying Defendants' Motion to Compel.

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IV. CONCLUSION

For the foregoing reasons, Defendants object to the Recommendation and respectfully request that the Court permit the discovery sought by Defendants.

/s/ Colby L. Balkenbush

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of April, 2021, a true and correct copy of the foregoing **DEFENDANTS' OBJECTION TO 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** 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., 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	Case No.: A-19-792978-B Dept. No.: XXVII **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**

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

Defendants.

PLEASE TAKE NOTICE that Report and Recommendation #3 Regarding Defendants' Motion to Compel Responses to Defendants' Second Set of Requests for Production on Order Shortening Time was entered on April 14, 2021, a copy of which is attached hereto.

DATED this 15th day of April, 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 15th day of April, 2021, I caused a true and correct copy of the foregoing **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** 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 #3 REGARDING DEFENDANTS' MOTION TO COMPEL RESPONSES TO DEFENDANTS' SECOND SET OF REQUESTS FOR PRODUCTION ON ORDER SHORTENING TIME

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On April 1, 2021, Defendants filed a Motion to Compel Responses to Defendants' Second Set of Requests for Production on Order Shortening Time. The Order Shortening Time was executed by the Special Master, setting the matter for hearing on April 13, 2021. On April 9, 2021, Plaintiffs filed a timely Opposition and on April 12, 2021, Defendants filed a Reply Brief

This matter was presented for telephonic hearing on April 13, 2021. Participating were the Special Master, Hon. David T. Wall, Ret.; Pat Lundvall, Esq., Kristen T. Gallagher, Esq., Amanda M. Perach, Esq., Rachel H. LeBlanc, Esq. and Matthew Lavin Esq., appearing for Plaintiffs, along with in-house counsel and Plaintiffs' representative Carol Owen, Esq.; D. Lee Roberts, Esq., Jason Orr, 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. On February 4, 2021, the Hon. Nancy L. Allf issued an Order Denying Defendants' Motion to Compel Responses to Defendants' First and Second Requests for Production on Order Shortening Time ("2/4/21 Order"). The Order addressed certain RFPs within the first (served July 29, 2019) and second (served August 12, 2020) sets of requests propounded upon Plaintiffs. The Court specifically noted that "the relevant inquiry isn this action is the proper rate of reimbursement." (2/4/21 Order, p. 3). The Order specifically denied Defendants' Motion to Compel as it related to the following:
    a. Corporate structure / relationship documents (RFPs 61, 69, 95, 108, 132-134, 142-145);
    b. Cost-related documents (RFPs 68, 86, 92-94); and
    c. Hospital/facility contracts and credentials (RFPs 126, 137 and 146).
2. The 2/4/21 Order specifically held 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 Health Care Providers' business and operations to purportedly establish the Health Care Providers' charges are excessive, as

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well as and United's monopoly argument, are not relevant to the claims or defenses in this case." (Id.) (Emphasis supplied).[1]

3. In the instant Motion, Defendants seek to compel Plaintiffs' responses to the following:

    a. RFPs 51, 98, 107, 109, 118, 119, 128, 129 and portions of 122 and 123 regarding expected reimbursement rates, analysis of charges, setting of charges and collections; and

    b. RFPs 56 and 57 regarding complaints about amounts charged.

4. 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.

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CONCLUSIONS OF LAW

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5. 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.

6. With respect to the ten (10) RFPs regarding expected reimbursement rates, analysis of charges, setting of charges and collections, the Special Master recommends as follows:

[1] At a hearing on April 9, 2021, the Court announced its intention to deny Defendants' Motion for Reconsideration of this Order.

a. RFP 51, requesting reports from any business consulting company addressing the typical ratees at which Plaintiffs received payment, or should have expected payment was responded to by Plaintiffs, indicating that they possessed no documents responsive to the request. Although Defendants' Motion describes this RFP as requesting discovery regarding "the typical ratees at which Plaintiffs received payment, or should have expected payment," (Motion to Compel, p. 12) the actual RFP requests reports from business consulting companies. As Plaintiffs have responded by saying that no documents are responsive to this request, the Special Master hereby recommends that the Motion to Compel be DENIED AS MOOT as to RFP 51;

b. RFP 98, requesting documents comparing Plaintiffs' billed charges to reimbursement amounts set under Medicare and Medicaid, is irrelevant under NRCP 26(b) and applicable case law. In its November 9, 2020, 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 ("11/9/20 Order"), the Court directed that Defendants exclude Medicare and Medicaid reimbursement rates from its production of market and reimbursement rates, but did not rule on the admissibility of such data. (11/9/20 Order, p. 2-3). Additionally, Plaintiffs have provided instructive authority regarding the lack of relevance of non-commercial payors such as Medicare and Medicaid to the reimbursement rate issues recognized by the Court in prior Orders (See, Stinnett v. Sanders, 2018 WL 6823221, at *1 (Nev. Dist. Ct. Oct. 25, 2018); and Gulf-to-Bay Anesthesiology Associates, LLC v.

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UnitedHealthcare of Florida, Inc., No. 17-CA-011207, December 1, 2020 Order Denying Defendants' Motion to Compel Discovery Regarding Managed Medicare and Medicaid (Fla. Cir. Ct.)). Given the foregoing, the Special Master hereby recommends that the Motion to Compel be DENIED as to RFP 98;

c. RFP 107, requesting documents, including contracts, showing services by any vendors provided to Plaintiffs related to billing or submitting claims, reimbursement, collections or the determination of the value of services, ostensibly relates to either TeamHealth and/or Collect Rx, which has already been addressed in Report and Recommendation #2.[2] Therefore, the Special Master hereby recommends that the Motion to Compel be DENIED as to RFP 107;

d. RFP 109, requesting contracts or agreements between Plaintiffs and any reimbursement claims specialists, including for pricing of emergency medical claims, has already been determined by the Court to be irrelevant under NRCP 26(b). As such the Special Master hereby recommends that the Motion to Compel be DENIED as to RFP 109;

e. RFP 118, requesting documents showing services which TeamHealth provided to Plaintiffs for billing, claim submission, reimbursement, collections and/or the determination of the value of services, has already been determined by the Court and the Special Master to be irrelevant under NRCP 26(b), and the Special Master hereby recommends that the Motion to Compel be DENIED as to RFP 118;

[2] Report and Recommendation #2 is hereby incorporated by reference herein.

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f. RFP 119, requesting documents showing services that any vendor provided to Plaintiffs for billing, claim submission, reimbursement, collections and/or the determination of the value of services, has already been determined by the Court (and the Special Master, to the extent this includes TeamHealth or Collect Rx) to be irrelevant under NRCP 26(b), and the Special Master hereby recommends that the Motion to Compel be DENIED as to RFP 119;

g. RFPs 122 and 123, requesting documents between Plaintiffs and TeamHealth (122) or any business entity (123) evidencing instructions, directives or guidance regarding pricing, has already been determined by the Court and the Special Master to be irrelevant under NRCP 26(b), and the Special Master hereby recommends that the Motion to Compel be DENIED as to RFPs 122 and 123;

h. RFPs 128 and 129, requesting documents demonstrating whether the physicians or other medical professionals that delivered at-issue services (128) or TeamHealth (129) had input into the amount that was charged or collected, is irrelevant under NRCP 26(b) to the issues presented in this "rate of payment" case. This is particularly true as it relates to collection, which has already been determined to be irrelevant. As such the Special Master hereby recommends that the Motion to Compel be DENIED as to RFPs 128 and 129;

i. RFPs 56 and 57, requesting documents relating to complaints by patients (56) and/or administrators or employees of hospitals or other facilities providing emergency medical services (57), are offered by Defendants as discoverable so as to establish that Plaintiffs' billed charges are unreasonable. However, the Court has already determined that the relevant inquiry in this action is the proper rate of

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reimbursement and not how billed charges are set. As such, the Special Master hereby recommends that the Motion to Compel be DENIED as to RFPs 56 and 57.

RECOMMENDATION

7. 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 14TH day of April, 2021.

Hon. David T. Wall (Ret.)

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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 April 14, 2021, I served the attached REPORT AND RECOMMENDATION #3 REGARDING DEFENDANTS' MOTION TO COMPEL RESPONSES TO DEFENDANTS' SECOND SET OF REQUESTS FOR PRODUCTION ON ORDER SHORTENING TIME on the parties in the within action by electronic mail at Las Vegas, NEVADA, addressed as follows:

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United Healthcare Insurance Company
UnitedHealth Group Inc.
UnitedHealthCare Services Inc dba UnitedHeal

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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 April 14, 2021.

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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

WEDNESDAY, APRIL 21, 2021

RECORDER'S TRANSCRIPT OF HEARING
ALL PENDING MOTIONS

Appearing via Videoconference:

For the Plaintiff: KRISTEN T. GALLAGHER, ESQ.

For the Defendant: BRITTANY M. LLEWELLYN, ESQ.

RECORDED BY: BRYNN WHITE, COURT RECORDER

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Las Vegas, Nevada, Wednesday, April 21, 2021

[Case called at 9:08 a.m.]

THE COURT: Fremont versus United Healthcare. Let's take appearances, please, starting first with the Plaintiff.

MS. GALLAGHER: Hi. Good morning, Your Honor. Kristen Gallagher on behalf of Fremont Emergency Services and the healthcare providers. Also on the line are Mr. Modiano and Mr. Ruffner, who are the subject of the motions to associate.

THE COURT: Thank you. For the Defendants.

MS. LLEWELLYN: Good morning, Your Honor. Brittany Llewellyn on behalf of the Defendants.

THE COURT: Are there any other appearances? No.

All right. So we have the motions to associate, Mr. Ruffner and Mr. Modiano. Ms. Llewellyn, will there be any opposition?

MS. LLEWELLYN: There is no opposition, Your Honor.

THE COURT: All right. I've reviewed both of them. They're in accord with SCR 42. Mr. Ruffner and Mr. Modiano will be admitted to practice, under our pro hac vice rule.

Now, on my calendar, but I didn't see where the objection was intended to be heard. I saw an objection to notice of intent to issue subpoena duces tecum, which the Special Master already ruled on in his second ruling. Do you guys show that that should be argued this morning?

MS. GALLAGHER: No, Your Honor. We noticed the same. I

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think it inadvertently was set by master calendar when it was filed. But Special Master Judge Wall has adjudicated that and has a report and recommendation that has been submitted to Your Honor and United has filed an objection to that report and recommendation. So, that part is in the briefing schedule but not intended to be argued on the underlying objection that we filed to the notice of intent for seeking.

THE COURT: Good enough. I did see that the decision was on March 29th, the objection was on 4-12, and so I was prepared in case you intended to argue it this morning. But, both sides agree that that is not on today?

MS. GALLAGHER: That's correct. We submitted a response to the objection; I believe it was on Monday, so that'll be in the Court's normal course.

If I may, just one or two housekeeping matters. There are a couple open orders; I just wanted to bring to the top -- to the attention of the Court, if I could. Relating to United's proposed order regarding Mr. Rosenthal's motion to stay his deposition and the healthcare providers filed an objection. And then to the similar order denying the motion for protective order with respect to Mr. Rosenthal, Ms. Nierman and Ms. Paradise, their depositions, and then United's objection to that proposed orders. Those just -- I haven't seen those come through, so I just wanted to raise that as open items, Your Honor.

THE COURT: I don't see any orders in my TPO application that are outstanding.

MS. GALLAGHER: Would it be appropriate for us to then

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resubmit both the proposed orders and our respective objections?

THE COURT: Please do that and send them to the Law Clerk.

MS. GALLAGHER: We will do so. Thank you, Your Honor.

THE COURT: And we'll review those this week.

MS. GALLAGHER: Okay. Thank you.

THE COURT: Anything else to take up today, on this case?

MS. GALLAGHER: Nothing from the Plaintiffs, Your Honor.

THE COURT: Ms. Llewellyn?

MS. LLEWELLYN: Nothing from the Defendants.

THE COURT: Good enough. Then Mr. Ruffner, Mr. Modiano, welcome to Nevada.

MR. RUFFNER: Thank you very much.

THE COURT: Thank you, both.

[Hearing concluded at 9:12 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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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

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

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

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corporation; OXFORD HEALTH PLANS, INC., a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., a Nevada corporation; SIERRA HEALTH-CARE OPTIONS, INC., a Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20,

Defendants.

PLEASE TAKE NOTICE that an Order Denying Motion for Reconsideration of Court's Order Denying Defendants' Motion to Compel Responses to Defendants' First and Second Requests for Production was entered on April 26, 2021, a copy of which is attached hereto.

DATED this 26th day of April, 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 26th day of April, 2021, I caused a true and correct copy of the foregoing **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** to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

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CLARK COUNTY, NEVADA

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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

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

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

Hearing Date: April 9, 2021
Hearing Time: 1:30 p.m.

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corporation; OXFORD HEALTH PLANS, INC., a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., a Nevada corporation; SIERRA HEALTH-CARE OPTIONS, INC., a Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20,

Defendants.

This matter came before the Court on April 9, 2021 on 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 on Order Shortening Time ("Motion for Reconsideration"). D. Lee Roberts, Jr., and Colby L. Balkenbush, Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC, and Dimitri Portnoi and Paul Wooten, O'Melveny & Myers LLP, appeared on behalf of United. Pat Lundvall, Amanda M. Perach and Kristen T. Gallagher, McDonald Carano LLP, and Justin Fineberg, Rachel LeBlanc, Lash & Goldberg LLP appeared on behalf of 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").

The Court, having considered United's Motion and reply, the Health Care Providers' opposition, and the argument of counsel at the hearing on this matter and good cause appearing, finds and orders as follows:

1. 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). "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

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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.").

2. 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. As a result, United's Motion for Reconsideration does not meet the standard for reconsideration.

3. As considered in connection with United's underlying motion, the Court finds that the cost of providing emergency medicine services is not relevant based upon the damages and the way they have been presented by the Health Care Providers and the Health Care Providers' profitability is unrelated to United's reimbursement rates at issue in this litigation.

Accordingly,

ORDER

IT IS HEREBY ORDERED that United's Motion for Reconsideration is DENIED.

Dated this 26th day of April, 2021

April 26, 2021

Nancy L Allf

NB

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Nancy Allf
District Court Judge

Submitted by:

McDONALD CARANO LLP

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Justin C. Fineberg
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Approved as to form and content:

WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC

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Attorneys for Defendants

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Marianne Carter

From: Llewellyn, Brittany M. <BLlewellyn@wwhgd.com>
Sent: Monday, April 26, 2021 9:48 AM
To: Kristen T. Gallagher; Balkenbush, Colby; Roberts, Lee; Portnoi, Dimitri D.; Fedder, Natasha S. (nfedder@omm.com); Blalack II, K. Lee
Cc: Pat Lundvall; Amanda Perach; Justin Fineberg; Rachel LeBlanc; Matt Lavin
Subject: RE: Fremont Emergency Services (Mandavia) Ltd. v. UnitedHealth Group, Inc. - proposed orders

Thank you. You may affix my electronic signature.

From: Kristen T. Gallagher [mailto:kgallagher@mcdonaldcarano.com]
Sent: Saturday, April 24, 2021 1:20 PM
To: Llewellyn, Brittany M.; Balkenbush, Colby; Roberts, Lee; Portnoi, Dimitri D.; Fedder, Natasha S. (nfedder@omm.com); Blalack II, K. Lee
Cc: Pat Lundvall; Amanda Perach; Justin Fineberg; Rachel LeBlanc; Matt Lavin
Subject: RE: Fremont Emergency Services (Mandavia) Ltd. v. UnitedHealth Group, Inc. - proposed orders

This Message originated outside your organization.

Brittany,

Your proposed revisions to the motion for reconsideration are incorporated in the attached. Please provide authority to insert your electronic signature for submission to the Court.

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Thank you,
Kristy

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Kristen T. Gallagher | Partner

McDONALD CARANO

P: 702.873.4100 | **E:** kgallagher@mcdonaldcarano.com

From: Llewellyn, Brittany M. <BLlewellyn@wwhgd.com>
Sent: Wednesday, April 21, 2021 5:58 PM
To: Kristen T. Gallagher <kgallagher@mcdonaldcarano.com>; Balkenbush, Colby <CBalkenbush@wwhgd.com>; Roberts, Lee <LRoberts@wwhgd.com>; Portnoi, Dimitri D. <dportnoi@omm.com>; Fedder, Natasha S. (nfedder@omm.com) <nfedder@omm.com>; Blalack II, K. Lee <lblalack@omm.com>
Cc: Pat Lundvall <plundvall@mcdonaldcarano.com>; Amanda Perach <aperach@mcdonaldcarano.com>; Justin Fineberg <jfineberg@lashgoldberg.com>; Rachel LeBlanc <RLeBlanc@lashgoldberg.com>; Matt Lavin <MLavin@Napolilaw.com>
Subject: RE: Fremont Emergency Services (Mandavia) Ltd. v. UnitedHealth Group, Inc. - proposed orders

Good Evening Kristy,

I have attached United's redlines to the two proposed orders for your review.

Thank you,

Brittany

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From: Kristen T. Gallagher [mailto:kgallagher@mcdonaldcarano.com]
Sent: Monday, April 19, 2021 5:55 PM
To: Balkenbush, Colby; Roberts, Lee; Llewellyn, Brittany M.; Portnoi, Dimitri D.; Fedder, Natasha S. (nfedder@omm.com); Blalack II, K. Lee
Cc: Pat Lundvall; Amanda Perach; Justin Fineberg; Rachel LeBlanc; Matt Lavin
Subject: Fremont Emergency Services (Mandavia) Ltd. v. UnitedHealth Group, Inc. - proposed orders

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Please see the attached proposed orders denying United's motion for reconsideration and granting the Health Care Providers' motion for order to show cause. Please provide any proposed edits by Wednesday, otherwise we will plan to submit to the Court Thursday morning.

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Thank you,
Kristy

Kristen T. Gallagher | Partner

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

AUTOMATED CERTIFICATE OF SERVICE

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

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Electronically Filed
4/28/2021 2:22 PM
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CLERK OF THE COURT

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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

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

DEFENDANTS' 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 ON ORDER SHORTENING TIME

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

Defendants.

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 object to Report and Recommendation No. 3 ("Recommendation") submitted by Special Master Hon. David T. Wall (Ret.) (the "Special Master") on April 14, 2021.

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This objection is supported by the accompanying Memorandum of Points and Authorities, all pleadings and filings of record, and any oral argument the Court may allow.

Dated this 28th day of April, 2021.

/s/ Brittany M. Llewellyn

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On April 14, 2021, the Special Master submitted a Recommendation to the Court, proposing that United's Motion to Compel Responses to its Second Set of Requests for Production ("Requests") be denied in full, based on a fundamental misinterpretation of the Court's February 4, 2021 Order ("Actual Costs Order") which in no way bars discovery on the At-Issue Requests.[1] This Recommendation, which cites to Report and Recommendation #2 as dispositive authority, and which concludes with a recommendation addressing an entirely different motion,[2] summarily denies all of United's requests for relevant and critical discovery. This discovery seeks documents bearing on whether Plaintiffs received a "reasonable" reimbursement rate from United, which the Court has declared to be the central issue in this case. This Court should decline to adopt the Special Master's Recommendation as to all At-Issue Requests and compel Plaintiffs to respond to them in full so that United can defend itself in this action and prove that its reimbursement rates are reasonable.

In adopting Plaintiffs' framing of the At-Issue Requests, the Special Master recognizes that before the Court are "RFPs regarding expected reimbursement rates" and "collections," which are key topics in this case. Indeed, the thrust of Plaintiffs' First Amended Complaint is that Plaintiffs did not *collect* what they purportedly should have based on *reasonable* or *expected reimbursement rates*. Specifically, Plaintiffs assert that United "must reimburse [Plaintiffs] at a *reasonable rate* or the *usual and customary rate* for the services they provide." *See, e.g.*, First Amended Complaint ¶ 21 (emphasis added). Yet, the Special Master recommends that this Court deny discovery on the At-Issue Requests designed to get at just that—"reasonableness"—

[1] The At-Issue Requests from United's Second Set of Requests for Production are: Request Nos. 51, 56, 57, 98, 107, 109, 118, 119, 122, 123, 128, and 129.

[2] In the Recommendation's final paragraph, the Special Master concludes: "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." Apr. 14, 2021 Report and Recommendation #3 Regarding Defendants' Motion to Compel Responses to Defendants' Second Set of Requests for Production on Order Shortening Time ¶ 7 (emphasis added). The Special Master also erred in noting that 10 Requests are at-issue, *see id.* at ¶ 6, when there are 12.

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based on Plaintiffs' unsupported and impermissibly overbroad reading of the Court's February 4, 2021 Actual Costs Order. As United has reiterated and demonstrated, this Motion does not seek to compel discovery on actual costs or any other topic covered by the Court's February 4, 2021 Actual Costs Order.[3] Mot at 8. Here, United seeks relevant discovery on: (1) what amounts Plaintiffs have actually billed, regardless of costs, (2) what amounts Plaintiffs have accepted or collected from other payors for similar services, (3) complaints Plaintiffs received about the amounts they billed, and (4) what amounts Plaintiffs' own contracted physicians consider to be fair. All of this is information is probative of whether Plaintiffs received a reasonable rate of reimbursement for the claims in this case.

II. LEGAL STANDARD FOR OBJECTIONS TO A SPECIAL MASTER'S REPORT AND RECOMMENDATION

NRCP 53(f) governs a district court's review of a special master's report and recommendation. Pursuant to that rule, a party may file and serve objections to a recommendation no later than 14 days after being served with it. Here, the Recommendation was served on April 14, 2021, so this Objection is timely.[4]

NRCP 53(f)(2) provides that a district court has three options when reviewing a master's recommendation: (1) adopt, reverse or modify the master's ruling without a hearing, (2) set the objection for a hearing, or (3) remand the matter to the master for reconsideration or further action. When a district court reviews a master's recommendation, the master's findings of facts are reviewed under the "clearly erroneous" standard and conclusions of law are reviewed *de novo*. *Venetian Casino Resort, LLC v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 118 Nev. 124, 132, 41 P.3d 327, 331–32 (2002). Because the Recommendation was based on either the master's legal interpretation of the Court's prior orders or the master's own original

[3] The Order did not directly address any of the At-Issue Requests; it was limited to RFP Nos. 61, 69, and 132 (regarding corporate structure); 95, 108, 133, 134, 142, 144, and 145 (regarding corporate relationship); Nos. 68, 86, 92, 93, and 94 (actual cost and cost-setting documents); and RFP Nos. 126, 137, and 146 (Hospital/Facility contracts and credentials). *See* Feb. 4, 2021 Actual Costs Order at 3.

[4] The Notice of Entry of the Recommendation, docketed after the initial submission of the Recommendation, is dated April 15, 2021.

legal interpretation,[5] United submits that the entire Recommendation should be reviewed *de novo* by this Court.

III. LEGAL ARGUMENT

A. The Court Should Not Adopt the Recommendation on Request No. 51, Seeking Business Reports on Typical and Expected Reimbursement Rates

Without inquiry, and accepting at face value Plaintiffs' say-so that there are no responsive documents, the Special Master recommended that the Court deny as moot United's Motion to Compel responses to Request No. 51, which seeks "all reports from any business consulting company, retained by you, which addresses the typical rates at which you received payment, or should have expected as payment, from any Payer for any of the CPT codes reflected in the Claims from July 1, 2017 to the present." It is difficult to believe that Plaintiffs do not possess a *single* report from any business consulting company reflecting the sought key data underlying this lawsuit—typical or expected rates of reimbursement—from the nearly four-year span that this Request contemplates. In any event, this Court should order Plaintiffs to conduct a more thorough search, or at the very least, to explain what specific searches Plaintiffs have conducted and actions they have undertaken to determine that no responsive documents exist. If Plaintiffs do not explain how they went about searching for these documents, there is no way for the Court to ascertain whether they have, in fact, conducted a reasonable search.[6]

B. The Court Should Not Adopt the Recommendation on Request Nos. 56 and 57, Seeking Complaints from Patients, Administrators, and Employees

On the stated basis of irrelevance, the Special Master recommended that the Court deny United's request to compel responses to Request Nos. 56 and 57, which seek complaints by

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[5] For at least one Request, the Special Master acknowledged that the Court previously "did not rule on the admissibility of [Medicare and Medicaid reimbursement rate] data" and he rendered his independent legal recommendation on the subject. R&R #3 ¶ 6(b).

[6] Neither the Special Master nor Plaintiffs state that the information sought by Request No. 51 is irrelevant, nor could they. Again, in this lawsuit—predicated on the alleged underpayment of benefit claims—documents showing "the typical rates at which [Plaintiffs] received payment, or should have expected as payment" are indisputably relevant under Plaintiffs' own theory of the case. *See* Mot. at 13.

patients and administrators or employees "including but not limited to informal and formal complaints and/or challenges" about amounts charged and/or any patient balance billing for services that Plaintiffs provided. The proffered basis for this recommendation is that "the Court has already determined the relevant inquiry in this action is the proper rate of reimbursement and *not how billed charges are set*." R&R #3 ¶ 6(i) (emphasis added). But Request Nos. 56 and 57 in no way request information on how Plaintiffs set their charges. As United has explained, this discovery—which does not seek information on how charges are established at the *outset* but only complaints about those charges *later on*—is material and essential to United's defense. *See* Mot. at 17. Put differently, here United does not seek discovery on how the sausage was made, but rather whether people complained about its taste and why; information that United is entitled to collect to support its position that "Plaintiffs billed charges are excessive[.]"[7] United expects that responsive documents will reveal complaints showing that Plaintiffs' unilaterally set charges are unreasonable, which will support its contention that Plaintiffs, out-of-network medical service providers, are motivated to inflate charges to then demand collection on them. *See* Mot. at 17.

Further, by granting United's objection on these two Requests, the Court can take a step toward evening the playing field of discovery in this case, a demonstrably uneven one,[8] by allowing United the same discovery that it has allowed Plaintiffs to take. *See* Oct. 27, 2020 Order Granting Plaintiffs' Motion to Compel Defendants to Respond to Request No. 41 (seeking "documents regarding *challenges* from other out-of-network emergency medicine groups regarding reimbursement rates paid.") (emphasis added). Ruling otherwise would produce an inequitable result and unfairly disadvantage United.

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[7] See Defendants' Answer to Plaintiffs' First Amended Complaint, at 44.

[8] Discovery in this case has been a one-way street: United has produced more than 534,000 documents in this case, while Plaintiffs have produced a mere 20,000 documents, less than four percent of United's production volume.

C. The Court Should Not Adopt the Recommendation on Request No. 98, Seeking Medicare and Medicaid Reimbursement Rate Information

Relying on Plaintiffs' cited authority, the Special Master recommended denying United's Motion to Compel a response to Request No. 98, seeking "[a]ll documents comparing your billed charges for emergency medical services to the reimbursement amounts set by the Centers for Medicare and Medicaid Services [('CMS')] for reimbursement of such services for every year since July 1, 2017." The Special Master so recommends even though this Court affirmatively struck language that this information is irrelevant ***twice*** from one of Plaintiffs' proposed orders, which Plaintiffs readily concede.[9] *See* Reply Exhibit 1, Nov. 9, 2020 Order Setting Production and Response Schedule at 2:28–3:2, 4:13–14. The Special Master further acknowledges that the Court "did not rule on the admissibility of [Medicare and Medicaid reimbursement rate] data," thereby indicating that Plaintiffs' objection based on the February 4, 2021 Actual Costs Order was improper, because that Order did not rule on—much less foreclose—this discovery. R&R #3 ¶ 6(b).

Without addressing United's arguments on Plaintiffs' two cited cases, one of which is from Florida, the Recommendation states that both are "instructive" on "the lack of relevance of non-commercial payors such as Medicare and Medicaid to the reimbursement rate issues[.]" *Id.* But as United has explained, *Gulf-to-Bay* and *Stinnett* are wholly inapposite. Reply at 5. Those courts presumed that a fair or reasonable rate of reimbursement reflected the *usual or customary* rates in the commercial marketplace, not the *reasonable* rates, which are at issue here based on Plaintiffs' own complaint. *Id.*; *see also id.* at 4 (identifying references to Plaintiffs' request for "reasonable value" or "reasonable payment" in Plaintiffs' First Amended Complaint). This case is also distinguishable from Plaintiffs' cited cases because here, reams of Medicare and Medicaid data have already been produced. Further, in *Gulf-to-Bay*, the court's ruling on the relevance of Medicare and Medicaid data followed an interpretation of Florida law that has no application here. *See* Plaintiffs' Opp. at Ex. 2 at 5–6; *see also* Reply at

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[9] *See* Plaintiffs' Opp. at 7, n.4 ("The Court did strike language from a proposed order about the relevancy of such [Medicare and Medicaid reimbursement] data.")

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5. Thus, Plaintiffs have fallen far short of their burden of proving that the amount they accept for Medicare/Medicare services is irrelevant.

Even more, as United has shown, Plaintiffs *themselves* admit the relevance of the Medicare/Medicaid comparison information requested by Request No. 98. *See* Mot. at 13–14 & Exs. 10 & 11 (reflecting Plaintiffs' own documents expressing reimbursement rates as percentages of Medicare/Medicaid reimbursement). Specifically, Plaintiffs do not dispute that all offers for reimbursement rates in the negotiations underlying this case are expressed as a percentage of CMS, nor do they dispute that Plaintiffs *demanded* that United present its reimbursement rates as a percentage of Medicare. *See* Plaintiffs' Opp. at 6 (dodging the issue and merely stating in response that "United point[ed] to discussions surrounding failed in-network contract discussions"). Plaintiffs, through their own communications, produced documents, and the silence of their opposition brief, concede that Medicare rates are an industry-standard benchmark for evaluating the reasonableness of rates for medical services, which again, is a key issue in this case. Discovery on how Plaintiffs' charges stack up against CMS reimbursement for the same medical services is indisputably and centrally relevant here. *See* Mot. at 13.

D. The Court Should Not Adopt the Recommendation on Request No. 107, Seeking Documents from Vendors Related to Claim Submission, Reimbursement, and Collections

Citing to Recommendation #2 as authority, the Special Master recommends denying United's Motion to Compel a response to Request No. 107, which seeks "documents, including but not limited to contracts, showing services which any vendors provided you related to . . . submitting claims, reimbursement, [and] collections."[10] Specifically, the

[10] In their opposition brief, Plaintiffs make much of the text related to "billing" and "determination of the value of services" in this Request by bolding it to mislead the Court, but as Plaintiffs well know, that text was specifically omitted from United's Motion because it does ***not*** seek to compel further responses related to how billed charges were set.

Recommendation asserts that this discovery "*ostensibly relates to* either TeamHealth and/or Collect Rx, which has already been addressed in Report and Recommendation #2." R&R #3 ¶ 6(c) (emphasis added). If all information that "ostensibly relates to" TeamHealth is off limits, this case cannot proceed, as all three Plaintiffs are TeamHealth-affiliated and this case has the private equity-backed holding company's fingerprints all over it.

Putting that aside, this Court should reject the overbroad interpretation of the Court's February 4, 2021 Actual Costs Order. Specifically, the Recommendation asserts that "[c]ollection and balance billing related documents . . . which relate to cost" were found "not discoverable" by the February 4, 2021 Actual Costs Order. Mar. 29, 2021 R&R #2 ¶ 10(b). But that Order says no such thing. As a preliminary matter, neither "collection" nor "balance billing" appear anywhere in the Order. And as United has reiterated, the February 4, 2021 Actual Costs Order did not broadly bar discovery on any topic "related to" Plaintiffs' charges. *See* Mot. at 8. Instead, the Court carved out three, and only three, categories of non-discoverable documents—those pertaining to (1) corporate structure and relationship; (2) actual costs and how costs were set, and (3) Hospital/Facility contracts and credentials—nothing more. Indeed, most of the evidence in this case necessarily "relates to" charges in some form or fashion. This Court should not adopt this interpretation of the Actual Costs Order, as it far exceeds the actual scope of the Order, and improperly denies access to discoverable and material information related to services that Plaintiffs received from vendors on claim submission, reimbursement, and collections.

Perhaps most jarring is the finding that the Court has precluded discovery on "collection." Fundamentally, this case is about *collection*, in particular, this case arises from Plaintiffs' complaint that they did not *collect* all that they wanted to from their unilaterally set billed charges. Collections, far from irrelevant, are central to this dispute. Cutting off United's ability to access relevant, proportionate discovery on the basis that it "relates to" charges or collection severely impedes United's ability to defend itself in this case.

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E. The Court Should Not Adopt the Recommendation on Request No. 109, Seeking Contracts/Agreements with Reimbursement Claims Specialists

Simply stating that this information "has already been determined by the Court to be irrelevant," R&R #3 ¶ 6(d), the Recommendation is that the Court deny United's Motion to Compel Request No. 109, which seeks "contracts and/or agreements between you and any reimbursement claims specialists or other business entity that were in force anytime form July 1, 2017 to the present which relate to: a) Reimbursement for emergency medical claims . . .; c) The Claims in dispute in this lawsuit; and d) Defendants."[11] As United has articulated, the sought vendor agreements are well within the bounds of relevance because United has reason to believe that this discovery will show Plaintiffs' use of collection companies to aggressively seek even more reimbursement on claims United has already dutifully paid. This information is relevant—and completely different from the cost-setting discovery contemplated in the February 4, 2021 Actual Costs Order—because Plaintiffs will likely present the final reimbursement rate paid by United, the amount ultimately obtained *after* their hired billing collectors incessantly hounded United, as the amount they were *entitled* to, when in reality that amount reflects a *concession* from United to avoid the balance billing of its members. *See* Mot. at 15.

F. The Court Should Not Adopt the Recommendation on Request Nos. 118 and 119, Seeking Documents from TeamHealth or Vendors on Claim Submission, Reimbursement, and Collections

Asserting that this discovery "has already been determined by the Court and the Special Master to be irrelevant," R&R # 3 ¶ 6(e)–(f), without indicating how or why, the Special Master recommends denying United's Motion to Compel responses to Request Nos. 118 and 119, which seek documents showing services that TeamHealth and a reimbursement claims specialist and/or other business entity provided Plaintiffs on "submitting claims, reimbursement, [and] collections." For the reasons set forth in Sections III(D)–(E) above, the

[11] Again, *see supra* n.10, while Plaintiffs make a show of bolding text related to "pricing" in United's Request Nos. 109, 122, and 123, this text was deliberately omitted from United's Motion because it is *not* seeking to compel further responses related to pricing. *See* Mot. at 12–13.

Court should order Plaintiffs to compel responses to these requests. The scope of discovery is broad, and nothing in the Court's February 4, 2021 Actual Costs Order forecloses this discovery, which is reasonably calculated to lead to relevant information on how TeamHealth and vendors influenced Plaintiffs' claim submission process, reimbursement amounts, and actual collections.

G. The Court Should Not Adopt the Recommendation on Request Nos. 122 and 123, Seeking Communications on Reimbursement, Disputed Claims and United

Again stating only that the discovery "has already been determined by the Court and the Special Master to be irrelevant," R&R #3 ¶ 6(g), the Special Master recommends denying United's Motion to Compel responses to Request Nos. 122 and 123, which seek documents "reflecting communications between you" and either TeamHealth or any business entity "from July 1, 2017 to the present, regarding instructions, directives, or guidance which relate to: a) Reimbursement for emergency medical claims; … c) The Claims in dispute in this lawsuit; and d) Defendants." Communications between Plaintiffs and these entities on reimbursement, disputed claims, and United fall squarely within the ambit of relevance. For example, if Plaintiffs' correspondence with its affiliate TeamHealth—a large for-profit, and private equity-backed company—include discussion of anything that even *could have* influenced the final reimbursement amount received, such as a decision not to appeal, that is material to this case. Neither Plaintiffs nor the Special Master articulate why Plaintiffs' communications on unquestionably relevant topics—reimbursement, disputed claims, and United—is out of bounds here, and accordingly, this discovery should be permitted.

H. The Court Should Not Adopt the Recommendation on Request Nos. 128 and 129, Seeking Documents Showing Whether Plaintiffs' Physicians or Medical Professionals Had Input into the Amount Collected

The Special Master concludes that Request Nos. 128 and 129, which seek documents showing whether *Plaintiffs' own physicians or other medical professionals* that delivered the at-issue services, or their affiliate TeamHealth, had input into the amount that was collected, is

irrelevant "to the issues presented in this 'rate of payment' case." R&R #3 ¶ 6(h). Shockingly, the Recommendation states that "[t]his is particularly true as it relates to *collection*, which has already been determined to be irrelevant." *Id.* (emphasis added). As explained above, *see supra* Section III(D), information on collection is arguably the *most* relevant data in this case, and absolutely nowhere has this Court said it is foreclosed. The Special Master seems to conflate "charges" and "collections," but as United has explained, the two are not the same. *See* Mot. at 16. If physicians, medical professionals, or TeamHealth in any way influenced the amount that Plaintiffs ultimately collected from their billed charges, for example, by discouraging Plaintiffs from seeking additional reimbursement for a particular service, United is entitled to that information to undermine Plaintiffs' case. The February 4, 2021 Actual Costs Order did not consider, and most certainly did not rule on, the involvement of Plaintiffs' *own* doctors in Plaintiffs' ultimate collections for emergency medical services.

I. Plaintiffs Have Not Met Their Burden in Objecting to United's Requests

Finally, Plaintiffs failed to meet their burden to "show[] the disputed discovery is not relevant." *V5 Techs. v. Switch, Ltd.*, 334 F.R.D. 306, 310 (D. Nev. 2019). This heavy burden can be met only by "specifically detail[ing] the reasons why each request is irrelevant or otherwise objectionable." *Oliva v. Cox Commc'ns Las Vegas, Inc.*, 2018 WL 6171780, at *1 (D. Nev. Nov. 26, 2018). Plaintiffs' refusal to respond to the At-Issue Requests here is based on the conclusory assertion that the February 4, 2021 Actual Cost Order's treatment of particular "cost-related" Requests extends to bar discovery on any Requests—even those not addressed in that Order—if they "relate" in any way to Plaintiffs' costs or charges. *See* Mot. at 10. This reflects both a fundamental misinterpretation of the Actual Costs Order and a failure to show how the At-Issue Requests exceed the broad scope of discovery under Nevada law. Accordingly, with nothing more than boilerplate objections, Plaintiffs fail to meet their burden.

IV. RELIEF REQUESTED

For the foregoing reasons, United objects to the Recommendation and respectfully requests that the Court grant United's Motion to Compel Plaintiffs' Responses to Defendants' Second Set of Requests for Production in its entirety by ordering Plaintiffs to respond fully to

Request Nos. 51, 56, 57, 98, 107, 109, 118, 119, 122, 123, 128, and 129.

Dated this 28th day of April, 2021.

/s/ Brittany M. Llewellyn

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of April, 2021, a true and correct copy of the foregoing **DEFENDANTS' 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 ON ORDER SHORTENING TIME** 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., a Nevada professional corporation; TEAM PHYSICIANS OF NEVADA-MANDAVIA, P.C., a Nevada professional corporation; CRUM, STEFANKO AND JONES, LTD. dba RUBY CREST EMERGENCY MEDICINE, a Nevada professional corporation,

Plaintiffs,

vs.

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

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

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

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

Defendants.

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 file this Errata to their Objections to the Special Master's Report and Recommendation No. 3. Defendants submit this Errata to the Court to correct a misstatement of fact on page seven (7), footnote eight (8) of their Objections. Defendants stated that:

> Discovery in this case has been a one-way street: United has produced more than 534,000 documents in this case, while Plaintiffs have produced a mere 20,000 documents, less than four percent of United's production volume.

Defendants submit this Errata to correct the record to reflect that the footnote was inaccurate, and should have stated the following:

> Discovery in this case has been a one-way street: United has produced more than 534,000 pages of documents in this case, while Plaintiffs have produced less than 10,000 pages, less than two percent of United's production volume.

Dated this 3rd day of May, 2021.

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I hereby certify that on the 3rd day of May, 2021, a true and correct copy of the foregoing **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** 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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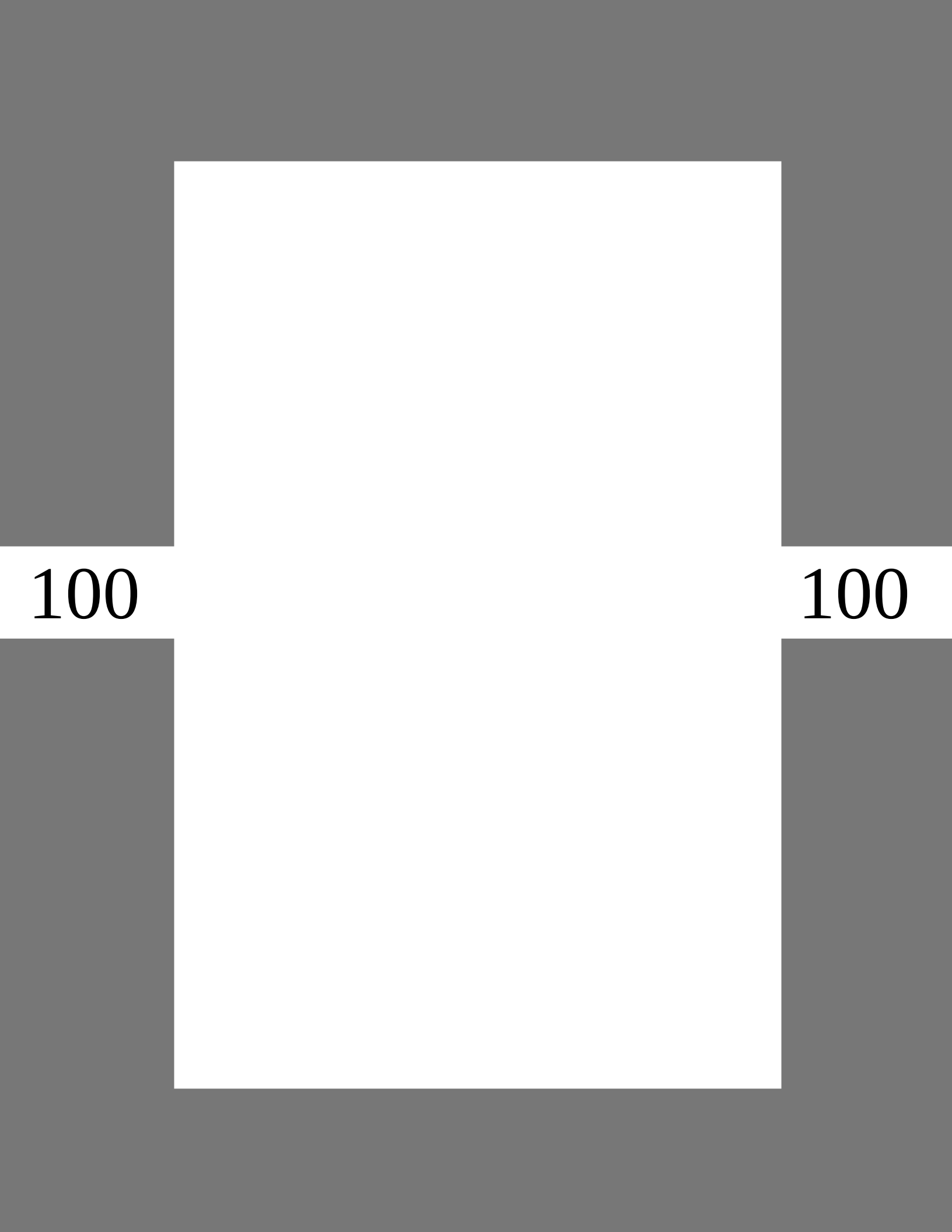
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DISTRICT COURT

CLARK COUNTY, NEVADA

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Plaintiffs,

vs.

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

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

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

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

Defendants.

Defendants UnitedHealth Group, Inc., UnitedHealthcare Insurance Company ("UHIC"), United HealthCare Services, Inc. ("UHS"), UMR, Inc. ("UMR"), Oxford Health Plans LLC, (incorrectly named as Oxford Health Plans, Inc.), Sierra Health and Life Insurance Co., Inc. ("SHL"), Sierra Health-Care Options, Inc. ("SHO"), and Health Plan of Nevada, Inc. ("HPN") (collectively "Defendants"), by and through their attorneys of the law firms of Weinberg Wheeler Hudgins Gunn & Dial, LLC and O'Melveny & Myers LLP, hereby lodge the following 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 (the "Proposed Order").

Plaintiffs submitted their draft Proposed Order to Defendants for review on April 19, 2021. On April 21, 2021, Defendants submitted proposed redline revisions to Plaintiffs, to strike findings of facts and orders of the Court that were not specifically addressed or ruled upon and to correct Plaintiffs' misinterpretation of the Court's Order. *See* Defendants' redlines to Proposed Order, **Exhibit 1**. Plaintiffs responded on April 27, 2021, stating that the only revision they would make is striking the following revision to paragraph 37:

> 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 sanctions and relief to the Health Care Providers.

Because this revision did not correct the misstatements, misinterpretations, or extraneous information present in Plaintiffs' Proposed Order, Defendants could not agree to the final form and content of the Proposed Order, as it still includes inappropriate and irrelevant findings. The Proposed Order was submitted via email to the Court on April 29, 2021.

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OBJECTIONS

Defendants set forth herein their objections to Plaintiffs' Proposed Order, which includes findings of facts and conclusions of law that were not addressed by the Court and far exceed the scope of what was at issue during the hearing of April 9, 2021. Plaintiffs' Motions concerned the Defendants' responses to specific Requests for Production ("RFP"), specifically Plaintiffs' RFP Nos. 2, 3, 6, 7, 9, 10, 11, 12, 13, 16, 18, 21, 27, 28, 30, 31, 32, and 34 as well as Interrogatory Nos. 2, 3, and 10. Plaintiffs' Proposed Order is fifteen (15) pages long, but, like Plaintiffs' Motions, does not contain the specific text of the RFPs at issue. Rather, Plaintiffs provided inaccurate descriptions and extraneous information beyond the scope of their Motion.

Defendants submit that any of Plaintiffs' inclusions that inaccurately represent the issues involved or fall outside the scope of what was addressed in the briefing at the time of the hearing should be stricken, as it would be prejudicial to include such extraneous findings of fact and conclusions of law. Defendants' specific objections to Plaintiffs' proposed order are as follows:

1. Defendants object to the inclusion of **paragraph 7** of the Proposed Order, which is comprised of out-of-context quotations from previous orders on issues unrelated to those in the present motion, such as the Order Denying Email Protocol and the Order Granting Production of At Issue Claims Files. These were not mentioned in Plaintiffs' Motion, which specifically referenced the records sought in "At Issue Claims File" as not being important enough to count among Defendants' document production. *See* Mot. at 2. Because these quotations are irrelevant to the Court's findings regarding the particular at-issue discovery requests, they should be stricken from the order.

2. Defendants object to Plaintiffs' assertions in **paragraph 9** regarding United's proposal to designate witnesses to describe how claims are processed on the various claims platforms used by walking Plaintiffs through 10 exemplar claims of their choosing. Plaintiffs contend that "the Court did not adopt United's proposal because it was an attempt to limit discovery." However, Defendants made this offer as an option to Plaintiffs—the Court did not opine on this offer and Plaintiffs did not respond to the offer at all. Defendants propose that paragraph 9 be augmented by replacing the strike-through text with the bold text as follows:

- United previously offered to provide a witness to testify about methodology limited to a claims set of 10 claims that would operate to satisfy **the Health Care Providers' requests seeking to understand United's claim processing methodologies, offering to fully explain the processing of 10 exemplar claims per claims platform**. ~~United' obligation to produce the claims file required by the September 28, 2020 Order Granting Production of Claims File for At-Issue Claims – a file that United originally represented would contain all information relating to the at-issue claims, including email correspondence. But United's witness proposal was proposal contingent on the Health Care Providers agreeing to limit the deposition to 10 claims per claims platform. The Court did not adopt United's proposal because it was an attempt to limit discovery.~~ **The Health Care Providers declined to respond to United's proposal.**

3. Defendants object to the inclusion of Plaintiffs' discussion about the production of the Daniel Rosenthal custodial documents in **paragraphs 10 and 11** as being extraneous and inaccurate regarding the particular discovery requests at issue. The only at-issue discovery request that references Mr. Rosenthal is RFP No. 13, which states "Produce all Documents and/or Communications concerning, evidencing, or relating to any negotiations or discussions concerning Non-Participating Provider reimbursement rates between You and Fremont, including, without limitation, documents and/or communications relating to the meeting in or around December 2017 between You, including, but not limited to, Dan Rosenthal, John Haben, and Greg Dosedel, and Fremont, where Defendants proposed new benchmark pricing program and new contractual rates." The at-issue discovery requests therefore only mention Mr. Rosenthal in the context of one meeting in December of 2017 and not his full custodial documents. As such, Plaintiffs characterizations in these paragraphs of Defendants' productions being deficient because they did not include the full universe of Mr. Rosenthal's custodial documents are misleading and extraneous with respect to these particular at-issue document requests. Defendants therefore propose incorporating Plaintiffs own words via the exact text of their at-issue discovery requests and either removing paragraphs 10 and 11 or revising them for accuracy as described on Pages 6 and 7 of Exhibit 1.

4. Defendants object to Plaintiffs' characterizations of their discovery requests in **paragraph 17a-g**. Plaintiffs' Order and Motion do not quote the actual text of the discovery requests that they place at issue and instead contain characterizations that are factually inaccurate and misleading regarding the information actually requested. For example, in paragraph 17b,

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Plaintiffs describe RFP Nos. 11, 12, and 21 as requesting "Documents related to United's relationship with MultiPlan, Inc. dba Data iSight and/or other third parties." However, as Defendants have repeatedly reminded Plaintiffs, Data iSight is not and never has been a dba of MultiPlan. Plaintiffs actual discovery requests read as follows:

- RFP 11 states "Produce all Documents and/or Communications between You and any third-party, including but not limited to Data iSight, relating to (a) any claim for payment for medical services rendered by Fremont to any Plan Member, or (b) any medical services rendered by Fremont to any Plan Member,"
- RFP 12 states Produce all Documents identifying and describing all products or services Data iSight, provides to You with respect to Your Health Plans issued in Nevada or any other state, including without limitation repricing services provided to You, whether You adjudicated and paid any Claims in accordance with re-pricing information recommended by Data iSight, and the appeals administration services provided to You"
- RFP 21 states "All Documents relating to Your relationship [to] Data iSight, including any and all agreements between You and Data iSight, and any and all documents that explain the scope and extent of the relationship, Your permitted uses of the data provided by Data iSight, and the services performed by Data iSight."

5. The requests do not mention Data iSight as a dba and the requests ask for far more nuanced information than is articulated in Plaintiffs' descriptions. To avoid any inaccuracy regarding the discovery requests that are at issue in Plaintiffs' Proposed Order, Defendants request that the actual text of Plaintiffs' discovery requests be included and paragraphs 17a-g be revised as indicated on pages 8-11 of Exhibit 1.

6. Defendants object to any reference in **paragraphs 19-24** of the Proposed Order that Defendants admit that they failed to comply with the Court's orders. The Defendants maintained throughout the Motions and the hearing that they were in substantial compliance with the Court's orders, had made fulsome productions, and would be making substantial responsive

productions prior to the document discovery deadline. As such, Defendants request, at minimum, that Paragraphs 21 and 23 be stricken from the Proposed Order.

7. Defendants object to Plaintiffs' characterizations of the Court's ruling on the applicability of the factors for case-terminating sanctions outlined in *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990), in **paragraphs 32-37**. Defendants contend that the Court's analysis of the *Young* factors was actually contrary to Plaintiffs' position in that the Court determined that other sanctions, and not dismissal of Defendants' answer and affirmative defenses, were warranted. As such, Defendants contend that the revisions outlined on pages 14-15 of Exhibit 1 are appropriate.

8. Defendants object to the Plaintiffs' characterization that the Court's Order in **order D**, in which Plaintiffs assert that the Court ordered that "The Health Care Providers shall be awarded their attorneys' fees and costs in connection with the Renewed Motion [for Order to Show Cause Why Defendants Should Not Be Held In Contempt And For Sanctions.]" However, the Court stated at the April 9 hearing that "The next thing is that with regard to the privilege log, should the plaintiff choose to challenge the privilege, that could be considered by separate motion. The plaintiff will be awarded the attorney's fees for the bringing of this motion, as well as any costs." Defendants contend that the Court ordered that Defendants were to pay for any motion challenging the privilege log and *not*, as Plaintiffs assert, Plaintiffs' Renewed Motion for Order to Show Cause Why Defendants Should Not Be Held In Contempt And For Sanctions. The Defendants request that the Proposed Order be revised as indicated on Page 16 of Exhibit 1.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court modify Plaintiffs' Proposed Order consistent with the objections as stated above.

Dated this 5th day of May, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of May, 2021, a true and correct copy of the foregoing **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** 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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EXHIBIT 1

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EXHIBIT 1

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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

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

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

Hearing Date: April 9, 2021
Hearing Time: 1:30 p.m.

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corporation; OXFORD HEALTH PLANS, INC., a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., a Nevada corporation; SIERRA HEALTH-CARE OPTIONS, INC., a Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20,

Defendants.

This matter came before the Court on April 9, 2021 on Plaintiffs Fremont Emergency Services (Mandavia), Ltd. ("Fremont"); Team Physicians of Nevada-Mandavia, P.C. ("Team Physicians"); Crum, Stefanko and Jones, Ltd. dba Ruby Crest Emergency Medicine's ("Ruby Crest" and collectively the "Health Care Providers") Renewed Motion For Order To Show Cause Why Defendants Should Not Be Held In Contempt and For Sanctions ("Renewed Motion") against 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"). Pat Lundvall, Amanda M. Perach and Kristen T. Gallagher, McDonald Carano LLP, and Justin Fineberg, Rachel LeBlanc, Lash & Goldberg LLP appeared on behalf of 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"). D. Lee Roberts, Jr., and Colby L. Balkenbush ~~and Brittany M. Llewellyn~~, Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC, and Dimitri Portnoi and Paul Wooten, O'Melveny & Myers LLP, appeared on behalf of United.

The Court, having considered the Health Care Providers' Renewed Motion, Errata, United's Opposition to the Renewed Motion, and the Health Care Providers' Reply in support of the Renewed Motion, the argument of counsel at the hearing on this matter and the record in

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this matter, makes the following findings of fact, conclusions of law and Order:

FINDINGS OF FACT RELEVANT TO THE COURT'S DECISION

1. Based on earlier Orders of this Court, United was obligated to produce documents and answer interrogatories as set forth in the Court's October 27, 2020 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").

2. The Court overruled all of United's objections to the discovery that is the subject of the October 27 Order Granting Motion to Compel.

3. In a November 9, 2020 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"), the Court set forth deadlines of October 22, October 26, November 6, and November 20 to provide supplemental answers to Health Care Providers' First set of Interrogatories and responses to their First Set of Requests for Production of Documents. ~~United's deadline for compliance with full and complete responses for each of the foregoing identified categories of documents and information subject to the October 27 Order Granting Motion to Compel~~.

4. When United was unable to produce all documents responsive to the Health Care Providers various discovery requests referenced in~~did not comply with~~ the Court's October 27 Order Granting Motion to Compel and others identified herein, the Health Care Providers filed a Countermotion for Order to show cause Why Defendants' Should Not Be Held in Contempt and for Sanctions ("Countermotion"). The Court denied the Countermotion without prejudice, but allowed the Health Care Providers the opportunity to renew the request in the event United did not provide an immediate response to those issues raised in the Countermotion.

5. In response, United made ~~several~~multiple productions of documents and meet-and-confer ~~req~~~~uests~~requests, but ~~When United did not provide an immediate response,~~ the

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Health Care Providers ~~believed~~deemed these insufficient and filed the Renewed Motion on March 8, 2021, ~~providing detailed information regarding~~arguing that United's ~~deficient~~ responses with respect to Request for Production ("RFP") RFP Nos. 5, 6, 7, 9, 10, 11, 12, 13, 15, 16, 18, 21, 27, 28, 30, 31, 32, 34 and Interrogatory Nos. 2, 3 and 10, were deficient and~~as well as~~ seeking relief in connection with United's failure to produce a privilege log. The Health Care Providers sought an order striking United's answer and affirmative defenses.

~~...~~

~~...~~

Procedural History

6. In addition to the October 27 Order Granting Motion to Compel and November 9 Order Setting Production Schedule, the Court has issued the following orders that are relevant to the Renewed Motion:

a. September 28, 2020 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");

b. 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"); and

c. January 20, 2021 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").

~~7. The Court has ordered and commented on United's failure to participate in discovery, attempts to delay discovery or to impede the Health Care Providers' access to relevant discovery on multiple occasions, including but not limited to the following:~~

~~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~~

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negotiations concerning an ESI Protocol. September 28 Order Denying Email Protocol at 6:15-17.

***

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. September 28 Order Denying Email Protocol at ¶ 15.

***

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. September 28 Order Granting Production of At-Issue Claims File at ¶ 18:

***

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 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. November 9, 2020 Order Setting Production Schedule at ¶¶ 1-2.

***

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.

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~~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. January 20 Order on Motion to Clarify/Countermotion at 3:7-10.~~

~~***~~

~~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. February 25, 2021, Hr. Tr. at 35:13-18.~~

~~8.~~7. In the September 28, 2020 Order Denying Email Protocol (at ¶ 6), the Court also found that "United also stated through counsel that it had already provided over 100,000 emails to its counsel for review." United ~~did not~~ produced the emails United's review processes had identified as responsive to the Health Care Providers' requests at the time ~~these previously identified documents~~ prior to the filing of the Renewed Motion ~~and its document production in this regard remains deficient~~.

~~9.~~8. United previously offered to provide a witness to testify about methodology limited to a claims set of 10 claims that would operate to satisfy the Health Care Providers' requests seeking to understand United's claim processing methodologies, offering to fully explain the processing of 10 exemplar claims per claims platform. ~~United' obligation to produce the claims file required by the September 28, 2020 Order Granting Production of Claims File for At-Issue Claims – a file that United originally represented would contain all information relating to the at-issue claims, including email correspondence. But United's witness proposal was proposal contingent on the Health Care Providers agreeing to limit the deposition to 10 claims per claims platform. The Court did not adopt United's proposal because it was an attempt to limit discovery.~~ The Health Care Providers declined to respond to United's proposal.

~~10.~~9. Though Health Care Providers' RFP 13, which was mentioned in the October 27 and November 9 orders, specifically references Daniel Rosenthal in the ~~limited~~ context of a

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December 2017 meeting,[1] United was unable to produce a broader production of Mr. Rosenthal's custodial documents ~~Despite the October 27 and November 9 Orders, United withheld Mr. Rosenthal's custodial documents from production~~ until just prior to his March 23, 2021 deposition, stating ~~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.

~~11.~~10. At the time the Health Care Providers filed the Renewed Motion, United had produced just three emails that identify Mr. Rosenthal as a custodian~~, though United had produced thousands of pages worth of Mr. Rosenthal's custodial documents at the time the Health Care Providers filed their Reply to United's Opposition to the Renewed Motion~~.

~~12.~~11. At a February 25, 2021 hearing, United stated that it was waiting for an ESI protocol to produce documents, despite the September 28 Order Denying Email Protocol (at 6:15-17) that made it clear that United was not permitted to use the ESI protocol to stay its production obligations:

> 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.

[1] Plaintif~~s~~fs' RFP 13 states "Produce all Documents and/or Communications concerning, evidencing, or relating to any negotiations or discussions concerning Non-Participating Provider reimbursement rates between You and Fremont, including, without limitation, documents and/or communications relating to the meeting in or around December 2017 between You, including, but not limited to, Dan Rosenthal, John Haben, and Greg Dosedel, and Fremont, where Defendants proposed new benchmark pricing program and new contractual rates."

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February 25, 2021 Hr. Tr. at 10:9-15.

~~13.~~12. United made a similar statement about its delayed discovery participation 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.

United Violated the Court's Orders Due to its

Incomplete and Deficient Responses to Written Discovery

~~14.~~13. ~~As~~ The Health Care Providers claim that at the time they filed their ~~of the filing of the~~ Renewed Motion, United had produced 97,901 pages of documents, 91,800 are at-issue claims files (which United refers to as the administrative record), leaving approximately 6,101 pages of non-administrative record documents. ~~O~~They further claim that as of those 6,096 pages, at least 2,617 pages are contracts or benefit plan template and ~~s.~~ United produced a total of approximately 3,484 non-administrative, non-contract pages of documents. Though United disputes these numbers~~As stated herein~~, the foregoing does not meet the Orders of this Court.

~~15.~~14. In opposing the Renewed Motion, United represented to the Court that it "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." Opposition at 2:22-25.

~~16.~~15. At the hearing, United further stated that is has provided "fulsome discovery," represented that "with respect to the RFPs, our production is at this time complete" and further stated, "We all know what substantial compliance is. And we know that it is a term of art demonstrating near total compliance." United urged the Court to not levy sanctions based on its representations that it had substantially complied with the September 28, 2020, October 27, 2020, November 9, 2020 and January 20, 2021 Orders.

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~~17.~~16. Based on the Health Care Providers' Renewed Motion, Reply and oral presentation at the April 9, 2021 hearing (each incorporated as if set forth in full herein), the Court finds that United's document production is deficient in connection with the following categories of documents and information identified by the Health Care Providers in the Renewed Motion, summarized as follows:

a. ~~United's shared savings program (RFP Nos. 9, 16) and related financial documents (RFP No. 34):~~ Documents concerning the impact of reimbursement rates from out-of-network providers in Nevada (RFP 34)[2]: There has been ~~no meaningful insuffiicent~~insufficient supplement, which was due October 22, 2020. United ~~has~~ had not, at the time of the filing of the Renewed Motion,~~not~~ produced any agreement with any employer group related to its shared savings program, ~~has~~ had not produced invoices or any documents relating to United's compensation or any other financial information.

b. Documents related to United's agreements, communications, or relationship with ~~MultiPlan, Inc. dba~~ Data iSight and/or other third parties (RFP Nos. 11, 12 and 21)~~.~~[3]: United's deadline to provide full and complete supplemental responses was October 22, 2020, though United contends that Data iSight is not an independent company capable of having agreements or sending communications but rather a proprietary tool of MultiPlan. Opposition at 12:1-13. United has ~~not~~ produced ~~all~~ reporting ~~with~~and communications between

[2] RFP 34 states "Produce any and all Documents and/or Communications regarding the impact, if any, that reimbursement rates paid by You to non-participating providers have had on profits You earned and/or premiums You charged with respect to one or more of Your commercial heath (sic) plans offered in the State of Nevada from 2016 to the present."

[3] RFP 11 states "Produce all Documents and/or Communications between You and any third-party, including but not limited to Data iSight, relating to (a) any claim for payment for medical services rendered by Fremont to any Plan Member, or (b) any medical services rendered by Fremont to any Plan Member,"
RFP 12 states Produce all Documents identifying and describing all products or services Data iSight, provides to You with respect to Your Health Plans issued in Nevada or any other state, including without limitation repricing services provided to You, whether You adjudicated and paid any Claims in accordance with re-pricing information recommended by Data iSight, and the appeals administration services provided to You"
RFP 21 states "All Documents relating to Your relationship [to] Data iSight, including any and all agreements between You and Data iSight, and any and all documents that explain the scope and extent of the relationship, Your permitted uses of the data provided by Data iSight, and the services performed by Data iSight."

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United and~~–~~ MultiPlan ~~and given the nature of the relationship, United has access to information that has not been provided~~regarding the relationship and has produced additional reporting following the filing of the Renewed Motion. United has not produced documents regarding National Care Network LLC, which United contends was fully acquired by MultiPlan in 2011 and thereafter ceased to be an independent entity. *See* Opposition at 12:1-12. ~~United did not produced aggregated national data until March 22, 2021, the date it filed its Opposition to the Renewed Motion. United has redacted information that makes the aggregated data file difficult to use.~~

c. Documents related to United's decision making concerning the payment of the specific at-issue claims (RFP Nos. 6, 7, and 18)[4] and strategy in connection with its out-of-network reimbursement rates ~~and implementation thereof~~ (RFP Nos~~s~~. ~~6, 7, 18,~~ 31, 32)~~.~~[5]: United's deadline to provide full and complete supplemental responses was October 22, 2020~~0~~. United's production is deficient and does not provide documents and information relating to decision made or reimbursement strategy or the methodology. This also applies to Interrogatory Nos. 2, 3, 10 and 12 RFP Nos. 5, 10, and 15.

~~d. 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 was October 22, 20200.~~

[4] RFP 6 states "Produce any and all Documents and/or Communications relating to Your decision to reduce payment for any CLAIM."
RFP 7 states "Produce any and all Documents and/or Communications supporting or relating to Your contention or belief that You are entitled to pay or allow less than Fremont's full billed charges for any of the CLAIMS."
RFP 18 states "All 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."

[5] RFP 31 states "Produce any and all documents and/or Communications regarding Your goals, thoughts, discussions, considerations, and/or strategy regarding reimbursement rates and/or fee schedules for participating Emergency Medicine Groups and/or any hospitals or other providers of Emergency Department Services from January 1, 2015, through the present."
RFP 32 states "Produce any and all Documents and/or Communications regarding Your goals, thoughts, discussions, considerations, and/or strategy regarding reimbursement rates and/or fee schedules for non-participating Emergency Medicine Groups and/or any hospitals or other providers of Emergency Department Services from January 1, 2016, through the present."

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~~United's production is deficient and does not provide documents and information relating to decision made or reimbursement strategy or the methodology. Further, no internal emails have been produced.~~

~~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's deadline to provide full and complete supplemental responses was October 22, 2020. United's production is deficient.~~

~~f.~~d. Documents concerning negotiations between United and the Health Care Providers' representatives (RFP Nos. 13, 27, 28)[6]. United's deadline to provide full and complete supplemental responses was October 26, 2020. ~~This is wholly deficient, especially given United's identification of 100,000 emails it had collected and provided to its counsel for review since at least June 23, 2020. September 28, 2020 Order Denying Email Protocol at ¶ 6~~While United has produced responsive documents, including several productions containing internal emails, prior to the filing of the Renewed Motion, the Court finds that there is additional outstanding information regarding MultiPlan.

~~g.~~e. Documents related to United's communications with other emergency medicine provider groups/hospitals relating to negotiations of reimbursement rates and fee

[6] RFP 13 states "Produce all Documents and/or Communications concerning, evidencing, or relating to any negotiations or discussions concerning Non-Participating Provider reimbursement rates between You and Fremont, including, without limitation, documents and/or communications relating to the meeting in or around December 2017 between You, including, but not limited to, Dan Rosenthal, John Haben, and Greg Dosedel, and Fremont, where Defendants proposed new benchmark pricing program and new contractual rates."
RFP 27 states "Produce any and All Documents and/or Communications concerning, evidencing, or relating to any negotiations or discussions concerning non-participating provider reimbursement rates between the UH Parties and Fremont, including negotiations or discussions leading up to any participation agreements or contracts with Fremont in effect prior to July 1, 2017."
RFP 28 states "Produce any and All Documents and/or Communications concerning, evidencing, or relating to any negotiations or discussions concerning non-participating provider reimbursement rates between the Sierra Affiliates and Fremont, including negotiations or discussions leading up to any participation agreements or contracts with Fremont in effect prior to March 1, 2019."

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schedules for emergency services (RFP No. 30).[7] United's deadline was October 22, 2020; however, United has made an insufficient production with regard to communications with other ER providers, groups, or hospitals, with regard to reimbursement rates and fees.

~~18.~~17. Additionally, to date, United has not produced a privilege log. In its opposition, United stated it has withheld or redacted 500 documents. The Court finds ~~it shocking~~ that United ~~has not produced a privilege log in this action because United~~ should have maintained a privilege log and provided it on a rolling basis.

~~19. The Court does not find United's explanations for its deficient responses and answers set forth in the Opposition and at the hearing on the Renewed Motion have merit, but has considered and relied upon United's representations to the Court in its Opposition and at the hearing regarding its substantial compliance with the Orders of this Court.~~

~~20.~~18. After considering, the Health Care Providers' Renewed Motion, the court finds that United is not in compliance with the Court's September 28, 2020, October 27, 2020, November 9, 2020 and January 20, 2021 Orders because United's productions to date have been deficient and that United's productions are in an unquantifiable state of substantial compliance. ~~has failed to produce and provide critical information and documents compelled by those Orders.~~

~~21. Further, 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.~~

~~22. United also points to the entry of an ESI protocol as justification for its failure to search, collect and produce electronically stored information. However, the Court made it clear that United could not delay production of emails and other documents, including the~~

[7] RFP 30 states "Produce any and all Documents and/or Communications between You and any Emergency Medicine Groups and/or any hospitals or other providers of Emergency Department Services other than Fremont occurring at any point from January 1, 2016, through the present relating to negotiations of any reimbursement rates and/or fee schedules for Emergency Medicine Services and/or Emergency Department Services."

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~~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.~~

~~23. At the April 9, 2021 hearing on the Renewed Motion, United also admitted its lack of compliance with the Court's Orders, stating that it "continued to make further productions, and the discovery period is not over. And the discovery period will end next week, and by that time, there will be further substantial productions."~~

~~24. Also at the April 9, 2021 hearing, the Court asked United to quantify its alleged percentage of its represented substantial compliance with the Court's Orders and its discovery obligations. United did not provide the Court a responsive answer, instead stating "we are doing our absolute best to get there. And my hope is that we will." The Court asked the question again and United still did not answer the Court directly. The Court finds its finds shocking, that two years into this litigation, with four days remaining before the April 15, 2021 document discovery deadline, United cannot quantify its represented substantial compliance.~~

~~25.~~19. The Court finds that United has shown a consistent pattern of practice of delay and obstruction in this case.

~~26.~~20. The Court finds that United's failure to comply with the Orders of this Court has resulted in needless waste of time and resources.

~~27.~~ The Court is also very concerned with the fact that the Health Care Providers have taken depositions without all of the documents being produced.

~~28. …~~

~~…~~

~~29.~~21. 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.

CONCLUSIONS OF LAW

Legal Standard

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~~30.~~22. 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).

~~31.~~23. NRCP 37 provides remedies and sanctions for a party's failure to comply with an order compelling discovery. In relevant part, NRCP 37(b)(1) and (3) provide:

> (1) *For Not Obeying a Discovery Order*. 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.
>
> ***
>
> (3) *Payment of Expenses*. Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

~~32. 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).~~

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~~33.~~24. 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).

~~34. 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 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.").~~

~~35.~~25. Prejudice from the unreasonable delay in failing to comply with a court order will be presumed. *Id*. at 65-66, 227 P.3d at 1048-1049.

~~36. 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.~~

~~37.~~26. In deciding ~~whether dismissal is~~ an appropriate discovery sanction, courts consider, among other things: (1) the degree of willfulness of the offending party, (2) the extent to which the non-offending party would be prejudiced by a lesser sanction, (3) the severity of the sanction of dismissal relative to the severity of the discovery abuse, (4) whether any evidence has been irreparably lost, (5) 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, (6) the policy favoring adjudication on the merits, (7) whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney, and (8) the need to deter both the parties and future litigants from similar abuses. *Young*, 106 Nev. at 93, 787 P.2d at 780.

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United's Conduct is Sanctionable

~~38.~~27. United's ~~repeated and complete disregard for this~~unquantifiable ~~substantial~~ compliance ~~regarding~~with the Court's September 28, October 27, November 9 and January 20 Orders and the rules of discovery in this jurisdiction warrants sanctions and relief to the Health Care Providers.

~~39.~~28. With respect to the first *Young* factor, the Court finds United's conduct to be willful. ~~United has failed to provide any explanation for its refusal to comply with the Court's multiple Orders.~~ In evaluating the degree of United's willfulness, the Court finds that there has been a pattern of noncompliance by United. By omission, ~~there has been an effort by~~ United ~~to~~ has ~~keep~~ prevented the Health Care Providers from discovering information and having access to witnesses. ~~United's willfulness lies with the United defendants and not its attorneys of record.~~

~~40. With respect to the second *Young* factor, prejudice can be presumed from violation of the Court's Orders.~~

~~41.~~29. Based on the information currently known, the Court does not believe there has been any destruction or fabrication of evidence.

~~42. The Court has also considered United's representations to the Court of its substantial compliance to date.~~

~~43.~~30. As a result, the Court will not strike United's answer or affirmative defenses, but will sanction United as set forth below.

Accordingly, good cause appearing, therefor,

ORDER

IT IS HEREBY ORDERED that the Health Care Providers' Renewed Motion is GRANTED as set forth herein.

IT IS FURTHER ORDERED that United shall be sanctioned for its violation of the Orders of this Court as follows:

A. United shall not be allowed to seek additional extensions of any discovery deadline;

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B. In connection with RFP Nos. 5, 6, 7, 9, 10, 11, 12, 13, 15, 16, 18, 21, 27, 28, 30, 31, 32, 34 and Interrogatory Nos. 2, 3 and 10, anything not produced by United by 5:00 p.m. Pacific time on April 15, 2021 will result in a negative inference which may be asked of witnesses at the time of trial or at any hearing and will be included in jury instructions stating that the jury should infer that the information would be harmful to United's position;

C. United's privilege log shall also be produced by 5:00 p.m. Pacific time on April 15, 2021. In the event the Health Care Providers choose to challenge any documents identified as withheld or redacted on the basis of privilege or work product can be done by separate motion. The Health Care Providers shall be awarded the attorney's fees for the bringing of a successful motion, as well as any costs;

~~D. The Health Care Providers shall be awarded their attorneys' fees and costs in connection with the Renewed Motion;~~

~~E.~~D. United shall be sanctioned in the amount of $10,000 to be paid to a Nevada *pro bono* legal services provider of its choice.

~~F.~~E. ~~Because United has not produced documents as set forth herein, after~~After the May 31, 2021 deposition deadline, the Health Care Providers may apply to the Special Master to retake depositions, based on ~~new~~ information produced by United after April 15, 2021, at 5:00 p.m. Pacific time. And if allowed by the Special Master, the ~~expense~~ costs of those depositions, to include travel, will be borne by United.

~~**IT IS FURTHER ORDERED** that, due to United's failure to produce documents as set forth herein, the Health Care Providers may apply to the Special Master to retake depositions after the May 31, 2021 deposition deadline based on any new information provided by United. And if allowed by the Special Master, the expense of those depositions, to include travel, shall be borne by United.~~

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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

BEFORE THE HONORABLE NANCY L. ALLF, DISTRICT COURT JUDGE

WEDNESDAY, MAY 12, 2021

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

Appearing via Videoconference:

For the Plaintiff: KRISTEN T. GALLAGHER, ESQ.

For the Defendant: No appearances

RECORDED BY: BRYNN WHITE, COURT RECORDER

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Las Vegas, Nevada, Wednesday, May 12, 2021

[Case called at 9:39 a.m.]

THE COURT: Fremont versus United. Is there anyone who's appearing? I believe all of the matters that were on calendar today have already been granted. All right --

MS. GALLAGHER: Good morning, Your Honor. Kristen Gallagher on behalf of the Plaintiff healthcare providers --

THE COURT: Thank you.

MS. GALLAGHER: -- Fremont and other entities. Has this been granted, Your Honor was indicating?

THE COURT: All right. So everything then on Fremont versus United is off calendar.

[Hearing concluded at 9:39 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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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

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

NOTICE OF ENTRY OF REPORT AND RECOMMENDATION #6 REGARDING DEFENDANTS' MOTION TO COMPEL FURTHER TESTIMONY FROM DEPONENTS INSTRUCTED NOT TO ANSWER QUESTION

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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.

PLEASE TAKE NOTICE that a Report and Recommendation #6 Regarding Defendants' Motion to Compel Further Testimony From Deponents Instructed Not to Answer Question was entered on May 26, 2021, a copy of which is attached hereto.

DATED this 26th day of May, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on this 26th day of May, 2021, I caused a true and correct copy of the foregoing **NOTICE OF ENTRY OF REPORT AND RECOMMENDATION #6 REGARDING DEFENDANTS' MOTION TO COMPEL FURTHER TESTIMONY FROM DEPONENTS INSTRUCTED NOT TO ANSWER QUESTION** to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

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Judge David Wall, Special Master
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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 #6 REGARDING DEFENDANTS' MOTION TO COMPEL FURTHER TESTIMONY FROM DEPONENTS INSTRUCTED NOT TO ANSWER QUESTION

On May 21, 2021, Defendants filed a Motion to Compel Further Testimony From Deponents Instructed Not to Answer Questions on Order Shortening Time. The Motion specifically addressed the issue to the attention of the Special Master. Plaintiffs filed an Opposition on May 24, 2021.

The matter was addressed during a telephonic hearing on May 25 2021. Participating were the Special Master, Hon. David T. Wall, Ret.; Pat Lundvall, Esq., Kristen T. Gallagher, Esq., Amanda M. Perach, Esq., Rachel H. LeBlanc, Esq. and Matthew Lavin, Esq., appearing for Plaintiffs; Dimitri Portnoi, Esq. and Brittany M. Llewellyn, Esq., appearing for Defendants.

The Special Master, having reviewed the pleadings and papers on file herein and having considered the arguments of counsel during the hearing, and pursuant to NRCP 53(e)(1), hereby sets forth the following Report and Recommendation regarding Defendants' Motion to Compel Further Testimony From Deponents Instructed Not to Answer Questions:

During a status teleconference on April 22, 2021, the Special Master addressed an issue regarding counsel's ability to instruct a deponent not to answer questions on matters already deemed irrelevant in motion practice before the trial court. During that status conference, the Special Master ruled that pursuant to NRCP 30(c)(2), counsel would

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be permitted to instruct a deponent not to answer questions on topics already deemed irrelevant so as "to enforce a limitation ordered by the court." (NRCP 30(c)(2)).[1]

By the instant Motion, Defendants cite to four (4) instances during two depositions where Plaintiffs' counsel instructed the deponent not to answer questions that Defendants allege did not relate to topics deemed irrelevant by the court. As a result, Defendants allege that Plaintiffs are using NRCP 30(c)(2) to create an overbroad interpretation of the relevancy determinations of the trial court and the Special Master in this action. Therefore, Defendants request an Order compelling Plaintiffs to produce for second depositions all witnesses who have been instructed not to answer questions by Plaintiffs' counsel.

It is the determination of the Special Master that none of the instances proffered by Defendants constitute inappropriate instructions from Plaintiffs' counsel to the deponent, given the prior Orders of the trial court and the Reports and Recommendations of the Special Master declaring certain issues irrelevant to these proceedings.[2]

As such, Defendants have failed to establish cause to re-depose these individuals. Additionally, it is the determination of the Special Master that a blanket order directing second depositions all of the witnesses that Plaintiffs' counsel has instructed not to answer a question would be an inappropriate remedy, even if any of the four instances cited by Defendants constituted an erroneous instruction under NRCP 30(c)(2).

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RECOMMENDATION

It is therefore the recommendation of the Special Master that Defendants' Motion to Compel Further Testimony from Deponents Instructed Not to Answer Questions be DENIED as set forth above.

Dated this 26TH day of May, 2021.

Hon. David T. Wall (Ret.)

[1] Since this issue arose during a discussion of pending issues during a status conference, and not as a result of any motion, this ruling was not memorialized in a Report and Recommendation from the Special Master.

[2] The prior Orders of the trial court include the June 2020 Order Denying Defendants' Motion to Dismiss, the October 2020 Order Denying Defendants' Motion to Compel, the February 2021 Order Denying Defendants' Motion to Compel and the April 2021 Order Denying Defendants' Motion for Reconsideration. The prior Reports and Recommendations of the Special Master include Reports and Recommendations #2 (March 29, 2021) and #3 (April 14, 2021). Defendants note that they have objected to Reports and Recommendations #2 and #3, citing to the fact that these have not yet been adopted by the trial court. However, for purposes of the application of NRCP 30(c)(2), the Special Master has incorporated the substance of the rulings within #2 and #3 into limitations ordered by the court to be enforced under NRCP 30(c)(2).

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 May 26, 2021, I served the attached REPORT AND RECOMMENDATION 6 on the parties in the within action by electronic mail at Las Vegas, NEVADA, addressed as follows:

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I declare under penalty of perjury the foregoing to be true and correct. Executed at Las Vegas, NEVADA on May 26, 2021.

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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, MAY 28, 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.

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

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LAS VEGAS, NEVADA, FRIDAY, MAY 28, 2021

[Proceeding commenced at 3:00 p.m.]

THE COURT: It's 3 o'clock. This is to the judge. I'm going to call Fremont versus United.

Before I take appearances, let me tell everyone that having seen the request for additional time that's been filed by the defendant, today is going to only be a scheduling issue. The reason I signed the order shortening time is that I know you guys were in the throes of discovery, and I wanted to make sure that it didn't -- didn't sit over a long weekend.

With that said, let's take appearances first from the plaintiff.

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

MS. LUNDVALL: Good afternoon, Your Honor. This the Pat Lundvall from McDonald Carano 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: Thank you.

And for the defendants, please.

MR. BALKENBUSH: Good afternoon, Your Honor. Colby Balkenbush on behalf of United.

THE COURT: Do we have other appearances for the

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defendant?

MR. BALKENBUSH: I will be the only one appearing today for the defendants, Your Honor.

THE COURT: Very good.

All right. So for the plaintiff, who takes the lead today?

MS. GALLAGHER: Your Honor, Kristen Gallagher does today. Thank you.

THE COURT: Okay. So give me an idea of -- I actually read everything. And give me an overview of what we think is needed and -- and when we can hear this matter.

To let all of you know, I start a bench trial Tuesday morning. And I finished one today at 12:15. So [indiscernible] going to be a little difficult. I'll be in bench trials for the next three weeks.

MS. GALLAGHER: Okay. I can appreciate that, Your Honor. And -- and I do appreciate you and your court staff taking a look at this on the shortened time. We certainly know it's a Friday of the long weekend.

So in terms of, you know, what we -- the relief that we were looking for is, you know, set forth in the motion. And I know it's very dense. And I'm happy to give an overview, but it sounds like you had -- you had an opportunity to read through it. So there are some opening --

THE COURT: There -- I don't really want to deal with the merits today. I want to make sure that both sides have the ability even -- equally to be heard.

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MS. GALLAGHER: Sure, Your Honor. We do have a hearing set on June 2nd, already, with respect to a motion filed by United on an order shortening time. So perhaps --

THE COURT: And let me just get to that screen. What time?

MS. GALLAGHER: I believe it's scheduled at 9 a.m., Your Honor.

THE COURT: You know, Wednesday morning is actually pretty clear. So why don't we move it to 10:00. And I have six things at 9 o'clock. If you are put on at 10:00, then assuming Mr. Balkenbush can -- can work with that, you could have an hour. So that's one option.

How long, do you think, Ms. Gallagher, it's going to take for them to be able to respond?

MS. GALLAGHER: Well, I guess I'll leave that to Mr. Balkenbush, but I would hope -- you know, obviously they filed things on order shortening time, and we respond quickly, you know, in advance, so the Court has that opportunity.

So if they have an opportunity to file something on, you know, Tuesday, with respect to your schedule, hopefully by Wednesday, then that would be -- you know, Your Honor would be able to hear that. But I'll leave that to Mr. Balkenbush.

THE COURT: Okay. Because I also have only one thing Thursday at 10:30 and nothing at 11:00. And then 1:30, I've got pretrial motions in a different case.

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So Mr. Balkenbush.

MR. BALKENBUSH: Thank you, Your Honor. If we could get until next Thursday, if we could move the hearing to next Thursday, I think we would prefer that. You know, our team has been working [indiscernible] getting these depositions done. I mean, I personally have been up until 1:00 or 2 a.m. almost every night this week. I know we've had many -- and yesterday we had six depositions go; today, seven depositions.

So I think Thursday would allow us just to have a breather over the weekend and get some papers together and file our opposition or a response by Wednesday, if Your Honor is amenable to that.

THE COURT: Well, I -- if it's possible, Tuesday, the 1st -- because I assume that your opposition will be as dense as the motion that was filed, and I need time to digest it.

Is there any way you could do it by noon on the 2nd?

MR. BALKENBUSH: We can make that happen, Your Honor.

THE COURT: All right. Good enough.

All right. So opposition, that doesn't really give a chance for the plaintiffs to reply.

And so, Ms. Gallagher, can you live with that?

MS. GALLAGHER: Your Honor, I will make it work.

One point of suggestion, if I could, could we move then what we have on the schedule on Wednesday to the [indiscernible]

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on Thursday?

THE COURT: Sure. And we'll put both things Thursday at 10:30.

Is there any objection to that, Mr. Balkenbush?

MR. BALKENBUSH: No. That would be fine, Your Honor.

THE COURT: Okay. Nicole and Brynn, for the record, the hearing today was a preliminary hearing only. The matter set at 9 o'clock on June 2, will be moved to Thursday, June 3rd, at 10:30. And as -- and this motion will be heard at that time with the opposition due on Wednesday the 2ndnd by noon.

Anything else now to take up?

MS. GALLAGHER: Nothing from the plaintiffs, Your Honor. I appreciate your time today.

THE COURT: And just because I don't have a robe at home, I want you guys to know I'm still at work.

Good enough.

Okay. Anything else?

Then stay safe and have a great weekend. I know you guys are working hard. So just be safe and healthy and have some fun.

MS. GALLAGHER: Thank you.

MR. BALKENBUSH: Thank you, Your Honor. We appreciate the continuance.

[Proceeding concluded at 3:06 p.m.]

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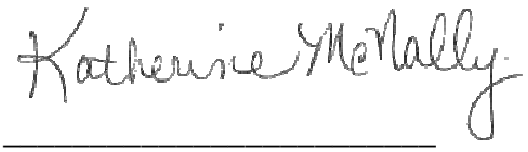
ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



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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

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

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

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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.

PLEASE TAKE NOTICE that a Report and Recommendation #7 Regarding Defendants' Motion to Compel Plaintiffs' Responses to Defendants' Amended Third Set of Requests for Production of Documents was entered on June 3, 2021, a copy of which is attached hereto.

DATED this 3rd day of June, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on this 3rd day of June, 2021, I caused a true and correct copy of the foregoing **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** to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

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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 #7 REGARDING DEFENDANTS' MOTION TO COMPEL PLAINTIFFS' RESPONSES TO DEFENDANTS' AMENDED THIRD SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS**

On May 18, 2021, Defendants filed a Motion to Compel Plaintiffs' Responses to Defendants' Amended Third Set of Requests for Production of Documents on Order Shortening Time. The Motion specifically addressed the issue to the attention of the Special Master. During a status teleconference on May 20, 2021, Plaintiffs were directed to file an Opposition on or before May 24, 2021, Defendants were directed to file any Reply Brief on or before May 26, 2021, and the matter was set for a telephonic hearing on May 27, 2021. Plaintiffs filed a timely Opposition on May 24, 2021 and Defendants filed a timely Reply brief on May 26, 2021.

The matter was addressed during the telephonic hearing on May 27 2021. Participating were the Special Master, Hon. David T. Wall, Ret.; Pat Lundvall, Esq., Kristen T. Gallagher, Esq. and Amanda M. Perach, Esq., appearing for Plaintiffs; Dimitri Portnoi, Esq. appearing for Defendants.

The Special Master, having reviewed the pleadings and papers on file herein and having considered the arguments of counsel during the hearing, and pursuant to NRCP 53(e)(1), hereby sets forth the following Report and Recommendation regarding Defendants' Motion to Compel Plaintiffs' Responses to Defendants' Amended Third Set of Requests for Production of Documents:

FINDINGS OF FACT

1. On or about July 7, 2020, the parties jointly filed a JCCR which provided for forty-five (45) days to respond to written discovery.

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2. On or about August 12, 2020, Defendants served their second set of Requests for Production of Documents (RFPs) requesting, among other things, production of Plaintiffs' "market data."

3. On or about January 6, 2021, Plaintiffs produced the market data, and on or about January 18, 2021, Plaintiffs served their second supplemental responses to Defendants' second set of RFPs, producing the same market data in response to RFPs 54, 55, 87 and 88.[1]

4. On or about March 9, 2021, Defendants served an Amended Third Set of RFPs with three additional RFPs:

   a. RFP 156: Service-by-service level market and reimbursement data related to reimbursement rates received by Plaintiffs for emergency services in the Nevada market from any and all payers, including in-network commercial payers, ou- of-network commercial payers, Medicare Advantage, Managed Medicaid, Traditional Medicare, Traditional Medicaid, self-pay/uninsured, worker's comp, TRICARE, and automobile insurance. For each service, include a separate line with the claim number, date of service, CPT code, modifier, the Federal Tax Identification Number, servicing facility information, servicing location information (including zip code), policy number, group number, a unique identifier for each Payer, the Payer line of business (Commercial, Medicare Advantage, etc.), the number of units, the charge billed, the allowed amount, the payment amount, the out-of-pocket patient responsibility, the amount collected from the patient, an indicator for whether the service was paid under a participating provider network agreement, and an indicator for whether the service was paid under a wrap/rental network agreement.

   b. RFP 157: All documents and information needed to understand any data produced in response to Request No. 156 or any prior Requests for Production including, but not limited to, data dictionaries and legends for any coded fields and detailed descriptions of parameters and filters used to generate data.

   c. RFP 158: All documents reflecting any "charge masters" that were used by you that represent your full billed charges for any of the CPT codes related to the Claims from January 1, 2013 to June 30, 2017.

[1] This market data was submitted *in camera* to the Special Master as Exhibit 6 to the instant Motion.

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5. On March 15, 2021, counsel for Defendants sent an email to counsel for Plaintiffs regarding the Amended Third set of RFPs. In the email, Defendants acknowledged the 45-day time period for responding to RFPs and noted that Plaintiffs' responses to the newest RFPs would become due on April 23, 2021, eight days after the documentary discovery cutoff of April 15, 2021, previously imposed by the Trial Court. Defendants requested that if Plaintiffs intended upon arguing that the RFPs were therefore untimely, to let Defendants know so that expedited relief could be requested before the Special Master.
6. On March 20, 2021, counsel for Plaintiffs responded to Defendants' email, indicating that "[i]n addition to other objections, the [Plaintiffs] intend to object to the timeliness of [Defendants'] third set of RFPs."
7. Defendants did not file the instant Motion to Compel until May 18, 2021.
8. 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.

CONCLUSIONS OF LAW

9. 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.
10. Defendants seek an Order compelling Plaintiffs to respond to the Amended Third Set of RFPs.
11. Plaintiffs argue that the instant RFPs include requests for irrelevant, non-commercial data already determined to be irrelevant to this action in prior Orders of the Trial Court and in Reports and Recommendations of the Special Master.[2] RFPs 156 and 157 in fact contain requests for irrelevant non-commercial data and in-

[2]Plaintiffs specifically reference the Trial Court's November 9, 2020 Order Granting Plaintiff's Motion to Compel and the Special Master's 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 and Report and Recommendation #3 on Defendants' Motion to Compel.

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network reimbursement data, including documents related to Medicare, Medicaid, TRICARE and Worker's Compensation, etc. Defendants do not dispute that some of the topics within RFP 156 have been deemed irrelevant by the Court, but note that other topics have not.

12. To the extent that RFPs 156 and 157 request relevant market data, it is the determination of the Special Master, after an *in camera* review of Exhibits 6, 11 and 13 to Defendants' Motion (comprising the market data already produced by Plaintiffs), and after full consideration of the arguments of counsel regarding the sufficiency of that data, that Plaintiffs have already produced information sufficiently responding to the portions of RFPs 156 and 157 requesting relevant commercial market data.

13. Plaintiffs argue that RFP 158, requesting chargemasters from 2013 to 2017, seeks documents outside of the relevant time period for the claims in the instant action. It is undisputed that Plaintiffs have already produced chargemasters for 2017 to 2019, as well as chargemasters for other related entities, some of which date back to 2013. Defendants argue that the prior chargemasters are relevant to show what Plaintiffs charged for services before being acquired by TeamHealth. It is the determination of the Special Master that the information is not relevant under the guidelines of NRCP 26(b)(1).

14. Plaintiffs argue that the instant RFPs, and the instant Motion to Compel responses thereto, are untimely. It is undisputed that the parties agreed to 45 days to respond to written discovery, which made the responses to the instant RFPs due eight days after the document discovery cutoff date. It is also undisputed that Plaintiffs made known, upon Defendants' inquiry, their intention to object to the timeliness of the RFPs on March 20, 2021, nearly sixty (60) days before Defendants filed the instant Motion.

15. Although the Nevada Rules of Civil Procedure do not specify a time limit for filing a motion to compel, case law evidences a general rule that such motions, absent unusual circumstances, should be filed before the close of discovery. See generally, Gerawan Farming, Inc. v. Rehrig Pacific Co., 2013 WL 492103, *5 (E.D. Cal. Feb. 8, 2013); EEOC v. Pioneer Hotel, Inc., 2014 WL 5045109, *1-2 (D. Nev. Oct. 9, 2014).

16. Although fact discovery has been fervently proceeding in the instant case, Defendants failed to provide justification for the delay in filing the instant Motion to Compel. Defendants received Plaintiffs' market data in mid-January of 2021, and did not seek any meet and confer with Plaintiffs regarding the alleged insufficiency of that production before serving the amended third set of RFPs. Additionally, after recognizing the issue of untimeliness on March 9, 2021, and being notified that Plaintiffs would not waive that issue,

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Defendants sought no relief from the Special Master (as they suggested they would do) for another sixty (60) days.

17. Although the document discovery cutoff date is not a jurisdictional bar to filing a motion to compel, a determination of the untimeliness of such a motion is discretionary, based on a number of factors. See, RKR Retail Holdings, LLC v. Tropicana Las Vegas, Inc., 2017 WL 2908869, *5 (D. Nev. Jul. 6, 2017). The most salient factors include the length of time since the expiration of the deadline, an explanation for the delay, prejudice to the party from whom discovery is sought and disruption of the court's schedule for the case. Here, Defendants failed to establish a sufficient reason for the delay, necessitating consideration of the instant Motion more than forty-five (45) days after the document discovery cutoff date imposed by the Trial Court.

RECOMMENDATION

18. Based on the foregoing, and having considered all of the arguments by both parties, it is the recommendation of the Special Master that Defendants' Motion to Compel Plaintiffs' Responses to Defendants' Amended Third Set of Requests for Production of Documents be DENIED on the substantive and procedural grounds set forth above.

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Dated this 3rd day of June, 2021.

Hon. David T. Wall (Ret.)

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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 June 03, 2021, I served the attached Report and Recommendation #7 Regarding Defendants' Motion to Compel Plaintiffs' Responses to Defendants' Amended Third Set of Requestes for Production of Documents on theparties in the within action by electronic mail at Las Vegas, NEVADA, addressed as follows:

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I declare under penalty of perjury the foregoing to be true and correct. Executed at Las Vegas, NEVADA on June 03, 2021.

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Steven D. Grierson
CLERK OF THE COURT

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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, JUNE 3, 2021

RECORDER'S TRANSCRIPT OF PROCEEDINGS
RE: MOTIONS HEARING

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.
D. LEE ROBERTS, JR., ESQ.
ADAM G. LEVINE, ESQ.
DAN POLSENBERG, ESQ.
ABRAHAM SMITH, ESQ.

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

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LAS VEGAS, NEVADA, THURSDAY, JUNE 3, 2021

[Proceeding commenced at 10:55 a.m.]

THE COURT: The last thing on our calendar this morning is Fremont Emergency versus United Healthcare.

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

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

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

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

THE COURT: Thank you.

And for the defendants, please?

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

THE COURT: Are you the only --

MR. LEVINE: Good morning, Your Honor. Adam Levine, also appearing on behalf of the defendants.

THE COURT: Thank you.

MR. POLSENBERG: Good morning, Your Honor, Dan Polsenberg, and Abe Smith for the defendants.

THE COURT: Thank you.

MR. BALKENBUSH: Good morning, Your Honor. Colby

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Balkenbush, also appearing for the defendants.

THE COURT: Thank you.

Does that exhaust the appearances for the defendants today?

MR. ROBERTS: I believe it does.

MR. LEVINE: I believe so, Your Honor.

THE COURT: Okay. We have a number of things on calendar this morning. I'm going to try to start with the things that we might agree on.

There's an Order Shortening Time for the Association of Counsel under SCR 42.

Will there be an objection?

MS. GALLAGHER: There will not, Your Honor.

THE COURT: Okay. So that can be granted, and the order can be submitted.

We also have a Motion to Supplement the Record.

MR. ROBERTS: Your Honor, this is Lee Roberts.

That is the defendant's motion, and it is opposed. I would suggest that -- that even though both parties entered into argumentative briefing on the relevance of the supplementation, that the motion to simply supplement the record to get what has happened in front of the Court to be fairly noncontroversial. And we would request that the motion to supplement be granted.

The alternative would be to have the Court rule on the existing record and then move for reconsideration based on new

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evidence that was not before the Court in deciding the motions, and we believe this would be much more efficient than doing it that way.

Thank you, Your Honor.

THE COURT: Thank you.

And the opposition, please.

MS. GALLAGHER: Your Honor, we don't disagree on that point.

We did file an opposition with respect to the substance of what's contained in the motion to supplement the record. We understood that today Your Honor would be entertaining whether or not to accept the supplement as part of the overall adjudication of the report and recommendation.

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And we have no objection to that supplement being part, in addition to what the Health Care Providers provided in response to the objection as part of that adjudication, Your Honor.

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THE COURT: Thank you.

And the reply, please.

MR. ROBERTS: No reply, Your Honor. It sounds like we're in agreement.

THE COURT: Okay. So the motion to supplement the record, with regard to objection to Reports and Recommendations 2 and 3 will be granted.

That takes us to the Plaintiff's Motion to Leave to File Opposition Under Seal. And that's with regard to exhibits to the Defendant's Motion for Protective Order.

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MS. GALLAGHER: Your Honor, that is our motion for leave with respect to filing certain documents under seal, pursuant to the terms of the protective order.

In the event any of those particular exhibits or documents are later deemed to be not protected by any future ruling, we obviously seek to have that designated in the Court record [indiscernible]. Your Honor, that is our position with a request to have it filed under seal.

THE COURT: And the opposition, please.

MR. ROBERTS: No opposition from the defendants, Your Honor.

THE COURT: Okay.

The motion will be granted.

So that takes us to the motion -- the Plaintiffs' Motion to Extend the Deposition Discovery Deadlines to Permit Certain Noticed Third-Party Depositions to Proceed.

And I have formed some impressions that I'm willing to -- to give you, unless you would like to just start arguing.

MS. GALLAGHER: No, Your Honor. This is Kristen Gallagher. I appreciate your input and your comments and will do my best to address those. I know that Your Honor spent considerable time prepping for these hearings. So I think I would take your lead, and let you ask me any questions that you would like.

THE COURT: My inclination was to give 30 days to each side, with the discovery to be managed by the Special Master, and

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extend all deadlines equally for 30 days, and direct the parties to come up with a plan to finish the fact witnesses before the expert depositions are required.

But that's, of course -- it's not to cut off your argument.

MS. GALLAGHER: Well, Your Honor, if I may respond just briefly to that, you know, we appreciate the offer to extend all deadlines. If there is room in the schedule to protect the October 4th deadline, that is the desired outcome from the Health Care Providers.

Your Honor, in the opposition, United indicated that it sought to depose just two people outside of the May 31st deadline, and they would have pursued that had they -- had there been different circumstances.

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I should note that they did not ask to meet and confer with the Health Care Providers on that point. And I don't want to guess, but it could very well be because they have a hard stop with respect to the order to show cause sanctioned order, which precluded United from seeking any additional extensions of the discovery deadline.

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You know, I would like to address some of the other issues in the opposition, but I think, with respect to moving the trial deadline, that is an outcome that we would not be agreeable to at this point, Your Honor.

We think that there is an opportunity to run these additional depositions, including defense -- defendants, if they wish to pursue relief with respect to Ms. Harris or Dr. Henner, you know,

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that they could do so within the 30-day timeline.

But with respect to extending scheduling, we don't think it necessary. The reason for that is that United did not intend, obviously, to have any expert consideration with respect to the MultiPlan witness, otherwise they would have sought those depositions prior to the close [indiscernible], and they did name four MultiPlan witnesses.

And so we are of the mindset that these final depositions can be run, as oftentimes they are, without impacting any other deadline. And that would be the relief that we would request.

We would be agreeable to a 30-day extension to allow both sides to complete the identified MultiPlan witnesses, and [indiscernible], but would request that the other deadlines not be extended.

THE COURT: Thank you.

And who -- who will take the lead for the defendants?

MR. LEVINE: Your Honor, this is Adam Levine. I will take the lead for the defendants.

If I may, Your Honor, we would -- you know, we think there are two potentially fair resolutions here. Your Honor has put her finger on one of the two.

You know, the primary resolution that we are looking for, coming in today, was that the deadline that was imposed by the Court, that the plaintiffs strongly urged for over defendants' strong objection because it didn't seem like the timing would work out

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given all that had to be done -- but that that deadline of May 31st be enforced. Okay?

That deadline was set in March of this year. The plaintiffs' first amended complaint alleging RICO violations against United, in connection with an enterprise they allege existed with MultiPlan, was filed in January 2020. Again, if you go back in time, they've had since January 2020 to seek discovery from and take depositions of the MultiPlan witnesses.

In March of 2021, plaintiffs demanded that the document discovery deadline be April 15th, and the deposition -- fact deposition discovery deadline be May 31st. They were unequivocal in that. That was a giant mountain for everyone to climb. Okay?

In that time -- at the same time they were demanding that deadline, they sought an extension of the presumptive 10 deposition limit or an increase to that limit from 10 to 25 and were granted it. Defendants were likewise granted it. At the time, zero depositions had been taken. There was now an opportunity to take 50 depositions between the mid-March date -- March 17th is actually the date on which the discovery -- excuse me -- the case management schedule was set, with a May 31st deadline. Okay?

At great effort, both plaintiffs and defendants lived under those -- you know, those -- those ground rules. They met and conferred. They set depositions. They took an enormous number of depositions, both party and third-party depositions. Okay? Third-party depositions, particularly out-of-state third-party

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depositions take time to set, and the [indiscernible] documents along with those depositions even more time. That was all well known in March when this set -- the schedule was set.

MultiPlan is not a new player here. Okay? They are -- they have been well known.

Despite all of that, and despite all of the meetings the parties had, there was never once any indication from plaintiffs that they're having any difficulty deposing the MultiPlan witnesses. They apparently were, as we see in the record, the nearly thousand-page record that was submitted in connection with this motion on Wednesday, May 26th, two business days before the close of fact deposition discovery. Okay?

The reason plaintiffs -- excuse me -- defendants learned of this issue was they received, on May 11th and on May 12th, Notices for Depositions of MultiPlan witnesses from May 24th -- to be held May 24th through May 28th -- five last days in the period before the discovery deadline.

In response to receiving that notice, I, on behalf of defendants, sent an e-mail to Ms. Gallagher and her colleagues on behalf of plaintiffs, and asked for, among other things, the subpoenas pursuant to which those depositions were going to take place, because the notice just had the notices. It was just a notice to the parties. I didn't hear back from her for five days. Okay? I had to have sent two follow-up emails. This is all in Exhibit 1 of our opposition to their brief -- two follow-up emails.

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And on May 20th, I heard, hey, these depositions may have to go forward in June. We haven't even subpoenaed one of the witnesses that are subject to this notice. And you know, it was prefaced with, As you know. I knew nothing of that. This is the first it was being raised by plaintiffs with us.

They claim that MultiPlan was talking to us about those depositions. MultiPlan is a third-party. We had some communications with MultiPlan, but never, never did defendants agree that any deposition could proceed after the discovery deadline. Never. So the first it's being raised with plaintiff -- by plaintiffs is May 20th, and there was a follow-up [indiscernible], Your Honor has as Exhibit 1, again, to our opposition that lays out what occurred from there.

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Plaintiffs claim that they had valid subpoenas for depositions to take place, of the MultiPlan witnesses, in the last week of May, that MultiPlan was not cooperating in. Okay?

In the thousand-page record that was submitted to Your Honor, which, of course, did not include the e-mail exchange as Exhibit 1 to defendants' opposition, you will not find valid subpoenas for what is the seven depositions they seek after the discovery deadline. They say it's eight -- but one of them went forward. There are only seven. Okay. You won't find it there. They're not there. Okay?

What you will find is only two notices for those seven depositions for the last week of May, two subpoenas. Okay? That

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were not issued on 14 days' notice. Okay? And that's only as to two of the seven. That's it. Okay?

You'll also find subpoenas for some earlier dates, [indiscernible] and I think this is a [indiscernible] example, Exhibit 17 to plaintiffs submissions you'll find a subpoena to Emma Johnson. You look at Exhibit D to Exhibit 17 of their submission, you'll find a subpoena supposedly to Emma Johnson that was served on April 20th on MultiPlan. United defendants, no knowledge of this, until their submission.

April 20th, served on defendants -- excuse me -- MultiPlan for a deposition April 21st. And if you look at Exhibit D to Exhibit 17, you'll see that it actually has the wrong name in the subpoena. Not only is it a one-day notice. It's [indiscernible] the heading of the subpoena is Emma Johnson, but in the subpoena, the deponent is listed as Elizabeth Lord. This is one of the valid subpoenas they say was issued prior to the May dates.

But in any event, no subpoenas for five of the seven were issued for the last weeks of May when they noticed the deposition. And even as to those two, they weren't on 14 days' notice. That's the background here.

At the same time, defendants were working their tails off to get all the depositions done -- third party and party alike. And they got a lot of them done.

Ms. Gallagher points out that two were not completed. We were willing to live with the rules. The rules are that if you don't

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get them done, you don't get them done. We want those two depositions, but May 31st is the deadline. We understand third parties are hard to control, hard to get into court, especially if they're -- to get a deposition up. It can take time, especially if they are out of state. So we're willing to live with that.

But plaintiffs made a calculus. They decided not to raise these issues until very late in the period. They say they knew about them earlier. They have a declaration from Mr. Lavin that says they knew about it as early as May 3rd. You know, it's not a headline to any of us who litigate on a regular basis that it takes time to depose these people, but they knew on May 3rd that these depositions were not going forward.

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We didn't hear about it until May 20th, after they sent notices on May 11th and 12th. They apparently made a calculus that, you know what, we're just going to send these notices. We know we don't have valid subpoenas. We know we don't have an agreement from the third party. And at the last possible moment we'll ask for forgiveness, and we'll go to the Court and hopefully the Court will give it to us.

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Well, in our view, that deadline of May 31st should hold. But if the Court is inclined, and I understand based on the review of the record the Court is, to give an extension of the deadline, defendants cannot be prejudiced by that extension.

Ms. Gallagher says, oh, all of these case management dates that, you know, except for this one, should hold. I mean, that

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would be a -- it's almost nonsensical, frankly.

We have an October 4th trial date. We have dispositive motions due on September 1. If we extended that date by 30 days, dispositive motions would be due almost the same date -- you know, without extending the trial date -- it would be due the same date as the trial date -- or almost the same day as the trial date. And that's just the motion, not to -- not to mention the opposition or the reply.

In terms of expert deadlines, the first expert deadline, expert disclosures, on the current schedule is June 30th. And the schedule is designed so that all fact discovery is complete before expert disclosures go. [Indiscernible] plaintiffs -- they don't seek 30 days by the way. They seek an indefinite extension.

They have no guarantee that they're going to get the documents they seek or the depositions they seek in the next 30 days, not even close to a guarantee. They have a hearing in Texas on June 9th. They say it's June 8th, but it's June 9th -- in their motion, it's June 9th, a hearing in Texas on a motion to compel an enormous number of documents. Okay? And among other documents that they seek, they seek all sorts of data from MultiPlan that will be relevant to expert reports, potentially, very potentially, very likely relevant to expert reports. They seek all MultiPlans -- and this is quotes from the subpoena -- that they have issued to MultiPlan that is subject to a Motion to Compel to be heard by a Texas court on June 9th -- all documents that identify the actual data you utilize MultiPlan to determine the allowed amount on any claim

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by plaintiff to United. Okay?

All documents upon which you, MultiPlan base your determination of the recommended rate of reimbursement for any claim by plaintiffs for payment of services rendered by any United member. And it goes on. That information very well may be relevant, almost surely will be relevant to expert reports.

And they're not going to get that information, if the Court rules on June 9th, it is unlikely they still get that information in the month of June. And that is just the documents, not to mention the deposition.

So, Your Honor, to say that the idea that this is going to get done in 30 days, I think is a long shot. Nevertheless, if Your Honor is inclined to give them more time, which we don't think they've showed good cause for, but respect your view of that, of course, we would, you know, ask for two things -- one of which you mentioned -- I think both of which you mentioned, but which Ms. Gallagher apparently opposes -- one is that defendants be given an equal opportunity to take depositions [indiscernible] in those 30 days, and that the discovery schedule -- excuse me -- the case management schedule and the trial date, necessarily, be moved a commensurate amount, so that defendants have a fair chance to defend this case, to -- you know, to -- to draft expert reports, submit expert reports, take expert discovery, then file dispositive motions, and then have, if necessary, a trial.

Thank you, Your Honor.

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THE COURT: Thank you, Mr. Levine.

Ms. Gallagher in reply. And please speak up.

MS. GALLAGHER: And Your Honor, thank you so much.

THE COURT: I really need more volume.

MS. GALLAGHER: I think I'm at my max volume, Your Honor. Can you hear me now?

THE COURT: I can. Thank you.

MS. GALLAGHER: Thank you, Your Honor.

So it seems like United takes issue with not receiving affidavits of service. But United was served with what is typical in this jurisdiction, which is Notices of Intent to Serve Subpoenas, Notices of Deposition. And we also broached the issue during early meet and confers in March and asked United if they wanted to be involved in, you know, the interim scheduling with MultiPlan. And the consensus was, no, just tell us when the depositions will go forward.

Today it seems like the argument is a little bit different from United.

But the Health Care Providers, we appear today, Your Honor, without a sanctions order that prevented us from seeking an extension. We've demonstrated a good faith history in front of Your Honor with respect to discovery disputes. We've only come to the Court when we've needed it. We've approached our discovery obligations, as Your Honor is aware, with the reasonableness that is required in following the rules that are both local and Nevada-based

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rules, which requires meet and confer efforts.

I don't need to go back and -- and remind the Court of the history that we have undertaken, because we take those obligations seriously to try and resolve issues without having to come before the Court.

In connection with the MultiPlan witnesses' scheduling, we have with been working with MultiPlan's counsel since April 1st, Your Honor. We -- I think maybe the mistake we made is being naive in that process and hoping that others would participate in a meet and confer with the same rigor that we do and trying to work through those issues before having to come to the Court.

We anticipated that that procedure would yield depositions before May 31st. In fact, we've presented the Court with documentation to suggest, to show that MultiPlan agreed to accept service of subpoenas that were issued. Counsel agreed to produce these witnesses in May. And we had dates, Your Honor. Counsel -- Mr. Lavin was [indiscernible] with MultiPlan's counsel. They were discussing hotel accommodations. They were, you know, talking about in-person versus remote and appeared to be moving forward in-person.

Ms. Johnson did go forward in May. So Mr. Levine made [indiscernible] that they didn't know about Ms. Johnson, however, they did have counsel there. So there was obviously communication that allowed them to participate in this process and cross-examine if they chose to.

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So unfortunately, this process did not play out as they anticipated. And MultiPlan's counsel after informing Mr. Lavin of the conversation with United's counsel, then all of a sudden there was sort of a line of demarcation about cooperation from May that turned into cooperation for June.

And so what we noticed in the opposition is that United did not squarely refuse participation in a phone call that yielded delay. And so we are left with the circumstances that are, which are we are seeking additional MultiPlan members' deposition. We don't think that we should be penalized for that attempt to participate in this meet-and-confer process that by all accounts is going to yield, you know, agreement by MultiPlan to produce these witnesses in May -- or in June, rather.

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However, Your Honor, I do want to make it clear that if the result is going to be moving the trial, the Health Care Providers will have to withdraw the request in the entirety, so as to protect the October 4th firm deadline.

One of the other points that I wanted to make is United indicated that it feels prejudiced by not being able to take the two depositions. Again, we don't have an opposition to that. We think that that can proceed. Obviously, if it was going to proceed, they were going to work on expert reports, without having that testimony, they were going to have experts without MultiPlan.

But I think to suggest that additional depositions are going to impact reimbursement rate data with respect to United's

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defenses -- I don't necessarily agree that it bears out.

However, Your Honor, if you are inclined to go with your tentative ruling and move all dates by 30 days, I do want to let you know that the Health Care Providers will withdraw the request.

THE COURT: Thank you.

This is the Plaintiff's Motion to Extent the Discovery -- Deposition Discovery Deadlines, to permit certain noticed third-party depositions to proceed. I'm going to pretty much adopt my tentative order with some directions.

When we set the schedule for discovery depositions, I knew it was a fevered pace. And I intended to keep everyone's feet to the fire. But we always knew we had an extra 30 days built in, in case the parties needed it. And I do find that they -- both sides do.

So they -- at this point I'll extend that deadline 30 days equally for both sides. The pace of the depositions will be managed by the Special Master. We can extend all the deadlines for 30 days, and you'll be tasked with finding a way to finish the fact witnesses before you get to the experts.

I am concerned about the dispositive motion deadline on September 1, so I will require that when dispositive motions are due that you cooperate with each other to set special settings and agreed -- and an agreed order for the argument of those motions.

At this point, I am going to decline to move the trial, but that is without prejudice. If it appears later that after you guys do finish your depositions, and you get to the next step, if both sides

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feel burdened by the trial date, I'll be happy to revisit that issue at a later time.

Any questions? Any comments?

MR. LEVINE: Your Honor, one point -- yeah. One point of clarification, Your Honor.

Are you saying that the expert discovery -- excuse me -- the expert disclosure deadline of June 30th is continued 30 days as well?

THE COURT: Yes.

MR. LEVINE: Okay. And -- and just to be clear, Your Honor, what -- if all of the deadlines pretrial are extended 30-day, but the trial date stays the same?

THE COURT: Stays the same. And I will compress the argument of dispositive motions into special settings. I'll consider an order shortening time so that they can be done before -- so you can still prepare for trial.

MR. LEVINE: Okay. But right now, Your Honor, just to be clear, the dispositive motion deadline that will be extended 30 days is September 1. So the dispositive motion deadline will be October 1 --

THE COURT: Oh, yeah.

MR. LEVINE: -- as I understand your order.

THE COURT: Ha, ha, ha.

MR. LEVINE: And the trial date will be October 4.

THE COURT: You know, oh, yes.

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MR. LEVINE: Is that correct?

THE COURT: And we have been working on this schedule for how long? Yeah. Yeah. You're right. And I have a --

MS. LUNDVALL: Your Honor --

THE COURT: Who --

MS. LUNDVALL: Your Honor, this is Pat Lundvall, on behalf of the Health Care Providers.

What can be accomplished with the Court's ruling -- and you indicated with the flex that we had built into the calendar that if there's extension of pretrial activities, it would be an extension of fact discovery for 30 days, the extension of expert disclosure for 30 days, the extension of rebuttal of expert disclosure for 30 days, and then the depositions of the experts. And it should not impact any of the other pretrial deadlines, so as to be able to ensure then that we are able to maintain that trial date.

And just to underscore the point is that why that September 1 should still be the date for purposes of dispositive motions is dispositive motions are based upon what should be undisputed facts. Experts don't express opinions. They don't create facts. They don't create a factual basis. And so any dispositive motion would be required -- would be based upon what the parties have gathered during the course of fact discovery. And that's where your flex comes into play, and it accomplishes the Court's goal.

THE COURT: Mr. Levine, I'm inclined to agree with Ms. Lundvall, but I want to give you a chance to respond.

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MR. LEVINE: Your Honor -- and thank you.

I could not disagree with her more. Dispositive -- the plaintiffs have said, I think Your Honor has said, that this case is really just a rate case. Okay? Experts are going to opine on the rates. And the -- you know, while facts are what govern in a summary judgment motion, summary judgment motions routinely cite to expert reports and opinions and are -- and those reports and opinions can be dispositive, absolutely will be -- you know, sometimes are dispositive, we would argue will be dispositive here.

And the schedule we're contemplating now, which was already, you know, extremely tight, is now being tightened up further here, so that as I -- if Ms. Lundvall's schedule is endorsed, expert discovery will be going on after dispositive motions are filed, and right up until the time of trial.

Expert discovery cutoff currently is September 1. If we push everything by 30 days, it's October 1. We have a trial date of October 4 that, for some reason, is a date that can't move despite the fact that plaintiffs have put us in this position. We are being prejudiced by that.

Their efforts to take MultiPlan's deposition over the course of almost two years have led to an extension of the discovery deadline that is prejudicing our ability to prepare for trial.

We were complying with a very tight schedule. They're asking for an extension of that schedule. Yet we're being told, hey, you know what, you could get ready in a very short period of time

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here. Your expert reports, we don't know what they'll be, but they won't have any impact on the summary judgment. That's not something we can say now. It's unlikely, frankly. It's surely not something we could say now.

And to make expert -- have expert discovery fall a month after dispositive motion deadline, and only a day or two -- a business day, I think one business day to be precise, before the trial starts is not a schedule that is likely to yield a fair result here.

So I would vehemently object to imposing that kind of schedule.

THE COURT: All right. So let me indicate to all of you.

MS. LUNDVALL: And Your Honor --

THE COURT: Let -- give me just a chance here.

I could move the trial to October 25th, November 1st, and November 8th. We have a couple of intervene -- a state holiday and a county-wide holiday that intervene, but I would be available to move the trial then.

Ms. Lundvall.

MS. LUNDVALL: Your Honor, from this perspective, what I want to do is to underscore the statement that was made by Ms. Gallagher, and that was this, if we are jeopardizing our trial date because of our motion, then we are withdrawing our motion.

And what Mr. Levine is trying to capitalize upon, and by hook or by crook, is pushing out the trial date of this case and continuing to kick the can down the road. This is exactly what we

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feared and exactly then what he is trying to transform this hearing into.

And we submit that this is exactly why it is that all at once the cooperation that we were experiencing with counsel for MultiPlan in scheduling these depositions in May disappeared.

But I think it is important for us to make sure that you appreciate our position, and that being that if we are jeopardizing our October 4 trial date, then we are withdrawing our motion requesting extension for purposes of these MultiPlan depositions.

THE COURT: Okay. Mr. Levine, your response?

MR. LEVINE: And Your Honor, if I may, let me just be very clear and versus succinct here. We're fine with the trial date. We do not want to move it. Ms. Lundvall's suspicions are wrong. They're very wrong. Okay? We're fine.

If the trial -- if the discovery deadline is May 31st, no further fact discovery proceeds. Plaintiffs do as they say they're doing, withdrawing their motion, no changes are needed. October 4th is fine.

I am only saying that fairness, basic fairness, dictates that if we're moving all of these dates by a month -- and we all know that a month is very optimistic when it comes to taking third-party depositions, especially where document requests subject to a subpoena -- excuse me -- a Motion to Compel in Texas to be heard on June 9th, okay, we all know that -- even that's very optimistic.

But putting that aside, we are fine. If they're withdrawing

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our motion, there's nothing further to discuss. It sounds like Ms. Lundvall's withdrawing her motion.

THE COURT: All right.

MR. LEVINE: But I leave that to Your Honor to sift through.

THE COURT: All right. So I -- I'm --

MS. LUNDVALL: Well, my position -- I think that our position has been made clear that we believe that the Court can enter an order that extends fact discovery by 30 days, expert disclosure by 30 days, rebuttal expert disclosure by 30 days, and the deposition of experts by 30 days, and allowing them the Special Master --

THE COURT: You know --

MS. LUNDVALL: -- to manning the pace and the flow of that --

THE COURT: You guys --

MS. LUNDVALL: -- but nothing else should change.

THE COURT: We're -- I don't really want to reargue the whole motion.

What I want to do is we'll reconvene tomorrow at 9:45. Either I'll allow the plaintiff to withdraw the motion or I'll offer you the dates to start the trial of October 25, November 1, or November 8. So those are the two choices.

And I -- I don't want to reargue it, but I will -- we'll reconvene tomorrow at 9:45 on Blue Jeans. You guys can then just respond to that option.

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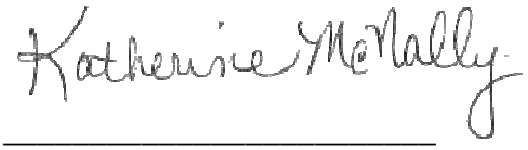
MR. LEVINE: Thank you, Your Honor.

THE COURT: Thank you, all.

[Proceeding concluded at 11:31 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.



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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

004210

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

004210

FRIDAY, JUNE 4, 2021

RECORDER'S TRANSCRIPT OF PROCEEDINGS
RE: MOTIONS HEARING

APPEARANCES (Attorneys appeared via Blue Jeans):

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

For the Defendant(s): COLBY L. BALKENBUSH, ESQ.
D. LEE ROBERTS, JR., ESQ.
ADAM G. LEVINE, ESQ.
ABRAHAM SMITH, ESQ.

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

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LAS VEGAS, NEVADA, FRIDAY, JUNE 4, 2021

[Proceeding commenced at 9:47 a.m.]

THE COURT: Thank you, everyone. Good morning.

I'm going to call the case of Fremont versus United.

And let's take appearances first from the plaintiff.

MS. LUNDVALL: Good morning, Your Honor. Pat Lundvall for McDonald Carano, here on behalf of the Health Care Providers.

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

THE COURT: Thank you.

And is Ms. Perach with us today? Okay.

MS. LUNDVALL: Not today, Your Honor.

THE COURT: Thank you.

So for the defendants, please.

MR. ROBERTS: Good morning, Your Honor. Lee Roberts for the defendants.

THE COURT: Thank you.

MS. LLEWELLYN: Good morning, Your Honor. Brittany Llewellyn, also on behalf of Defendant.

MR. LEVINE: And good morning, Your Honor. Adam Levine, also on behalf of Defendants.

THE COURT: Thank you.

Other appearances?

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All right. So -- Abe Smith also for Defendants.

THE COURT: Who was that again?

MR. SMITH: Abraham Smith for Defendants.

THE COURT: Okay. So Mr. Polsenberg, Mr. Balkenbush not with us today? Okay.

MR. ROBERTS: [Indiscernible] Mr. Balkenbush, Your Honor. And I don't see Mr. Polsenberg.

THE COURT: Thank you.

MR. SMITH: I will check on Mr. Polsenberg.

THE COURT: Okay.

So Plaintiff, have you had a chance to consult with your client? How do you wish to proceed?

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MS. LUNDVALL: First and foremost, Your Honor, we wanted to thank you for the opportunity to recess yesterday so that we could confer with our client. We also took the opportunity to send and exchange some messages with counsel then for United.

And we have reached certain agreements that I think hopefully should streamline this process then this morning. I can set forth those agreements on the record, if you wish.

THE COURT: Yes, please.

MS. LUNDVALL: The first and probably the most important one to the Court -- for the Court's purposes is that we've agreed to a change in the firm trial date to October 25th.

We've agreed to fact disclosure cutoff of June 30th.

We've agreed to expert -- the initial expert disclosures of

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July 30th.

We've agreed to rebuttal disclosures of August 31st.

September 1st (sic) is the expert cutoff and discovery completion date.

September 1 (sic) is also the date for a filing of dispositive motions and motions in limine.

MR. LEVINE: Sorry, Ms. Lundvall. Just to interrupt, I think you misstated. You said September 1. I think you meant September 21 on those last two.

MS. LUNDVALL: My apologies. You are correct.

September 21 is the expert cutoff as well as the completion of discovery.

And September 21 is the filing for dispositive motions and *motions in limine*.

In addition, the parties have agreement that there are three depositions that United wishes to take during this -- the June period of time. Those three depositions, as we understand it, are Dr. Harris (sic), Ms. Rena Harris, and Ms. J. J. Shrader.

There are eight depositions of MultiPlan witnesses that the Health Care Providers intend to take during this -- the month of June. I'm going to give last names of the eight, just simply for ease and convenience, Crandell, Schill, Bandomer, Mohler, Edwards, Dotson, and Kienzle.

Those are the agreements that the parties have reached. And I think that this should make the Court's job easier.

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THE COURT: Okay. And let me add to both of you that for dispositive motions, you guys need to agendize those and get a special setting, so --

And Mr. Roberts and Mr. Levine, are those representations accurate?

MR. LEVINE: They're mostly accurate, Your Honor.

A few clarifications: One, in terms of the witnesses that defendants -- whose depositions defendants will take during the month of June, I think Ms. Lundvall said Dr. Harris, and then second, Rena Harris. I think she meant Dr. Henner. I may have the name wrong, but Henner, not Harris. And so I wanted to correct that aspect of it.

Also I believe that among the names listed by Ms. Lundvall was a -- as depositions that Plaintiffs would take was a Johnson. I think she means Emma Johnson. That deposition has already been taken. So she would not be on that list.

And finally, Your Honor probably, you know, just to clarify what occurred -- and I just want to make sure I fully understand the agreement. Plaintiffs' counsel sent to us at approximately 4 p.m. Pacific time yesterday a proposal in terms of schedule. We told them we had to check with our client. We responded to them at 6 -- approximately 6:45 a.m. this morning.

And in our response, we said that the schedule date proposed made sense as relayed just now by Ms. Lundvall. But we also had several conditions, which I assumed by Ms. Lundvall saying

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we have an agreement, Plaintiffs are in agreement with -- but I'll just read them for the record as well.

That June 30th is a hard deadline for completing all fact depositions, number one.

But, number two, absent agreement among the parties, the only new fact depositions that will proceed in June are the ones that Ms. Lundvall listed and that --

And number three, that defendants will be consulted on scheduling of the depositions Plaintiffs are willing -- are planning to take. Likewise, Defendants will consult with Plaintiffs on the depositions Defendants are taking -- planning to take.

And I would just note that last night, quite late Pacific time, we received some notices of depositions of MultiPlan witnesses, including notices for as early as next Tuesday.

And while we will make best efforts to cooperate with Defendants, we do need to be in the loop on the scheduling. And notices on just, you know, two days, business days, ahead of a deposition -- you know, again we'll try to cooperate, but that may not work.

So we have to speak about scheduling of these depositions, which we don't need to bother the Court with right now, but it needs to be mutually convenient dates for Plaintiffs, Defendants, and the third parties.

And then finally, Your Honor, I would note that -- and this was in the communication with Plaintiffs as well -- that the

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October 25th trial date does work for us. But our lead trial counsel does have trial in another matter set to start in early December. And given the length of time that we would anticipate this trial going, we cannot agree to any further continuance of the trial date beyond October 25th, if that should ever become an issue, unless it's continued beyond the December trial of the lead trial counsel, you know, which would necessarily put it into 2022. So I just want to note that for the record, as well.

THE COURT: Thank you.

Ms. Lundvall, your response, please.

MS. LUNDVALL: Thank you, Your Honor.

Number one is that the three depositions that United wishes to take are Dr. Henner, H-E-N-N-E-R; Rena Harris, H-A-R-R-I-S; and J. J. Shrader.

MR. LEVINE: That is correct.

MS. LUNDVALL: There were -- we did not include Emma Johnson in the list of MultiPlan witnesses that we intended to take during the month of June.

We listed seven names -- Crandell, Schill, Bandomer, Mohler, Edwards, Dotson, and Kienzle. The dates for these depositions have been the subject of much back and forth between the Health Care Providers and counsel for MultiPlan. These dates have been agreed to. And if there is dispute with these dates, as Mr. Levine has indicated, we understand that any dispute among the parties would be taken up then with the Special Master.

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There were certain conditions that were contained in the e-mail that was sent to us by Mr. Levine, with which that we did not agree. And what we did is we set forth our agreement on the record as to the portions that we did agree.

The only issue, I think genuinely, or the only dispute between the parties, deals with the scheduling of the MultiPlan witnesses. And as we've done in the past, we have worked cooperatively with counsel for United. We have worked extensively with counsel for MultiPlan. And the dates that are set forth within the notices at this point in time have been well known for many weeks to counsel for United.

But, as Mr. Levine indicated, I don't think that those are disputes at this point that you have to wade into. If there are legitimate disputes, we can take them up then with [] Judge Wall. As a matter of fact, we have a conference scheduled with him on Monday.

MR. LEVINE: Yeah. I would just add, Your Honor, if I may, that I -- it is incorrect that these dates have been well known for many weeks by United.

It is our understanding that Plaintiffs have been in communication with MultiPlan about June dates for many weeks. Of course, in their submission to this Court, they said the dates were being scheduled in May, but other than in communications about June dates [indiscernible].

We received last night, for the first time, notice of June

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dates. Okay. We have heard that there -- you know, in submissions to Your Honor, the plaintiffs had said that they discussed June dates and put some June dates in a submission.

Again, we want to cooperate, will cooperate, but we cannot be held to agreements on dates that haven't involved our -- discussions with us, especially if those dates are not on 14 days' notice. So again, we will do our best to cooperate.

Another thing that I put in the e-mail this morning to which neither Ms. Lundvall nor anyone on Plaintiffs' side responded -- they've just responded on the record today -- so I didn't know [indiscernible] for what we put in the e-mail three hours before this call, is that I wanted them to confirm for us that they have provided all of the documents that MultiPlan produced to them to us. Okay? I didn't get a response on that.

I don't know, as I sit here right now whether we have even received all of the documents MultiPlan has produced to Plaintiffs in response to their subpoena on us. Yet, there is a deposition that we have noticed for June 8th. I'm not -- we got the notice of it last night.

I'm not saying we can't make June 8th work. I'm going to try to make it work. I haven't talked to our people. We literally got the notice last night, late. But I'm going to try and make June 8th work.

I just am saying that the six dates or seven dates that they have chosen for the seven MultiPlan witnesses that they're seeking to depose in June, apparently in consultation with Plaintiff -- with

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MultiPlan's counsel, may or may not work for us in their entirety. We need to meet and confer about them. And I think that's, you know, imminently fair.

THE COURT: Okay.

MS. LUNDVALL: To the extent that Mr. Levine [indiscernible] conviction that he's received all of the documents that we have received from MultiPlan, that [indiscernible] he -- he has received all of those documents. We make that representation that anything that we've received from MultiPlan has been shared then with United.

THE COURT: Okay.

MS. LUNDVALL: And so I guess I'm still thinking that we -- that there is agreement that this Court can reduce then to a scheduling order. And if there are disputes dealing with the dates on the MultiPlan depositions, [indiscernible] can be handled by Judge Wall.

These dates -- while there's a disagreement upon the parties as to how long and who has been involved and how well that they've known about these -- we disagree with that. But that's an issue I guess that we can take up with Judge Wall, if necessary.

THE COURT: All right. I'm going require that this agreement be put in writing so that I can enter a new scheduling and trial order.

Is there anything else to take up today?

MR. LEVINE: -- Your Honor, not to belabor the point, but

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Judge Wall, we have a hearing with him on Monday. Okay. [S The|It is] now Friday. They've noticed last night a deposition for Tuesday. So again, we'll try to cooperate, but I don't know that waiting for Judge Wall to weigh in on this is going to be adequate.

I think I would ask Your Honor, I guess, to order the parties to meet and confer to agree to a schedule and ask the parties to do their best in good faith to cooperate with the schedule that's been worked out with MultiPlan. But kicking this to Judge Wall at this point, given that the notices came in last night for hear -- depositions not on 14 days' notice, I think is not an adequate resolution, as it -- at least as it pertains to the depositions -- two of them scheduled for next week, one on Tuesday.

THE COURT: I don't know that it's necessary for me to intervene at this time.

MS. LUNDVALL: Your Honor --

THE COURT: If you guys can't work it out, either arrange to see Judge Wall. And if you both agree, you can ask me for a telephonic.

I believe that both sides are cooperating and are operating in good faith with regard to these scheduling issues.

Now, is there anything else to take up?

MR. LEVINE: Okay. Well, thank you, Your Honor. We will proceed with that advice.

THE COURT: Good enough.

MS. LUNDVALL: Thank you, Your Honor.

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THE COURT: All right. Thank you, all.

MS. LUNDVALL: And we'll --

THE COURT: I cut you off.

MS. LUNDVALL: One last thing for you quickly, Your Honor.

I would assume that what you want us to do then is to -- in the revision on the scheduling order, you want us to include since we've got a new trial date and the resultant changes as to the status conferences and when the pretrial memorandum is due, *et cetera, et cetera*. Is that correct?

THE COURT: That's correct.

MR. LEVINE: Well, Your Honor, if I could, the last scheduling order only had a handful of dates that were in there, and those were the dates that we agreed to move. We haven't discussed or agreed to any other dates related to pretrial scheduling.

So what we have focused on, and I have not discussed with our client any other dates, other than the dates that -- in Your Honor's March 17th order. And the dates in that order that are -- that were still -- that hadn't passed when we came before you, you know, yesterday were the initial expert disclosure date, the rebuttal expert disclosure date, expert discovery cutoff date, the dispositive motion and *motion in limine* date, and the trial date. Those are the dates that we discussed and agreed to. No other dates, pretrial dates have been discussed or agreed to among the parties.

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THE COURT: All right. That --

MR. BALKENBUSH: So we would ask that it's that order that was issued on March 17th that we would provide to you a revised version of with the new -- with the dates that the parties have agreed to.

THE COURT: And that's why I'm requiring your agreement to be in writing so that I can issue a new scheduling and trial order.

So all right, guys.

MR. BALKENBUSH: Thank you, Your Honor.

THE COURT: Thank you for your professional courtesy to each other. And see you next time.

MR. ROBERTS: Your Honor --

THE COURT: Mr. Roberts.

MR. ROBERTS: Your Honor, this is Lee Roberts.

THE COURT: Yes.

MR. ROBERTS: I had one issue I would like to raise, as long as we have the Court.

I have not seen a hearing set on United's Motion on Objections to Reports and Recommendations Nos. 2 and 3. And I apologize if I've missed that.

But I did want to take this opportunity to simply inform the Court that we are requesting a hearing on that. And that's the one which the Court allowed the supplement to in yesterday's hearing.

THE COURT: I'll have to get with the law clerk on that. If you asked for a hearing, the clerk would have set a hearing.

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So are you sure you asked for a hearing?

MR. ROBERTS: Your Honor, I will confirm that. And if we did not, we will file a separate request for a hearing.

THE COURT: Good enough. Good enough. And if it needs a special setting, let us know. Because if you on a stacked calendar, there are going to be four things every half hour.

MR. ROBERTS: Thank you, Your Honor.

I imagine that would be the best --

THE COURT: Okay.

MR. ROBERTS: -- for this issue.

THE COURT: All right, you guys. Everybody stay safe and healthy until I see you next.

MR. ROBERTS: Thank you, Your Honor.

MR. BALKENBUSH: Thank you, Your Honor.

MS. GALLAGHER: Thank you, Your Honor.

[Proceeding concluded at 10:05 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.

Katherine McNally

Katherine McNally
Independent Transcriber CERT**D-323
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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

WEDNESDAY, JUNE 9, 2021

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 REQUESTS FOR PRODUCTION ON ORDER SHORTENING TIME IN REDACTED AND PARTIALLY SEALED FORM

Appearing via Videoconference:

For the Plaintiff: PATRICIA K. LUNDVALL, ESQ.

For the Defendant: BRITTANY M. LLEWELLYN, ESQ.

RECORDED BY: BRYNN WHITE, COURT RECORDER

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Las Vegas, Nevada, Wednesday, June 9, 2021

[Case called at 9:31 a.m.]

THE COURT: Fremont versus United.

MS. LUNDVAL: Good morning, Your Honor. This is Pat Lundvall from McDonald Carano here on behalf of the healthcare providers.

THE COURT: Thank you. Other appearances.

MS. LLEWELLYN: Good morning, Your Honor. Brittany Llewellyn on behalf of United.

THE COURT: Are there any other appearances?

COURT RECORDER: No one has checked in.

THE COURT: Okay. So I understand -- this was a motion for leave for the Plaintiff to file a response under seal. Is that correct?

MS. LUNDVAL: That's correct, Your Honor. There has been no opposition to this motion.

THE COURT: Okay. Ms. Llewellyn is there any opposition?

MS. LLEWELLYN: There is no opposition, Your Honor.

THE COURT: Okay. Then the motion can be granted and sent to the TPO inbox.

Thank you both for your --

MS. LUNDVAL: Thank you, Your Honor.

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THE COURT: Thank you both for your appearance.

MS. LLEWELLYN: Thank you very much.

[Hearing concluded at 9:32 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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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

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

DEFENDANTS' OBJECTION TO THE SPECIAL MASTER'S REPORT AND RECOMMENDATION NO. 7 REGARDING DEFENDANTS' MOTION TO COMPEL RESPONSES TO DEFENDANTS' AMENDED THIRD SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS

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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.

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 object to Report and Recommendation No. 7 (the "Report and Recommendation") submitted by Special Master Hon. David T. Wall (Ret.) (the "Special Master") on June 3, 2021.

This Objection is supported by the accompanying Memorandum of Points and Authorities, all pleadings and filings of record, and any oral argument the Court may allow.

Dated this 17th day of June, 2021.

/s/ Brittany M. Llewellyn

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On June 3, 2021, the Special Master submitted a Report and Recommendation to the Court, proposing that Defendants' Motion to Compel Plaintiffs' Responses to Defendants' Amended Third Set of Requests for Production of Documents ("Motion"), which covers Requests for Production No. 156, 157, and 158 (the "At-Issue Requests"), be denied in full. The At-Issue Requests seek data identifying actual charges and reimbursements that Plaintiffs received for emergency services in Nevada from any payors,[1] at a level of detail sufficient to identify individual services and the units of service provided, as well as the "charge masters," or fee schedules, that Plaintiffs used to set those rates. Defendants request that this Court decline to adopt the Special Master's Report and Recommendation as to all the At-Issue Requests and compel Plaintiffs to respond to them in full so that Defendants and their experts can determine the actual amounts at which Plaintiffs were reimbursed for the individual services at issue. The requested data are directly relevant to the claims asserted by Plaintiffs and United's defense in the case, including their affirmative defenses. Defendants require these data to demonstrate that the rates for reimbursement Plaintiffs sought for these individual services were not reasonable, which is the issue at the heart of Plaintiffs' lawsuit.

The Report and Recommendation provides no substantive analysis of the merits of the arguments presented in Defendants' Motion or Reply in Support of Defendants' Motion ("Reply"). Instead, the Special Master focuses on the *timing* of when Defendants served the At-Issue Requests, finding that the Joint Case Conference Report ("JCCR") required Defendants to have served the At-Issue Requests forty-five days before the deadline for document discovery

[1] The Report and Recommendation notes that "Defendants do not dispute that some of the topics within RFP 156 have been deemed irrelevant by the Court," including "non-commercial data and in-network reimbursement data, including documents related to Medicare, Medicaid, TRICARE and Worker's Compensation, etc." To be clear, Defendants have objected to the Special Master's Report and Recommendation No. 3 that deemed this information to be irrelevant. *See* Defendants' 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 on Order Shortening Time (Apr. 28, 2021).

(the "Document Discovery Cut-Off"). While Defendants served these requests after the deadline, the primary cause of Defendants' delay was *Plaintiffs'* delay in producing their market data—a fact omitted in Report and Recommendation No. 7. In addition, the Report and Recommendation found that Defendants gave insufficient justification for the delay between Plaintiffs' representation that they would not respond to the At-Issue Requests and Defendants filing their Motion. However, Defendants filed their Motion immediately after their experts completed their analysis of Plaintiffs' document production on the day of the Document Discovery Cut-Off—which constituted ***over one-third of their entire production***—and confirmed that Plaintiffs' market data had not been supplemented and remained deficient.

Aside from these timeliness issues, which Defendants respectfully submit have no merit, there is no real dispute that the At-Issue Requests seek relevant and discoverable information under NRCP 16.1 and NRCP 26. Defendants require the requested service- and unit-level market data to help them show that "Plaintiffs' billed charges are excessive under the applicable standards" and that Plaintiffs have not suffered any damages. (Mot. at 14.) Accordingly, Defendants request that the Court decline to adopt the Report and Recommendation in its entirety and order Plaintiffs to provide sufficiently detailed market data to Defendants—just as Defendants have provided to Plaintiffs.[2]

II. LEGAL STANDARD FOR OBJECTIONS TO SPECIAL MASTER'S REPORT AND RECOMMENDATION

NRCP 53(f) governs a district court's review of a special master's report and recommendation. Pursuant to that rule, a party may file and serve objections to a recommendation no later than 14 days after being served with it. Here, the Report and Recommendation, and Notice of Entry of Report and Recommendation, were served on June 3, 2021, so this Objection is timely.

NRCP 53(f)(2) provides that a district court has three options when reviewing a master's recommendation: (1) adopt, reverse or modify the master's ruling without a hearing, (2) set the

[2] *See* Reply at 7–8.

objection for a hearing, or (3) remand the matter to the master for reconsideration or further action. When a district court reviews a master's recommendation, the master's findings of facts are reviewed under the "clearly erroneous" standard and conclusions of law are reviewed *de novo*. *Venetian Casino Resort, LLC v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 118 Nev. 124, 132, 41 P.3d 327, 331–32 (2002). Because the Report and Recommendation was based on either the Special Master's legal interpretation of the Court's prior orders or the Special Master's own original legal interpretation, Defendants submit that the entire Report and Recommendation should be reviewed *de novo* by this Court.

III. LEGAL ARGUMENT

A. Defendants Request That the Court Decline to Adopt the Finding That the Timing of Defendants' At-Issue Requests Controls

Report and Recommendation No. 7 based its conclusions on the fact that the "parties agreed to 45 days to respond to written discovery," and the date on which Defendants served the At-Issue Requests—March 9, 2021—created a response deadline eight days past the close of document discovery. (R&R #7 ¶ 14.) The Report and Recommendation did not address, however, that Defendants could not reasonably serve the At-Issue Requests any sooner because of the Plaintiffs' own delay tactics regarding the production of their market data.

Defendants served their Second Set of Requests for Production of Documents on August 12, 2020. Those Requests sought data, including market data from Plaintiffs. (Mot. at 7.) Plaintiffs, therefore, had been on notice that Defendants sought the data in the At-Issue Requests since August 2020.

On December 11, 2020, Plaintiffs indicated that they would provide their market data by "the holidays."[3] Despite their promises, Plaintiffs failed to produce information that purported to contain Plaintiffs' market data until mid-January 2021.[4] After receiving Plaintiffs' information, Defendants' experts diligently analyzed that production, which contains almost ***215,000 lines of***

[3] Mot., Exhibit 11.

[4] Mot., Exhibit 4.

data documenting charges at myriad facilities across Nevada. Ultimately, Defendants' experts determined that Plaintiffs' production was severely deficient because, for over one third of the health care claims in Plaintiffs' data, Plaintiffs aggregate multiple services into one claim and the data do not contain the individual service lines necessary to show the individual services allegedly rendered by Plaintiffs. (*See also infra* at 9–10).

As a result of Plaintiffs' delay in producing the full scope of data called for in Defendants' Second Set of Requests for Production, Defendants, in an abundance of caution, served the At-Issue Requests on March 9, 2021—over a month before the Document Discovery Cut-Off—to unequivocally request service- and unit-level market data that would be sufficient for Defendants' experts to analyze the reasonableness of Plaintiffs' rates for individual services rendered. Acknowledging that under the JCCR Plaintiffs' response date for the At-Issue Requests would have been a few days beyond the Document Discovery Cut-Off, Defendants contacted Plaintiffs on March 15 to offer Plaintiffs an additional eight days to respond to the At-Issue Requests.[5] Plaintiffs refused that offer.[6]

Defendants' minor and justified delay did not prejudice Plaintiffs, and should be considered in light of a court's "strong preference for deciding cases on the merits whenever reasonably possible." (Mot. at 12 (citing *Silvagni v. Wal-Mart Stores, Inc*, 320 F.R.D. 237, 243 (D. Nev. 2017)).) It violates that principle to embrace Plaintiffs' position that they may withhold critical details of their market data when they were aware of Defendants' request for this information in August 2020, produced material in mid-January 2021 that purported to contain market data, and then refused to agree to a limited extension of a mere eight days beyond the Document Discovery Cut-Off.[7] Plaintiffs have not, and cannot, establish any prejudice by responding to the At-Issue Requests a few days after the Document Discovery Cut-Off. Even if Plaintiffs could demonstrate prejudice, which they cannot, any prejudice Plaintiffs would have

[5] Mot., Exhibit 8.

[6] Mot., Exhibit 9.

[7] Plaintiffs' Opposition to Defendants' Motion at 3.

suffered is dwarfed by the severe prejudice Defendants suffer by Plaintiffs' deficient production of market data.

Plaintiffs' argument is further undermined by their conduct during discovery in this case. Namely, Plaintiffs' April 30, 2021 supplemental production added entirely new claims to the case **fifteen days** after the Document Discovery Cut-Off (*see* Mot. at 11 n.2; Reply at 12), and Plaintiffs continue to seek document discovery on non-party MultiPlan (*see* Reply at 6, 12). Try as they might, Plaintiffs cannot have it both ways regarding deadlines in this case: strictly enforced against Defendants, and liberally applied to Plaintiffs. Defendants' eight-day delay in serving the At-Issue Requests should not permit Plaintiffs to hold critical information necessary for Defendants to evaluate Plaintiffs' claims and assert their affirmative defenses.

B. Defendants Request That the Court Decline to Adopt the Finding That Defendants' Motion to Compel Was Untimely

Apart from the timeliness of the At-Issue Requests themselves, the Report and Recommendation also found that the Motion was untimely because it was brought sixty days after Plaintiffs informed Defendants that they would not respond to the Third Set of Requests for Production of Documents. But any delay in bringing the Motion was also justified in light of Plaintiffs' conduct.

As Defendants detailed in their moving papers, the reason for Defendants' delay was that Defendants had to sift through Plaintiffs' document dump on the day of the Document Discovery Cut-Off. Indeed, of the 3,215 total documents Plaintiffs produced to Defendants, *over one-third* of these documents were produced on April 15, 2021, the day of the Document Discovery Cut-Off. Upon receiving this production, Defendants and their experts worked diligently to analyze each of these newly produced documents *and to confirm that Plaintiffs had not cured their prior deficient market data production*. As soon as Defendants and their experts completed their analyses of Plaintiffs' April 15 production and concluded that that production did not cure their deficient market data production, Defendants filed their Motion.

As the Report and Recommendation acknowledges, the Court has discretion to consider motions to compel after a document discovery cut-off. Defendants request that this Court

exercise that discretion here given the critical nature of the data sought by the At-Issue Requests produced on the day of the Document Discovery Cut-Off.

C. Defendants Request That the Court Decline to Adopt the Report and Recommendation on Requests No. 156 and 157, Seeking More Complete Market Data

Notwithstanding the Special Master's findings regarding the timeliness of Defendants' Motion, the Report and Recommendation purported to make a "full consideration of the arguments of counsel regarding the sufficiency" of the "market data already produced by Plaintiffs" and found that "Plaintiffs have already produced information sufficiently responding to the portions of RFPs 156 and 157 requesting relevant commercial market data." That is simply not so.

Even a cursory review of Plaintiffs' market data demonstrates that Plaintiffs' market data is anything but sufficient for Defendants and their experts to determine the amount that Plaintiffs were actually reimbursed for the *individual* services at issue. As Defendants explained in their moving papers, Plaintiffs' market data places multiple services on the same line and fails to enumerate the number of units of how many services were provided in connection with particular claims prevents any analysis of dollar amounts per unit. (*See* Mot. at 11–12; Reply at 7–8.) Defendants require data that breaks out Plaintiffs charges by specific service and unit in order for their experts to evaluate the rates Plaintiffs charged, and in order for United to defend against Plaintiffs' principal claim in this lawsuit that Plaintiffs' rates charged to Defendants were reasonable. Plaintiffs do not seriously dispute this, instead arguing erroneously that Defendants' market data was just as deficient as theirs. For the reasons Defendants already detailed (Reply at 7–8), Plaintiffs' characterization of Defendants' market data is baseless and disingenuous.

The effect of the Report and Recommendation, if adopted by this Court, will be that Defendants will be left with no choice but to make assumptions about Plaintiffs' charges for the individual services rendered. In a case that Plaintiffs have maintained is a "rate of payment" case about whether the amounts that Plaintiffs charged and were reimbursed by Defendants is "usual and customary," Defendants are entitled to the data necessary to determine the actual rates Plaintiffs charged for each individual service they provided to Defendants' customers. The

Requests No. 156 and 157, therefore, are plainly relevant under NRCP 16.1 and NRCP 26, and accordingly, Defendants request that this Court grant Defendants' Motion to prevent further inequities in what evidence the parties may obtain and present at trial. (*See* Mot. at 13; Reply at 6–10.)

D. Defendants Request That the Court Decline to Adopt the Report and Recommendation on Request No. 158, Seeking Plaintiffs' Prior Chargemasters

Report and Recommendation No. 7 also concluded, without analysis, that Plaintiffs' chargemasters from 2013 to 2017 are "not relevant under the guidelines of NRCP 26(b)(1)." As Defendants explained in their underlying moving papers, *Plaintiffs already produced some of their pre-2017 chargemasters*.[8] That production reflects an acknowledgment that these historical chargemasters are relevant to the reasonableness of the charge that Plaintiffs billed Defendants after being acquired by TeamHealth.

Plaintiffs concede the relevance of their historical chargemasters to this case through the testimony of Plaintiff Ruby Crest Emergency Medicine's NRCP 30(b)(6) corporate designee, Kent Bristow. Mr. Bristow testified that Plaintiffs' claim for damages is tied directly to the difference between what was reimbursed by Defendants and Plaintiffs' full billed charges.[9] Defendants should be permitted to review the full billed charges reflected in Plaintiffs' historical chargemasters, which Defendants believe will describe the full billed charges that Plaintiffs charged for the exact same services prior to being acquired by TeamHealth, so that Defendants and their experts can evaluate Plaintiffs' claims for damages and support Defendants' affirmative defense regarding Plaintiffs' lack of damages.

Without any explanation, the Report and Recommendation endorses Plaintiffs' objection to Request No. 158 that none of Plaintiffs' chargemasters before TeamHealth acquired Plaintiffs are relevant. Plaintiffs have not provided any support for their position that Plaintiffs' historical chargemasters are irrelevant simply because TeamHealth acquired them in 2017. Plaintiffs are

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[8] *See* Reply at 10.

[9] *See* Bristow NRCP 30(b)(6) Depo (Ruby Crest Emergency Services) at 91:3–14.

picking and choosing when and how to argue that facts about TeamHealth are irrelevant in this lawsuit.[10] But the rates reflected in Plaintiffs' historical chargemasters are indisputably relevant because the degree of variance between those rates and the rates in Plaintiffs' recent chargemasters will help show the unreasonableness of the rates that Plaintiffs charged Defendants in this case.

IV. RELIEF REQUESTED

For the foregoing reasons, Defendants object to the Report and Recommendation and respectfully requests that the Court grant Defendants' Motion to Compel Plaintiffs' Responses to Defendants' Amended Third Set of Requests for Production of Documents in its entirety.

Dated this 17th day of June, 2021.

/s/ Brittany M. Llewellyn

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[10] *See, e.g.*, Plaintiffs' Opposition to Motion to Compel Responses to Defendants' First and Second Requests for Production on Order Shortening Time at 7–10 (arguing that "the relationship between TeamHealth and [Plaintiffs] has no bearing on the parties' respective claims or defenses").

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of June, 2021, a true and correct copy of the foregoing **DEFENDANTS' OBJECTION TO THE SPECIAL MASTER'S REPORT AND RECOMMENDATION NO. 7 REGARDING DEFENDANTS' MOTION TO COMPEL RESPONSES TO DEFENDANTS' AMENDED THIRD SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS** 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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CLERK OF THE COURT

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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

004240

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

004240

WEDNESDAY, JUNE 23, 2021

RECORDER'S TRANSCRIPT OF PROCEEDINGS
RE: MOTIONS HEARING

APPEARANCES (Attorneys appeared via Blue Jeans):

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KRISTEN T. GALLAGHER, ESQ.
AMANDA PERACH, ESQ.

For the Defendant(s): ADAM G. LEVINE, ESQ.
DAN POLSENBERG, ESQ.

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

004240

LAS VEGAS, NEVADA, WEDNESDAY, JUNE 23, 2021

[Proceeding commenced at 9:02 a.m.]

THE COURT: Thank you, everyone. Please be seated.

Good morning. We have one thing at 9 o'clock, Fremont versus United Healthcare.

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

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

THE COURT: Thank you.

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

THE COURT: Thank you.

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

THE COURT: Thank you.

For defendants, please.

MR. LEVINE: Good morning, Your Honor. It's Adam Lavine, from O'Melveny & Myers, of the defendants.

THE COURT: Thank you.

Is there anyone else appearing for the defendants today?

MR. LEVINE: I believe those will be -- I'll be the only appearance.

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THE COURT: Very good.

MR. LEVINE: Oh, no. Dan Polsenberg. I see you there. They are on mute. We have one more.

THE COURT: Mr. Polsenberg, please make your appearance.

MR. LEVINE: Your Honor, I think Mr. Polsenberg's microphone is not active. So Dan Polsenberg is also appearing on behalf of defendants.

THE COURT: Very good. Thank you all.

THE CLERK: There's also a Margane Hall (phonetic).

THE COURT: Do we have other people?

All right. So let's take -- I understand there's only one thing on calendar this morning. And was that the defendant's objection to the Special Master's Report No. 7?

MR. LEVINE: I believe that's correct, Your Honor.

THE COURT: All right. Several things got put on our calendar that should have -- that are being heard by the Special Master, including Motions to Compel and Motions for Relief; is that correct?

MS. GALLAGHER: That's correct, Your Honor.

If I may just make one clarification. It's Report and Recommendation No. 8.

Report and Recommendation No. 7 is not quite right. The response by the Health Care Providers is not due till tomorrow, and it wasn't the subject of United's request on OST for today.

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THE COURT: All right.

MS. GALLAGHER: So just for that clarification, it will be right.

THE COURT: So, Mr. Levine, your response?

MR. LEVINE: In terms of what Ms. Gallagher just said, yes. I'm sorry, Your Honor, if you said No. 7; it's No. 8 that's on today.

THE COURT: No.

MR. LEVINE: Objections to R&R No. 8.

THE COURT: I -- that's my error. I'm prepared on No. 8.

MR. LEVINE: Okay. So are you asking for me to begin now argument on No. 8?

THE COURT: Yes.

MR. LEVINE: Okay. Sure, Your Honor. Thank you.

You know, as Your Honor has seen in the papers submitted in connection with -- [audio cut out for approximately 10 seconds] No. 1 --

THE COURT: Mr. Levine.

MR. LEVINE: -- is that --

THE COURT: Mr. Levine?

MR. LEVINE: Excuse me. Yes.

THE COURT: You cut out after your first phrase. As the Court may have seen --

MR. LEVINE: I'm sorry.

THE COURT: So start again please.

MR. LEVINE: So do you -- do you hear me now?

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THE COURT: Yes. It -- it says Poor Network on our screen.

MR. LEVINE: Okay. I -- let me know if you don't hear me further, and then we'll begin again.

THE COURT: I will.

MR. LEVINE: Your Honor, defendants have objected, as you know, to Report and Recommendation [indiscernible] on two primary grounds.

Number 1, as detailed in our papers, we object to an additional seven hours of deposition for United's witnesses. As Your Honor may have seen in the papers, Report and Recommendation No. 1 was issued on March 16th of this year. Okay?

In that Report and Recommendation, it was stated, endorsed by the Special Master and agreed upon by the parties, that there would be a 7-hour limit for depositions in this case. Specifically called out in that Report and Recommendation was a 7-hour limit that would apply to 30(b)6 depositions, even if -- and this is written explicitly -- even if an individual notice includes multiple entities or requires multiple designees.

Now, that was issued on March 16th. That's not just some random day. That's the day after, on March 15th, plaintiffs served a 30(b)6 notice, or 30(b)6 notices, on the defendants. Okay? They also sought the departure from the 10 deposition limit, so that 20 -- they may take 25 depositions before the deposition discovery deadline.

As part of that whole arrangement, ground rules were set.

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And among those ground rules were the rules -- was the sentence -- was the agreement and endorsement by the Special Master of a 7-hour limit for depositions.

Now, plaintiffs could have noticed all eight depositions separately of defendants -- 30(b)6 depositions, separately. They chose not to do that; they bucketed them. There are eight defendants in this case. And they decided to bucket the 30(b)6 depositions into three notices.

The one that's at issue here today is the notice that was issued to UHG, UHCS, and UHIC, called "you-hick" (phonetic). Okay? One notice to those three defendants. This was contemplated by Report and Recommendation No. 1. And seven hours was the limit to apply to that deposition.

In that notice to the three, what I'll call, United defendants, they listed 73 topics and subtopics. There are 20 topics, and many of them have subtopics. As an example, topic 20 has subtopics A through W. Okay? Some of these sub text -- topics tied more directly to the original topic at the beginning, and some tied much more loosely to that topic. But regardless, there were 73 topics and subtopics in the notice to three different defendants.

Okay? That was on March 15th. And then the R&R was issued on March 16th.

On March 18th, defendants objected to the notice and asked to meet and confer. Plaintiffs never responded to that.

Now, the parties had a lot of work cut out for them at the

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time. There were a lot of depositions to take, pursuant to a very -- you know, in a very short time period, as Your Honor knows. And the parties worked, you know, at an -- you know, with a -- cooperatively many times, much of the time -- to get those depositions done.

In fact, between the last week of April and May 31st, 37 depositions were taken, okay, of which one is the deposition at issue here today. Okay? The three -- the 30(b)6 deposition of three defendants, that was taken on May 18th, among the 37.

Now, in preparing for that deposition, on 73 topics, across three defendants, plaintiffs designated seven witnesses, okay, seven designees to testify on those topics across three defendants. That deposition took place on May 18th, as I've stated, and went for over 7 hours.

These seven witnesses prepared for many, many hours. To give you an example, one of those witnesses, Jolene Bradley, testified that she -- she prepared between 12 and 18 hours for this deposition.

Another one of those witnesses, Ms. Paradise, testified that she prepared for approximately 10 hours for the deposition.

The seven witnesses who were prepared to testify on the 73 topics across three defendants were in three time zones. Okay? This context is important for understanding this. Okay? There was a witness in Florida, in Connecticut. There were two witnesses in Minneapolis, a witness in Wisconsin, a witness in Texas, and a

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witness in Las Vegas. Lawyers were assigned to prep and defend those witnesses.

Defendants provided to plaintiffs, the date prior to the deposition, the names of the designees that would be testifying.

Now, this was not the first time they knew all the names of the designees. They -- we had tried to work out with defendants an arrangement where the designees would testify -- all the designees who were scheduled to testify with the exception of two -- five of the seven were also 30(b)(1) witnesses. And we tried to arrange for those five -- that their testimony would take place back-to-back with their individual testimony so that they wouldn't have to appear more than once. We were not able to work that out. So they appeared all on May 18th, in these various time zones.

We provided to plaintiffs the list and the preferred order, given the different time zones for the witnesses so they didn't all have to be available all day. Plaintiffs rejected that and said they wanted to go in their own order, and we accommodated that.

So the witnesses, all seven witnesses, were available all day. As it got to the end of the day, some of the East Coast witnesses had some limitations, which we stated to defendants at the deposition. But nevertheless, the witnesses, with that small exception, were available all day. Okay?

They testified for over seven hours. Plaintiffs allotted the time for those -- that testimony the way they wanted. They spent about four hours with the first witness, Ms. Rebecca Paradise. And

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then they -- and then they allotted the time for the remaining three-plus hours across three witnesses, knowing that there were three other witnesses, including one in Florida, waiting around until 8 p.m. at night to testify. So that was their choice; that's how they proceeded. We're all playing by the same rules.

This motion followed. In this -- well, Plaintiffs' Motion to Compel further testimony followed. It was brought during the last week of May, when there were 15 depositions scheduled in this case. The Special Master heard it on 36-hours' notice and made his ruling. Okay? The lawyers were scattered at various depositions around the country at the time, and you know, did the best we could to cover the hearing.

In their motion, their original motion, plaintiffs sought additional testimony on 49 of the 73 topics. And the Special Master granted -- well, I should say it this way -- they sought testimony on 49 of the 73 topics as to UHIC and UHCS. They sought testimony on all 20 as to UHG.

Okay. Now, in plaintiffs' response to our objection to the R&R -- and I want to stick on the 7-hour issue -- I want to assume for the 7-hour issue that we have no issue with the Special Master's ruling, okay, that we accept the ruling in terms of what the witnesses were not able to cover.

I'm going to talk in a moment about why that ruling is erroneous, but for purposes of the 7-hour discussion, let's accept it.

Plaintiffs, in their opposition, know this is a -- the 7 -- an

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additional 7 hours is not warranted here. They only had 7 hours to begin with. Unequivocally, the witnesses who testified at great length on May 18th cover a lot of ground that was right down the middle of the plate of -- you know, in the topics. They don't even seek to compel further testimony on many of the topics from UHIC or UHCS. And the Special Master denied them any further testimony from UHG.

Now, plaintiffs, in their response, ignore this issue in their introduction. They ignore this issue in their background section. You won't find it in the original 7-hour issue. And they address it in a few lines on pages 13 -- 12 and 13 of their response, which I'll address here.

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Argument on page 13 -- and I'm saying this in almost so many words -- is that we, plaintiffs, ask for 14 more hours for the United -- the three United witnesses 30(b)6 depositions -- the three United defendants 30(b)6 depositions, and the Special Master gave us seven. United can't establish that that is clearly erroneous.

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That's conclusory, Your Honor. That doesn't justify what they're seeking here or what they were provided at all. It makes no sense either.

If you only had seven hours to begin with, those are the ground rules that we're all playing under, okay. And no one could say they were short shrifted on what they got in terms of deposition in this case. Okay?

You know, we could -- defendants could have read the

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phone book for 7 hours, and they would have been entitled to another 7 hours. But they got an enormous amount of information. There was the testimony for over 7 hours on dozens of topics.

And the plaintiffs' motion only addressed -- their original motion only addressed 8 of the 73 topics. Yet, they're getting additional times -- additional 7 hours on 49 topics, 7 hours -- as if the original deposition didn't even take place. Honestly, it's hard to think of a situation where a ruling is more clearly erroneous.

Now, look, there was a lot going on at the time. So I'm not sure how much time was -- how much thought was given to this. But this is why we have a process for objecting to an R&R is that mistakes can be made and a mistake was made here. There was an erroneous ruling in allowing 7 more hours.

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I will also add that plaintiffs argue as to the 7 hours that, quote, noticeably absent is any legal authority, provided again by defendants, that a 7-hour limit is absolute.

What there was, Your Honor -- no one is saying a 7-hour limit is absolute. Okay?

There was an agreement that 7 hours would apply to all depositions, including depositions where parties noticed the 30(b)6 deposition of multiple defendants where multiple designees were required to cover the topics. So that's point No. 1.

And point No. 2 -- and I'll only have two points, but they are somewhat broad points, acknowledged.

But point No. 2 is addition to logically only the -- that

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