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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148	Second Amended Complaint	10/07/21	21 22	5246–5250 5251–5264
458	Second Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits (Filed Under Seal)	01/05/22	126 127	31,309–31,393 31,394–31,500
231	Special Verdict Form	11/16/21	41	10,169–10,197
257	Special Verdict Form	11/29/21	49	12,035–12,046
265	Special Verdict Form	12/07/21	49	12,150–12,152
6	Summons – Health Plan of Nevada, Inc.	04/30/19	1	29–31
9	Summons – Oxford Health Plans, Inc.	05/06/19	1	38–41
8	Summons – Sierra Health and Life Insurance Company, Inc.	04/30/19	1	35–37
7	Summons – Sierra Health-Care Options, Inc.	04/30/19	1	32–34
3	Summons - UMR, Inc. dba United Medical Resources	04/25/19	1	20–22
4	Summons – United Health Care Services Inc. dba UnitedHealthcare	04/25/19	1	23–25
5	Summons – United Healthcare Insurance Company	04/25/19	1	26–28
433	Supplement to Defendants' Motion to Seal Certain Confidential Trial Exhibits (Filed	12/08/21	110 111	27,383–27,393 27,394–27,400

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

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

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

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

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258	Verdict(s) Submitted to Jury but Returned Unsigned	11/29/21	49	12,047–12,048

CERTIFICATE OF SERVICE

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

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

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

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

ORDER AFFIRMING AND ADOPTING REPORT AND RECOMMENDATION NO. 9 REGARDING DEFENDANTS' RENEWED MOTION TO COMPEL FURTHER TESTIMONY FROM DEPONENTS INSTRUCTED NOT TO ANSWER AND OVERRULING OBJECTION

Hearing Date: August 17, 2021
Hearing Time: 2:00 p.m.

004751

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.

This matter came before the Court on August 17, 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. (collectively, "United") Objection to the Special Master's Report and Recommendation No. 9 ("R&R #9") Regarding Defendants' Renewed Motion To Compel Further Testimony From Deponents Instructed Not To Answer (the "Objection"). Pat Lundvall, Amanda M. Perach and Kristen T. Gallagher, McDonald Carano LLP, appeared on behalf of plaintiffs Fremont Emergency Services (Mandavia), Ltd. ("Fremont"); Team Physicians of Nevada-Mandavia, P.C. ("Team Physicians"); and Crum, Stefanko and Jones, Ltd. dba Ruby Crest Emergency Medicine ("Ruby Crest" and collectively the "Health Care Providers"). Abraham G. Smith and Daniel F. Polsenberg, Lewis Roca Rothgerber Christie LLP, appeared on behalf of United.

The Court, having considered R&R #9, Defendants' Objection to R&R #9, the Health Care Providers' Response to United's Objection ("Response"), the papers and pleadings on file herein, the argument of counsel at the hearing on this matter, and good cause appearing therefor,

IT IS HEREBY ORDERED that, for the reasons set forth on the record at the hearing and contained in the Response, R&R #9 is hereby affirmed and adopted in its entirety, as set

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forth in **Exhibit 1** attached hereto.

IT IS FURTHER ORDERED that, for the reasons set forth on the record at the hearing and contained in the Response, United's Objection is overruled in its entirety.

September 15, 2021

Dated this 16th day of September, 2021

Nancy L Allf

TW

57B 614 714F 474C
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District Court Judge

Submitted by:

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EXHIBIT 1

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EXHIBIT 1

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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 #9 REGARDING PENDING MOTIONS**

Report and Recommendation #9 Regarding Pending Motions

On June 25, 2021, the Arbitrator conducted a telephonic hearing on several pending Motions. Participating in the telephonic hearing were the Special Master, Hon. David T. Wall, Ret.; Pat Lundvall, Esq., Kristen T. Gallagher, Esq. Amanda M. Perach, Esq. and Rachel H. LeBlanc, Esq., appearing for Plaintiffs; D. Lee Roberts, Esq., Brittany M. Llewellyn, Esq., Abraham Smith, Esq., Nadia Farjood, Esq. and Marjan Hajimirzaee, 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 the pending Motions as follows:

Defendants' Motion for Protective Order Regarding Confidentiality Designations (filed 5/28/21)

During the telephonic hearing, Defendants' requested a continuance of the hearing on this Motion. The request was GRANTED by the Arbitrator, and the hearing on this Motion is continued to July 20, 2021, at 8:30 a.m. (Pacific). No additional briefing is necessary.

Defendants' Renewed Motion to Compel Further Testimony from Deponents Instructed Not to Answer Questions

Defendants' filed this Motion on June 8, 2021, with a request for an Order Shortening Time. Plaintiffs filed an Opposition on June 22, 2021.

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The Motion is styled as a Renewed Motion, as Respondents filed a Motion to Compel Further Testimony From Deponents Instructed Not to Answer Questions on May 21, 2021. That Motion was addressed in the Special Master's Report and Recommendation #6, which states in pertinent part as follows:

> 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 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)).
>
> 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.
>
> 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.

Report and Recommendation #6 Regarding Defendants' Motion to Compel Further Testimony From Deponents Instructed Not to Answer Questions.

Defendants have brought this Renewed Motion, citing to seventy-three (73) purported examples of improper instructions from Plaintiffs' counsel to the deponent, including the same four (4) instances addressed in the original Motion.

NRCP 30(c)(2) provides that an attorney may instruct a deponent not to answer when necessary to enforce a limitation ordered by the court. Defendants allege in this Renewed Motion that counsel for Plaintiffs have instructed deponents not to answer questions on topics that did not relate to prior Orders of the trial court, thereby exceeding the scope of an appropriate application of NRCP 30(c)(2). Plaintiffs argue that all 73 instances addressed in the Renewed Motion fall squarely within the prior Orders of the trial court and/or the Reports and Recommendations of the Special

Master in this case.[1] Defendants argue that the Special Master's Reports and Recommendations cannot form the basis for a "limitation ordered by the court" under NRCP 30, as they have not yet been approved by the trial court. It is the determination of the Special Master that such Reports and Recommendations, until modified by the trial court, constitute the law of the case as to those matters that the Special Master has been delegated the authority to address. As such, Report and Recommendation #2 and #3, which address prior Orders of the trial court, may properly form a limitation to be enforced by a party by instructing a deponent not to answer pursuant to NRCP 30.

It is the determination of the Special Master, after reviewing the materials submitted by the parties, including deposition transcripts and detailed logs of each instruction not to answer, that Defendants have failed to sufficiently establish grounds to obtain further testimony from any of the deponents that Plaintiffs' counsel instructed not to answer certain questions from Defendants. Defendants challenges to the instructions not to answer fail for several reasons, including but not limited to the following:

- Some of the instances are the same as those addressed in Report and Recommendation #6 (see chart in Exhibit 1 to Plaintiffs' Opposition, items 50, 51, 60, 62), which were determined to be within the scope of prior Orders of the trial court and/or Reports and Recommendations of the Special Master;
- In some instances, the deponent actually provided a response which effectively ameliorated any potential error in being instructed not to answer (Id., e.g., items 28, 32);
- Many instances involved questions on topics already deemed irrelevant by the trial court and/or the Special Master in prior Orders or Reports and Recommendations, including:
    - The reasonableness of amounts Plaintiffs' bill for emergency services, as addressed in the trial court's February 4, 2021 Order (Id., e.g., item 8);
    - Plaintiffs' policies on balance billing, as addressed in the February 4, 2021 Order and Report and Recommendation #2 and #3 (Id., e.g., item 57);
    - Plaintiffs' contracts with other providers or government payors, as addressed in the February 4, 2021 Order and Report and Recommendation #2 and #3 (Id., e.g., items 21, 39, 70);

[1] Plaintiffs cite to Orders of the trial court dated June 24, 2020, October 26, 2020, February 4, 2021 and April 26, 2021, as well as the Special Master's Report and Recommendation #2 and #3 dated March 29, 2021 and April 14, 2021, respectively, as support for the limitations enforced by instructing deponents not to answer certain questions.

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- Complaints by patients, administrators or hospital employees regarding the actual amount charged for emergency medical services, as addressed in the June 24, 2020 Order, the October 26, 2020 Order, the February 4, 2021 Order and Report and Recommendation #2 and #3;
- TeamHealth's acquisition of Plaintiffs and or Blackstone's purchase of TeamHealth, as addressed in the prior Orders of the Court and Report and Recommendation #2 (Id., e.g., items 36, 47, 55, 73).

While not an exhaustive list, the above-referenced instances are examples of appropriate instructions by counsel not to answer questions so as to enforce limitations already promulgated by the trial court and the Special Master. None of the instances cited by Defendant are outside the scope of these prior rulings or present any prejudice to Defendants so as to justify additional questioning of the deponents in question.

It is therefore the recommendation of the Special Master that Defendants' Renewed Motion to Compel Further Testimony From Deponents Instructed Not to Answer Questions be DENIED.

Plaintiff's Objection to Notice of Intent to Issue Subpoena Duces Tecum to TeamHealth Holdings, Inc., Without Deposition and Motion for Protective Order

Plaintiffs filed this Objection and request for a Protective Order on June 15, 2021. Defendants filed an Opposition on June 23, 2021.

This request relates to a similar Objection and request for a Protective Order filed by Plaintiffs with respect to TeamHealth on March 12, 2021. The prior Objection addressed fifty-six (56) of fifty-eight (58) categories of documents sought by Defendants. The only exceptions to Plaintiffs' request for relief were regarding RFPs 14 and 51, wherein Plaintiffs stated, "The Health Care Providers do not object to No. 14 or 51." See, Objection to Notice of Intent to Issue Subpoena Duces Tecum to TeamHealth Holdings, Inc. Without Deposition and Motion for Protective Order, p. 4 at fn. 4. In the prayer for relief, Plaintiffs stated, "Accordingly, with the exception of Nos. 14 and 51, the Health Care Providers respectfully request that the Court quash the request as overbroad and not relevant or proportional to the needs of this case, while issuing a protective order because United's document requests have nothing to do with the Health Care Providers' claims against United." Id. at p. 7.

In that prior document request, Nos. 14 and 51 were as follows:

14. All internal communications about termination of Plaintiffs' provider participation contract with United.

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51. All agreements or contracts with any network, such as MultiPlan, which could potentially apply to services in Nevada.

The Special Master's Report and Recommendation #2 largely granted Plaintiffs' requests with respect to this subpoena, but noted in footnote 2 that "Plaintiffs did not object to Nos. 14 and 51."

In the instant Objection, Plaintiff now seeks to object to the same two document requests that were previously not objectionable. Defendants have issued a new subpoena, with the former request No. 14 now listed as request No. 1, and the former request No. 51 listed as request No. 2. As grounds for this change in position, Plaintiffs state as follows:

> Although the Health Care Providers did not initially object to Requests 1 and 2 (formerly 14 and 51, respectively) United's disregard of Report and Recommendation #2 through its re-issued subpoena to TeamHealth has prompted this current Objection and request for protective order.

See, Plaintiffs' Objection, p. 3.

However, the Special Master finds that position to be incorrect. Defendants did not ignore Report and Recommendation #2 with the instant subpoena duces tecum. Instead, they followed it to the letter by only requesting the documents excepted from that Report and Recommendation based on Plaintiffs' non-opposition to these two requests. Although Plaintiffs argued at the telephonic hearing that Report and Recommendation #2 was broader in scope than Plaintiffs' prior Objection and request for protective order, thereby necessitating this Objection, the record belies that contention.

It is the recommendation of the Special Master that Plaintiffs have not set forth sufficient grounds to modify Report and Recommendation #2, which specifically excepted these two requests. Therefore, the Special Master finds that Plaintiffs' Objections are not meritorious and that this Motion for Protective Order should be DENIED.

Defendants' Motion to Compel Compliance With Deposition Subpoena on Order Shortening Time

Defendants filed this Motion on June 16, 2021. Plaintiffs filed an Opposition on June 22, 2021, and Defendants filed a Reply brief on June 24, 2021.

At issue is Defendants' attempt to depose non-party witness John Henner. Defendants originally scheduled this deposition to occur on May 26, 2021, but encountered difficulties in serving Henner. On May 20 and 21, 2021, Defendants' process server spoke with Henner's wife, who indicated that Henner was leaving the country (or had already left the country), and that she was not authorized to accept service on Henner's behalf. On May 24, 2021, less then two days before the deposition, Defendants served a deposition subpoena on Henner's fifteen year-old daughter.

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Then, on May 25, 2021, less than one day before the deposition, Defendants served another deposition subpoena on a co-occupant of Henner's residence (apparently not related to Henner).

Henner did not appear for the deposition, and apparently had a conversation with counsel for Defendants after the original deposition date, indicating that he was at a residence in Mexico and would not appear for a deposition absent a court order.

Based on these facts, Defendants contend that Henner is evading service and therefore request an Order compelling Henner to appear for a re-noticed deposition.

Pursuant to NRCP 45, it is the recommendation of the Special Master that the Motion to Compel Compliance With Deposition Subpoena be DENIED. Defendants have failed to establish effective service on Henner for the prior deposition date. Even if service was substantially completed, it was less than one day prior to the time set for deposition. It is premature for the issuance of an Order compelling Henner to appear, given all of the facts set forth above.

Defendants' Motion to Compel Plaintiffs' Production of Documents About Which Plaintiffs' Witnesses Testified

Defendants filed this Motion on June 24, 2021, with a request for an Order Shortening Time. During the June 25, 2021 telephonic hearing on the motions set forth above, it was agreed that this Motion would be heard on July 20, 2021 at 8:30 a.m. (Pacific). Plaintiffs shall file any Opposition on or before July 6, 2021, and Defendants shall file any Reply brief on or before July 12, 2021.

Dated this 1st day of July, 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 July 01, 2021, I served the attached REPORT AND RECOMMENDATION #9 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 July 01, 2021.

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Marianne Carter

From: Balkenbush, Colby <CBalkenbush@wwhgd.com>
Sent: Wednesday, September 15, 2021 11:34 AM
To: Kristen T. Gallagher; asmith@lrrc.com; dpolsenberg@lrrc.com; Llewellyn, Brittany M.; Roberts, Lee
Cc: Pat Lundvall; Amanda Perach
Subject: RE: Fremont v. United - orders re: R&R ## 6, 7 and 9

We are fine with the form and content. You may insert our signature block to that effect for each of those orders and submit to the Court.

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Cc: Pat Lundvall; Amanda Perach
Subject: RE: Fremont v. United - orders re: R&R ## 6, 7 and 9

This Message originated outside your organization.

I am following up on the submission of the attached orders to the Court. If there is no objection planned, will you agree to the form/content? If an objection is planned, please let me know so that my office can convey that information to the Department when we resubmit the proposed orders. As of now, the Department has returned the orders based on a perception that there will be competing orders.

Thank you,
Kristy

Kristen T. Gallagher | Partner

McDONALD CARANO

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From: Kristen T. Gallagher
Sent: Wednesday, September 1, 2021 9:36 AM

CSERV

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 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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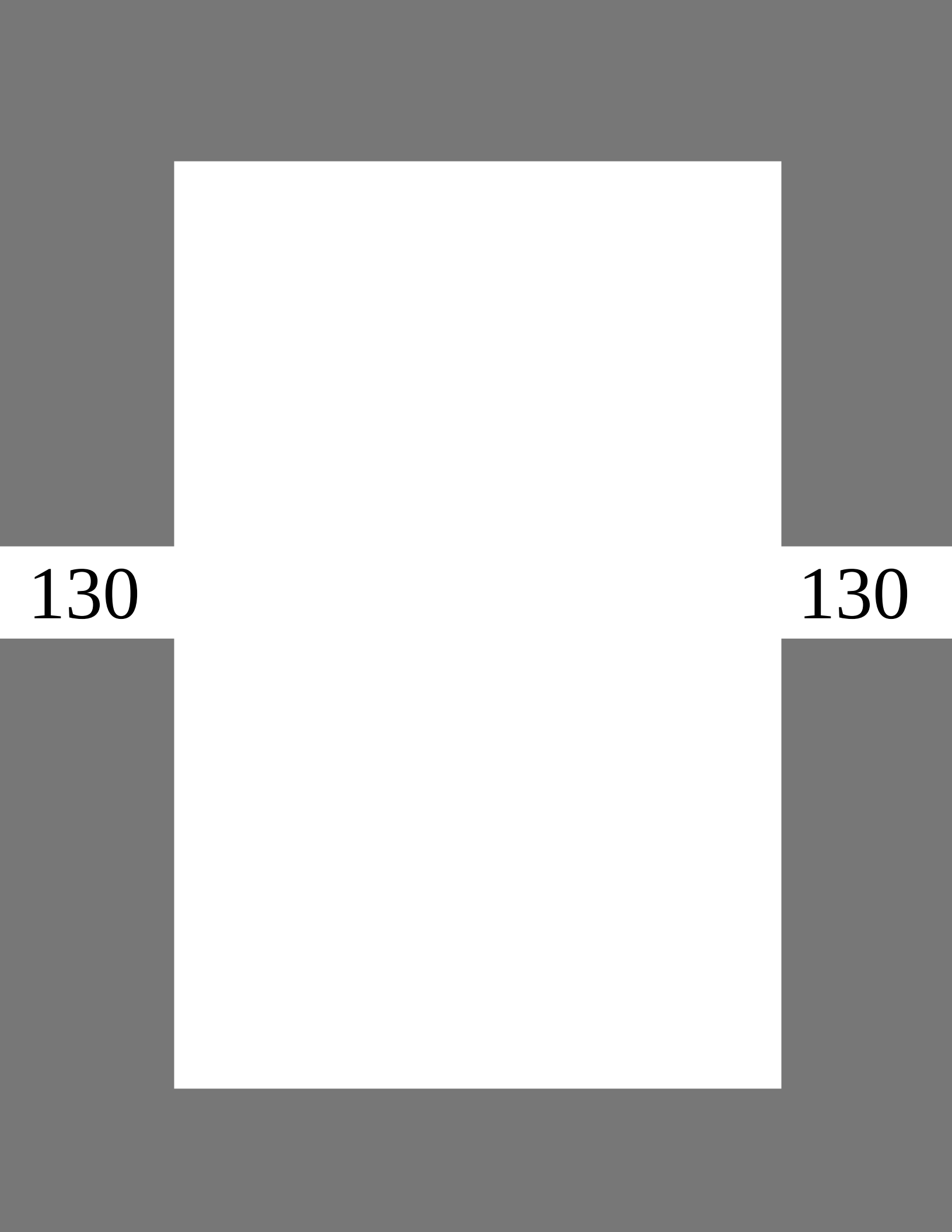
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DISTRICT COURT

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,	Case No.: A-19-792978-B Dept. No.: 27 **DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT** **(HEARING REQUESTED)**

vs.

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

Defendants.

I. INTRODUCTION

Defendants UnitedHealth Group, Inc. ("UHG"), United Healthcare Insurance Company ("UHIC"), United Health Care Services Inc. ("UHS", which does business as UnitedHealthcare or "UHC" and through UHIC), UMR, Inc. ("UMR"), Oxford Health Plans, Inc. ("Oxford"), Sierra Health and Life Insurance Company ("SHL"), Sierra Health-Care Options, Inc. ("SHO"), and Health Plan of Nevada, Inc. ("HPN") (collectively, "Defendants"), bring this Motion for Partial Summary Judgment ("Motion") to narrow the disputed issues for trial and to simplify the presentation of evidence for the jury. Defendants contend that the benefit payments that they already allowed for the disputed healthcare services—$3 million for just over 12,000 benefit claims—equal or exceed the reasonable value of those out-of-network services. The TeamHealth Plaintiffs[1] allege that Nevada law obligates the Defendants to reimburse their unilaterally set charges and they further contend that Defendants' refusal to allow payment of their full billed charges resulted in underpayments of about $11.1 million.

To advocate refusing discovery requested by the Defendants, TeamHealth Plaintiffs have

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

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argued repeatedly that this is a rate of payment case. But the pleadings raise a much broader and more complicated set of legal and factual disputes than the proper rate of payment for the disputed health benefit claims. This Motion seeks to simplify the trial by removing claims that are patently unsupported in the law and evidence. It does not purport to resolve all of the pending legal claims. Rather, by granting this Motion, the Court can streamline an otherwise complicated and unwieldy trial, permitting jurors to focus on the "rate of payment" dispute that the Court has repeatedly held is the heart of the case.

The current trial plan will be incredibly complex and lengthy. There are eight different Defendants, and those Defendants offer different services to different types of clients in different parts of the healthcare market. Each Defendant has its own unique business relationship and course of dealing with each of the three TeamHealth Plaintiffs. There are eight different causes of action, some statutory and some common law, each with distinct elements requiring unique proof against each Defendant. Much of that proof will be extraneous to the core rate of payment dispute that Plaintiffs argue is the focus of their case. And there are more than 12,000 individual reimbursement claims at issue, covering a period of 31 months between July 1, 2017 and January 31, 2020.

There are clear grounds to narrow and simplify this case. ***First***, two of the Defendants did not, and never do, pay, price, or negotiate reimbursement claims. UHG is a holding company and SHO is a provider network; neither has ever paid a single reimbursement claim to any TeamHealth Plaintiff, much less underpaid them. Judgment should be granted in their favor because it is beyond genuine dispute that neither UHG nor SHO engaged in any conduct at issue in the Amended Complaint ("FAC").

Second, recognizing the complexity of setting rates of payment for out-of-network emergency medical services and the exploding cost of these services, the Nevada Legislature enacted a law governing all such reimbursement claims effective January 1, 2020. All emergency services rendered in or after January 2020 are subject to this law, which sets forth a mandatory and exclusive alternative-dispute resolution framework. TeamHealth Plaintiffs' request for a declaratory judgment relating to future reimbursement claims they ***might*** submit to

Defendants in the future is precluded by this statutory framework; all future reimbursement claims will be resolved through this mandatory alternative-dispute resolution process. And many of the disputed benefit claims from January 2020 are governed by this law as well, and therefore cannot be adjudicated in this judicial proceeding.

Third, through error or otherwise, the list of disputed reimbursement claims supplied by TeamHealth Plaintiffs during discovery still contains thousands of claims that are outside the scope of their FAC. For example, these disputed claims include reimbursement claims relating to government health benefit programs, such as Medicaid and Medicare, and claims that were submitted to companies affiliated with UHG that are not a defendant in this case. For each individual one of these benefit claims—and there are thousands of them—TeamHealth Plaintiffs will have to prove their allegations in the FAC that the claims are in fact out-of-network commercial claims that a Defendant allowed but underpaid. The record evidence proves that many of these individual reimbursement claims do not qualify as claims that they are contesting as defined by their own pleadings. By removing these extraneous reimbursement claims at summary judgment, the Court will narrow the proof that must be offered at trial to the 9,753 benefit claims that fall within the scope of the FAC.

Fourth, Defendants are entitled to judgment as a matter of law on TeamHealth Plaintiffs' cause of action alleging that Defendants violated the Nevada Racketeer Influenced and Corrupt Organizations Act ("RICO"), or at a minimum those RICO claims must be substantially limited. There is no evidence that any alleged RICO predicate act caused any of the harm alleged in this case. And, in any event, it is undisputed that most Defendants did not even utilize the Data iSight pricing service, which is the singular evidentiary basis supporting the alleged RICO predicate acts.

Fifth, there is no evidence to support the TeamHealth Plaintiffs' cause of action for breach of the implied covenant of good faith and fair dealing because the undisputed facts show no "special relationship" sufficient to impose fiduciary duties on Defendants.

Sixth, the undisputed facts confirm that there is no basis for this Court to award punitive damages in this commercial dispute between large and sophisticated corporate actors.

Defendants should therefore be granted summary judgment on that claim for relief.

Granting this Motion will eliminate causes of action unrelated to the core rate of payment dispute and narrow the factual issues requiring the presentation of evidence at trial, averting a lengthy and unmanageable trial that no jury could reasonably be expected to follow or endure.

II. STATEMENT OF UNDISPUTED FACTS

TeamHealth Plaintiffs are for-profit physician staffing companies owned by TeamHealth Holdings, Inc. ("TeamHealth"). **Ex. 1**, 30(b)(6) Dep. of Kent Bristow (May 28, 2021) ("Fremont NRCP 30(b)(6) Dep.") at 55:16–25; **Ex. 2**, 30(b)(6) Dep. of Kent Bristow (May 13, 2021) ("TPN NRCP 30(b)(6) Dep.") at 220:7–11; **Ex. 3**, 30(b)(6) Dep. of Kent Bristow (May 14, 2021) ("Ruby Crest NRCP 30(b)(6) Dep.") Dep. at 18:14–21:5. TeamHealth was a publicly traded company until it was acquired in 2016 by a private equity firm, the Blackstone Group, at a valuation of $6.1 billion. **Ex. 4**, Expert Report of Bruce Deal (July 30, 2021) ("Deal Rep.") Deal Rep. at 10. TeamHealth has over 20,000 affiliated healthcare professionals in about 3,400 hospitals located in 47 states, and submits tens of thousands of reimbursement claims annually to UHG affiliates alone. **Ex. 2**, TPN NRCP 30(b)(6) at 39:9–40:9; **Ex. 5**, Dep. of Kent Bristow (May 7, 2021) ("Bristow Dep.") at 99:2–5 & **Ex. 6**, Bristow Dep. Ex. 4; **Ex. 4**, Deal Rep. at 10. The billing department at TeamHealth submits reimbursement claims on behalf of the three TeamHealth Plaintiffs. **Ex. 5**, Bristow Dep. at 52:6–54:8. TeamHealth Plaintiffs are not themselves healthcare providers; they are staffing companies that contract with healthcare providers, including emergency medicine physicians, and then separately contract with hospitals to staff those hospitals' emergency departments with those physicians. *See* FESM001524; FESM001510; FESM001496 (contracts with providers). TeamHealth is to emergency department staffing what Manpower is to secretarial staffing; Manpower supplies the staffing but does not provide secretarial services itself.

Defendants are managed care companies whose primary clients are employers and unions that sponsor health benefit plans for their employees and members. There are two types of health benefit plans: fully insured and self-funded. **Ex. 7**, Expert Report of Karen B. King (July 30, 2021) ("King Rep.") at 5. Managed care companies such as Defendants may offer both types

of plans as options to their clients; the primary difference between the two types of plans is whose funds are used to reimburse benefit claims for healthcare rendered to members of the plans. **Ex. 7**, King Rep. at 5–6. Fully insured plans are funded by an insurance carrier; clients pay premiums to the health insurer in consideration for the insurer assuming the risk of coverage, and the insurer pays claims for covered services. *Id.* Self-funded plans, which are also called "administrative services only" or ASO plans, are funded by the client, who assumes the risk of payment of medical costs. *See id.* There are no insurance premiums for a self-funded plan. *Id.* at 6. In return for administrative fees, a third-party claim administrator manages the fund and processes payments for covered healthcare services. *Id.*; **Ex. 8**, 30(b)(6) Dep. of Marty Millerliele (May 14, 2021) ("UMR-Oxford NRCP 30(b)(6) Dep.") at 26:13–26:25. Regardless of whether the plan is fully insured or self-funded, healthcare providers submit reimbursement claims to the plan administrator, and the administrator allows payment based on the written terms of the plan. *See* **Ex. 9**, 30(b)(6) Dep. of Leslie Hare (May 12, 2021) ("Sierra NRCP 30(b)(6)") at 39:25–40:11.

Defendants are eight separate companies that provide distinct services.

- **UHG** is a publicly traded holding company and is the ultimate parent company of all United Healthcare legal entities. Answer ¶ 6; **Ex. 10**, 30(b)(6) Dep. of Kevin Ericson (May 18, 2021) ("UHG NRCP 30(b)(6) Dep.") at 16:4–7. UHG is not an insurer or a claim administrator, and it does not price or process claims to reimburse healthcare providers for services rendered to members of health benefit plans. **Ex. 10**, UHG NRCP 30(b)(6) Dep. at 16:4–11; 22:6–23:7.
- **UHIC** is an insurance company and third-party administrator that provides health insurance to fully insured clients and claims administration services for self-funded clients. **Ex. 11**, Declaration of Jolene Bradley in Support of Defendants' Motion for Partial Summary Judgment ("Bradley Decl.") ¶ 6. UHIC administers commercial health benefit plans. *Id.*
- **UHS** does business under the trade name UnitedHealthCare ("UHC"), and acts as a third-party administrator that provides claims administration services for self-funded clients.

Ex. 11, Bradley Decl. ¶ 7. UHS administers both commercial and government health benefit plans. **Ex. 12**, Dep. of Daniel Schumacher ("Schumacher Dep.") at 11:22–12:4. UHS does not provide fully insured insurance products. *See* **Ex. 11**, Bradley Decl. ¶ 7.

- **UMR** is solely a third-party administrator that offers claims processing services for self-funded clients. **Ex. 8**, UMR-Oxford NRCP 30(b)(6) Dep. at 25:23–26:3. UMR is not an insurer. *Id.* at 26:4–6, 72:4–72:9; **Ex. 13**, 30(b)(6) Dep. of Scott Ziemer (May 27, 2021) ("Ziemer Dep.") at 16:5–16:14.
- **Oxford** is primarily an insurer, but does a limited amount of business as a third-party administrator. **Ex. 14**, 30(b)(6) Dep. of Jolene Bradley (May 27, 2021) ("Oxford NRCP 30(b)(6) Dep.") at 13:16–14:1. Oxford is not based in Nevada; it does most of its business in the northeastern United States. *Id.* at 14:2–7.
- **SHL** is a Nevada-based insurer that solely offers fully insured health benefit plans to clients. **Ex. 9**, Sierra NRCP 30(b)(6) Dep. at 12:2–17, 23:8–13.
- **SHO** is a Nevada provider network; it does not insure or administer any health benefit plans, and it does not process reimbursement claims. **Ex. 9**, Sierra NRCP 30(b)(6) Dep. at 23:8–13, 57:1–11, 60:17–23, 61:21–24, 62:24–25. Self-funded employers who participate in SHO's provider network select a third-party administrator to process reimbursement claims relating to healthcare services. *Id.* at 57:1–7, 97:3–15.
- **HPN** is an insurer that solely offers fully insured health benefit plans to clients in Nevada. *Id.* at 23:8–13.

TeamHealth Plaintiffs allege, *inter alia*, that Defendants engaged in a racketeering scheme with MultiPlan, Inc. ("MultiPlan") to reimburse healthcare providers' claims at unreasonably low rates using MultiPlan's Data iSight service. FAC ¶ 110. MultiPlan is a publicly held company that offers healthcare cost management solutions, including Data iSight. **Ex. 15**, DEF245162; **Ex. 16**, DEF298507. Data iSight is a service that reprices out-of-network healthcare services at a benchmarked rate based on the geography, procedure, and paid claims data for those billed services. **Ex. 17**, DEF501261; **Ex. 18**, DEF300122. It is undisputed that the Data iSight service is broadly used in the healthcare industry. **Ex. 40**, Dep. of David M.

Leathers (Sept. 15, 2021) ("Leathers Dep.") at 183:25–184:4. Indeed, many health insurers that compete against the Defendants utilize the Data iSight service and many of those competitors did so before any Defendant in this case. *See* **Ex. 19**, Dep. of Susan Mohler (June 18, 2021) ("Mohler Dep.") at 261:8–15; **Ex. 20**, DEF303916, **Ex. 21**, DEF299508. Contrary to the allegations in this case, however, several Defendants do not use Data iSight. UHG, as a holding company, does not use the Data iSight service to price any reimbursement claims. **Ex. 22**, Declaration of Kevin Ericson in Support of Defendants' Motion for Partial Summary Judgment ("Ericson Decl.") ¶¶ 6–8. Similarly, SHO does not process reimbursement claims and does not use Data iSight. **Ex. 23**, Declaration of Leslie Hare in Support of Defendants' Motion for Partial Summary Judgment ("Hare Decl.") ¶ 5. SHL and HPN both process reimbursement claims, but they have never used Data iSight to price those benefit claims. **Ex. 9**, Sierra NRCP 30(b)(6) Dep. at 115:25–116:6. Oxford had no relationship with Data iSight during the period at issue in this case, July 1, 2017 through January 31, 2020; it did not start using Data iSight to price out-of-network reimbursement claims until 2021. **Ex. 14**, Oxford NRCP 30(b)(6) Dep. at 22:23–23:11.

TeamHealth Plaintiffs do not currently participate in any provider network offered by Defendants in Nevada, meaning none of them are parties to a written agreement with Defendants that specifies—among other things—how much they will be reimbursed if and when they render healthcare services to members of health plans that are insured or administered by Defendants.[2] **Ex. 24**, Fremont's Resp. to RFA No. 2 (July 29, 2019). TPN and Ruby Crest have at all times been out-of-network with Defendants. FAC ¶ 254. Prior to being acquired by TeamHealth, Fremont had longstanding network contracts with UHIC, UHS, SHO, SHL, and HPN. *See* **Ex. 25**, DEF011411 (UHS); **Ex. 26**, DEF011380 (SHO); **Ex. 27**, DEF000154 (SHL); **Ex. 28**, DEF011377 (HPN). After the acquisition, TeamHealth noticed the termination of those Fremont contracts. On June 30, 2017, Fremont's prior notice to terminate its contract with UHIC became

[2] Healthcare providers who render services to members of health plans pursuant to a written agreement with the health insurer or third-party administrator are often called "participating" or "network" providers. *See generally* **Ex. 5**, Bristow Dep. at 131:20–132:18. Conversely, non-participating providers are often referred to as "out-of-network" providers. *Id.* at 132:20–133:23.

effective. **Ex. 29**, FESM000779. And on February 25, 2019, Fremont's prior notice to terminate its contracts with SHO, SHL, and HPN became effective. **Ex. 30**, FESM001234.

At the same time that Fremont was terminating its contracts with certain Defendants, TeamHealth was negotiating with UHIC and UHS to become a network provider on a nationwide basis. TeamHealth started the negotiations in 2017, and its top executives met with senior UHS executives several times between December 2017 and the fall of 2019 to discuss reimbursement rates. **Ex. 5**, Bristow Dep. at 237:3–242:3, 294:8–296:22, 327:6–15; **Ex. 2**, TPN NRCP 30(b)(6) Dep. at 179:21–180:3. As early as October 2017, TeamHealth Plaintiffs were on notice that Defendants intended to implement programs designed to reduce reimbursement rates for out-of-network providers. **Ex. 5**, Bristow Dep. at 244:14–245:18. These were arms-length negotiations between two companies with equal bargaining power. **Ex. 31**, Deposition of Rena Harris (June 25, 2021) ("Harris Dep.") at 90:20–25; *see also* **Ex. 5**, Bristow Dep. at 219:2–225:6, 253:14–24, 256:19–257:20. When those national contract negotiations proved unsuccessful, TeamHealth filed this lawsuit in April 2019, and later ended all discussions over a national network agreement in late 2019. *Id.* at 276:4–14, 294:8–296:22, 312:5–313:9, 317:8–318:25, 327:6–15.

TeamHealth Plaintiffs submit reimbursement requests for the full amount of their billed charges, an amount that they unilaterally set. **Ex. 43**, Dep. of Scott Phillips (Sept. 17, 2021) ("Phillips Dep.") at 175:3–176:24. The undisputed evidence shows that they are rarely paid their full billed charges; the experts for all parties confirmed that they were paid their full charges less than 7 percent of the time. *Id.* at 197:12–197:21. However, the payment that the health plan administrator allows is determined by the terms of the applicable benefit plan, which describes the benefits available to the member for out-of-network healthcare services. *See* **Ex. 9**, Sierra NRCP 30(b)(6) at 39:25–40:11. The evidence shows that for less than 10% of the disputed benefit claims in this case (*i.e.*, 793 of the disputed claims), UHC and UMR relied on MultiPlan's Data iSight service to recommend a price for reimbursing the out-of-network services allegedly rendered by TeamHealth Plaintiffs. *See* **Ex. 32**, Expert Report of David M. Leathers (July 30, 2021) ("Leathers Rep.") ¶ 37; **Ex. 33**, Dep. of David M. Leathers ("Leathers

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Dep.") Ex. 16. Sometimes UHC and UMR would accept that recommended price; other times they would allow a higher reimbursement rate pursuant to internal reimbursement policies adopted by Defendants. *See* **Ex. 19**, Mohler Dep. at 265:2–6; **Ex. 34**, 30(b)(6) Dep. of Rebecca Paradise (June 30, 2021) ("Paradise Dep.") at 25:14–26. When a benefit claim was adjudicated and/or priced using Data iSight, TeamHealth Plaintiffs had the option of appealing the pricing recommendation through a post-payment negotiation process offered by Data iSight. **Ex. 2**, TPN NRCP 30(b)(6) Dep. at 249:20–253:15; **Ex. 35**, Dep. of Mark Edwards (June 15, 2021) ("Edwards Dep.") at 172:1–22, 175:25–176:3. When TeamHealth Plaintiffs settled claims through this process, they signed a written agreement in which they accepted the agreed-upon reimbursement rate as "payment in full" for the benefit claim. *See* **Ex. 2**, TPN NRCP 30(b)(6) Dep. at 253:9–15; *e.g.*, **Ex. 36**, FESM001489.

TeamHealth Plaintiffs have produced during discovery a spreadsheet of reimbursement claims that they purport to be challenging in this lawsuit; thus far, they have produced six versions of that disputed list of claims, dropping more than 10,000 previously disputed claims from the case. *Compare* **Ex. 37**, FESM03527 (version produced during fact discovery, with nearly 23,000 claims), *with* **Ex. 38**, Phillips Dep. Ex. 6 (current version with about 12,000 claims). The most recent version of this list contains 12,081 reimbursement claims with dates of service between July 1, 2017 and January 31, 2020 (the "At-Issue Claims"). *See* **Ex. 38**, Phillips Dep. Ex. 6. Defendants' expert witness, Bruce Deal, has reviewed that spreadsheet and added additional information about the same benefit claims from other sources of data that Defendants produced during discovery in this case (the "Matching Spreadsheet"). **Ex. 39**, Deal Decl. ¶ 8 & Ex. A. This Court can use the Matching Spreadsheet as a reference guide that allows it to identify the individual reimbursement claims that are subject to the legal arguments in this Motion, as discussed *infra*. Defendants submit that the facts represented in the Matching Spreadsheet are beyond genuine dispute within the meaning of Nevada Rule of Civil Procedure 56(c).

III. LEGAL ARGUMENT

Nevada Rule of Civil Procedure 56 expressly contemplates "partial summary judgment"

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on a motion that identifies "each claim or defense—or the part of each claim or defense—on which summary judgment is sought." NRCP 56(a). This Court must grant summary judgment on a particular claim or defense "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." NRCP 56(c). An issue of material fact is genuine only when the evidence is such that a rational jury could return a verdict in favor of the nonmoving party. *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). When a defendant files a motion for summary judgment that identifies the absence of facts sufficient to establish a claim for relief, the claimant must come forward with admissible evidence sufficient to support the asserted claims. *Id.*

If the nonmoving party bears the burden of persuasion at trial, as TeamHealth Plaintiffs do here, "the party moving for summary judgment may satisfy the burden of production by either (1) submitting evidence that negates an essential element of the nonmoving party's claim, or (2) pointing out … that there is an absence of evidence to support the nonmoving party's case." *Cuzze vs. University Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602–03, 172 P.3d 131, 134 (2007) (internal quotation omitted). The party opposing summary judgment is not entitled to build a case on the "threads of whimsy, speculation and conjecture." *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983) (affirming summary judgment because plaintiff's affidavit insufficient to "produce the requisite quantum of evidence to enable him to reach the jury with his claims"). Further, speculative arguments about what the facts might be at the time of trial do not suffice to defeat summary judgment. *Wood*, 121 Nev. 731–32, 121 P.3d at 1031.

A. No evidence supports TeamHealth Plaintiffs' causes of action against UHG and SHO, which did not process or pay any of the at-issue claims

The Court should dismiss UHG and SHO prior to trial because the undisputed evidence shows that they were not involved in the adjudication or pricing of any At-Issue Claims, or in any alleged conspiracy with MultiPlan. All of the causes of action in the Amended Complaint are expressly tied to the payment of claims for services that the TeamHealth Plaintiffs allegedly

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rendered to members of health benefit plans that Defendants insured or administered.[3] TeamHealth Plaintiffs' causes of action fail against UHG and SHO because neither Defendant was responsible for claims processing, setting the price for out-of-network reimbursements or a party to any agreements with MultiPlan concerning Data iSight.

TeamHealth Plaintiffs' own list of At-Issue Claims contains no mention of UHG or SHO. *See* **Ex. 38**, Phillips Dep. Ex. 6; **Ex. 23**, Hare Decl. ¶ 5 (SHO did not process any of the At-Issue Claims); **Ex. 40**, Leathers Dep. at 63:7–64:20 (only UHC and UMR processed At-Issue Claims that used Data iSight). Nor do these two Defendants appear in any other claims data that has been produced by either party in this litigation. *See* **Ex. 39**, Deal Decl. Ex. A.

This should come as no surprise. UHG is a holding company, the purpose of which is to be the parent and common stock registrant for all UnitedHealthcare and Optum legal entities. **Ex. 10**, UHG NRCP 30(b)(6) Dep. at 16:5–11. UHG does not sell healthcare insurance products; it does not process healthcare providers' reimbursement claims; it does not control the pricing for such reimbursement; and it does not make use of Data iSight. *See id.* at 15:22–23 ("UHG does not provide administrative services or insurance products."); *see also* **Ex. 22**, Ericson Decl. ¶¶ 7–8. Nor did UHG determine the pricing or reimbursement of any At-Issue Claims. **Ex. 22**, Ericson Decl. ¶ 8. TeamHealth Plaintiffs deposed a UHG corporate representative and solicited no relevant evidence connecting UHG to any disputed reimbursement claims in this action.

As for SHO, it too is not a health insurer and does not process benefit claims for reimbursement. **Ex. 9**, Sierra NRCP 30(b)(6) Dep. at 57:1–64:5. For that reason, it does not utilize the Data iSight service to adjudicate and/or price reimbursement claims. **Ex. 23**, Hare Decl. ¶ 5. SHO is a provider network only—in other words, an administrative services company

[3] *See, e.g.*, FAC ¶¶ 1 ("This action arises out of a dispute concerning the rate at which Defendants reimburse the [Defendants] for the emergency medicine services they have already provided … to patients covered under the health plans underwritten, operated, and/or administered by Defendants."), 200 ("Defendants have [*sic*] and continue to unreasonably and systemically adjudicate the non-participating claims at rates substantially below both the usual and customary fees in the geographic area and the reasonable value of the professional emergency medical services provided by the Health Care Providers to the Defendants' Patients.").

that creates and sells access to a provider network for self-funded clients, largely employers who sponsor health plans for their employees. *See* **Ex. 9**, Sierra NRCP 30(b)(6) Dep. at 23:8–13, 57:1–11, 60:17–23, 61:21–24, 62:24–25. The processing and reimbursement of benefit claims for those self-funded plans is handled by a third-party administrator, not SHO. *Id.* at 57:1–11.

Because none of the At-Issue Claims in any way implicate the conduct of UHG or SHO, and there is simply no evidence in the record otherwise, summary judgment should be entered for those two Defendants on all counts in the FAC.

B. TeamHealth Plaintiffs cannot, as a matter of law, obtain a declaratory judgment in this case

TeamHealth Plaintiffs seek a far-reaching declaration against all Defendants that would set—prospectively and indefinitely—the reimbursement rates paid to emergency medicine providers in various regions of Nevada. The requested declaration would bind those Defendants to out-of-network payment rates or methodologies without regard to the actual benefits available to members of numerous health insurance and self-funded benefit plans. To begin, in their Amended Complaint, they seek a judicial declaration that would "establish[] the usual and customary rates" to which they assert entitlement for the At-Issue Claims. FAC ¶¶ 257–259. Then they go further and demand "a declaration that [Defendants] are required to pay [TeamHealth Plaintiffs] at a usual and customary rate for ***claims submitted thereafter***." *Id.* (emphasis added). Even assuming that they established liability at trial for the historical At-Issue Claims, TeamHealth Plaintiffs are not entitled to declaratory relief for any future benefit claims for at least three independent reasons.

First, the Nevada Legislature recently enacted a comprehensive statutory framework for resolving payment disputes between out-of-network providers of emergency medicine services and third-party payors, and that statutory framework is the exclusive remedy for any future payment disputes over the proper reimbursement for their services. ***Second***, notwithstanding that exclusive statutory remedy, there is no lawful basis for mandating a specific payment rate or payment methodology for future out-of-network emergency medicine services. ***And third***, a declaratory judgment would amount to an impermissible mandatory injunction compelling

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ongoing specific performance of a contract with no end date.

For each of these reasons, this Court should follow other courts that have dismissed similar requests by TeamHealth for declaratory relief and dismiss the Seventh Claim for Relief (Declaratory Judgment) in the FAC.

1. Nevada Law Requires Mandatory Arbitration for Any Disputes Over the Payment of Future Reimbursement Claims Submitted by TeamHealth Plaintiffs for Out-of-Network Emergency Services

In 2019, the Nevada Legislature enacted Assembly Bill 469, a comprehensive act designed to lower "excessive billed charges and revenues generated" by healthcare providers in the State and to "provide relief from excessively high costs of medical care" (the "Act"). NRS 439B.160(2). The Act, effective for dates of service on or after January 1, 2020, *see* NRS 439B.700 *et seq.*, establishes a mandatory and exclusive statutory framework for contesting the amount of reimbursement for emergency medicine services rendered by out-of-network providers, including the healthcare providers who work for TeamHealth Plaintiffs. The Act prescribes mandatory negotiation protocols and then, if the parties cannot reach a resolution, "the parties are required to submit the dispute to binding arbitration," with the out-of-network provider responsible for initiating that arbitration. S.B. No. 68–Comm. On Gov't Affairs, Ch. 62, AB 469, Legis. Counsel's Digest (approved May 14, 2019). Because this statutory framework supplies the exclusive and mandatory remedy for a payment dispute of this kind, TeamHealth Plaintiffs can obtain no relief in this judicial proceeding for reimbursement claims that they may submit to Defendants in the future. This statutory remedy precludes any declaratory, injunctive, or other equitable relief related to future benefit claims.

The comprehensive and mandatory framework set forth in NRS 439B.751 governs all future disputes between TeamHealth Plaintiffs and Defendants concerning "medically necessary emergency services … rendered to a covered [insured]." NRS 439B.751(1), (2). Where the third-party payor (here, the six Defendants that adjudicated and allowed payment of benefit claims)[4] and the out-of-network provider (here, TeamHealth Plaintiffs), had no network contract

[4] As discussed *supra* in section A, neither UHG nor SHO were involved in the processing, payment, or pricing of any At-Issue Claims.

in the 12 months before the date of service, subsection (2) applies. *Id.* 439B.751(2). Any declaration or other equitable relief rendered by this Court as to future benefit claims would necessarily relate to future dates of service, more than 12 months after the termination of any relevant network contract. *See* FAC ¶¶ 254–255 (TeamHealth Plaintiffs have been out-of-network with all Defendants since March 2019 at the latest). Section 439B.751(2) governs all disputes between TeamHealth Plaintiffs and Defendants over reimbursement of benefit claims relating to future out-of-network emergency medicine services.

The Act, in NRS 439B.751(2), sets forth a mandatory process for pre-dispute negotiation and post-dispute resolution of reimbursement claims for out-of-network emergency medicine services. The framework, as laid out by the Legislature, is not complicated. ***First***, the third-party payor (*e.g.*, one of the Defendants) makes an offer of payment to the out-of-network provider (*e.g.*, one of the TeamHealth Plaintiffs) for the medically necessary emergency services. *Id.* ***Second***, the out-of-network provider "shall accept or reject" the amount offered as payment in full within 30 days after receiving the payment. NRS 439B.754(1). If the provider does not object within 30 days, the amount paid "shall be deemed accepted as payment in full." *Id.* ***Third***, if the out-of-network provider timely rejects the amount remitted as payment in full, the provider must also request an additional amount which it would accept as payment in full. NRS 439B.754(2). ***Fourth,*** if the third-party payor refuses to pay the requested additional amount within 30 days after receiving the request, "the out-of-network provider ***must*** request a list of five randomly selected arbitrators" from an entity authorized by the Nevada Department of Health and Human Services ("DHHS"). NRS 439B.754(3) (emphasis added). ***Fifth***, after selecting an arbitrator from the list of five identified, the "provider and the third party shall participate in binding arbitration" concerning the proper reimbursement amount. NRS 439B.754(5).

The dispute resolution process enacted by the Nevada Legislature requires TeamHealth Plaintiffs to pursue disputes over reimbursement for out-of-network emergency medicine services by following these steps. As detailed *infra* in section C, either NRS 439B.751(1) or NRS 439B.751(2) applies to any of TeamHealth Plaintiffs' claims with dates of service in

January 2020 when the Act took effect. Therefore, TeamHealth Plaintiffs cannot be granted any equitable relief concerning future claims. Such prospective relief would contradict the mandatory and exclusive remedy that the Nevada Legislature has enacted for resolving these reimbursement disputes. The Court should therefore dismiss the TeamHealth Plaintiffs' declaratory judgment claim with respect to any disputes over the proper reimbursement of future benefit claims.

2. Mandating a Specific Payment Rate or Methodology for Future Out-of-Network Benefit Claims Contravenes Nevada Law

Even without the requirements of NRS 439B.751(2) and NRS 439B.754, the judicial declaration that TeamHealth Plaintiffs seek would contravene well-established Nevada law that bars declaratory relief related to future events.

The Nevada Supreme Court has long made clear that "[a] declaratory judgment should deal with a ***present***, ascertained or ascertainable state of facts." *Cox v. Glenbrook Co.*, 78 Nev. 254, 268, 371 P.2d 647, 656 (1962) (emphasis added). Declaratory relief is available only where an "issue is ripe for judicial determination." *Cty. of Clark, ex rel. Univ. Med. Ctr. v. Upchurch*, 114 Nev. 749, 752, 961 P.2d 754, 756 (1998). In *Cox*, for example, the Supreme Court reversed a trial court's declaratory judgment order that a proposed subdivision would overburden a right-of-way easement. The Court reasoned that the "factual circumstances which may arise in the future cannot be fairly determined now … [especially] where there is presently no justiciable controversy, and where the existence of a controversy is dependent upon the happening of future events." 78 Nev. at 267, 371 P.2d at 655–656. Here, TeamHealth Plaintiffs seek a declaratory judgment that sets reimbursement rates for benefit claims for out-of-network services that have not yet been provided, the facts of which are not ascertainable because they have yet to actually transpire. Such a result would violate Nevada law requiring that "every judgment following a trial upon the merits must be based upon the evidence presented; it cannot be based upon an assumption made before the facts are known or have come into existence." *Id.* at 266, 371 P.2d at 655.

With respect to future benefit claims, there is no present ascertained state of facts for this

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Court to adjudicate, and so there is no ripe claim for judicial resolution. The Court cannot today adjudicate healthcare reimbursement rates for 2022, much less 2032 and beyond. Myriad factors impact healthcare reimbursement, as is demonstrated by the voluminous and competing expert reports in this case. Through merger, acquisition, dissolution, or bankruptcy any plaintiff or defendant may not even exist in its present form in future years.

One need look only at the evidence relating to the At-Issue Claims to see why no justiciable controversy exists as to future benefit claims—that evidence demonstrates a large disparity in the factors that affected the reasonable value of the At-Issue Claims, yet TeamHealth Plaintiffs request an unworkable, one-size-fits all declaration to resolve future disputes over payment of benefit claims. For example, the At-Issue Claims span from July 1, 2017 through January 31, 2020, and reveal wide variations in (i) the number of claims that were submitted to Defendants, (ii) the specific CPT codes that were reported on those claims, (iii) the amount of the charges that were billed on those claims, and (iv) the amount that Defendants allowed for payment of those claims; these material variations will assuredly manifest again for future claims as well. *See* **Ex. 41**, Expert Rebuttal Report of Bruce Deal (Aug. 31, 2021) ("Deal Rebuttal Rep.") ¶¶ 24–25, 36 n.53; *id.* Ex. 1 A-1–B-6 (measuring changes to TeamHealth Plaintiffs' billed charges over time); *see also* **Ex. 42**, Expert Report of Scott K. Phillips (July 30, 2021) ("Phillips Rep.") Exs. 7–10 (listing TeamHealth Plaintiffs' billed charges by CPT code over time). TeamHealth Plaintiffs' own expert witness conceded that he could not calculate the reasonable value of emergency medicine services performed after January 31, 2020, without claims data and other evidence that extended beyond that date, none of which he possesses. **Ex. 43**, Phillips Dep. at 42:2–23. To state the obvious, no claims data exists for emergency medicine services that have not yet been performed.

TeamHealth Plaintiffs seek a declaratory judgment that would require Defendants to allow payment at the "usual and customary rate" for emergency medicine services rendered in the future. But that is not the applicable legal standard in Nevada; in this case, the legal standard is whether the Defendants' allowed payment for the "reasonable value" of the At-Issue Claims. *Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 283 P.3d 250, 256 (2012). Even if

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the "usual and customary rate" was the applicable standard, however, the "usual and customary rate" for reimbursement claims for a particular service in one year may be different in any other year. For instance, billed charges for various emergency medicine services have increased dramatically in Nevada just in the past two or three years. *See* **Ex. 39**, Deal Rep. Ex. 1 & App'x B. Even TeamHealth Plaintiffs' expert witness conceded that "there's a lot of variables" that determine providers' charges, including revenue demands to cover costs, overall payor mix, and a hospital's unique requirements and policies. **Ex. 43**, Phillips Dep. at 175:3–176:24. It is impossible for this Court to determine what the "usual and customary" reimbursement rate or methodology would be for all emergency medicine services that may be rendered in the future by TeamHealth Plaintiffs to members of health plans insured or administered by Defendants.

For similar reasons, two courts have rejected similar claims for injunctive or "declaratory" relief brought by other TeamHealth affiliates. In *ACS Primary Care Physicians Southwest PA v. Molina Healthcare* ("*Molina*"), No. 2017-77084 (Tex. 113th Jud. Dist.), a number of TeamHealth affiliates filed an action disputing the out-of-network reimbursements that Molina Healthcare allowed for emergency medical services they rendered to Molina's members. Those TeamHealth affiliates sought a declaratory judgment for the payment of future benefit claims, and Molina moved for summary judgment, requesting relief on benefit claims "arising in the future for unknown services, at an unknown date, and for an unknown amount." **Ex. 44**, *Molina*, Def.'s Mot. for Summ. J. 27 (Jan. 10, 2020). The court granted Molina summary judgment on that claim. **Ex. 45**, *Molina*, Order (Apr. 15, 2020). Similarly, in *Southeastern Emergency Physicians, LLC v. Arkansas Health & Wellness Health Plan* ("*Centene*"), No. 4:17-cv-492-KGB (E.D. Ark.), a court granted the defendant's motion to dismiss the declaratory judgment claim. **Ex. 46**, *Centene*, Defs' Br. in Support of Mot. to Dismiss (Aug. 31, 2017); **Ex. 47**, *Centene*, Order on Mot. to Dismiss (Jan. 30, 2018). Like these recent trial court decisions denying the similar requests for declaratory relief, this Court should dismiss TeamHealth Plaintiffs' request for declaratory judgment.

3. TeamHealth Plaintiffs' Request for Declaratory Relief Seeks an Unprecedented Mandatory Injunction Compelling Ongoing Specific Performance of an Implied-in-Fact Contract

TeamHealth Plaintiffs' request for a declaratory judgment should also be rejected in light of their request for a mandatory injunction that would require Defendants' specific performance of an implied-in-fact contract with no end date.[5] *See* FAC, Request for Relief ¶ F. There is no precedent in Nevada law that supports such an extraordinary remedy. Courts do not order a party to perform a continuous series of acts which extend through a long period of time and require perpetual supervision by the court. *See City of Thousand Oaks v. Verizon Media Ventures*, No. CV-02-2553, 2002 WL 987910, at *9 (C.D. Cal. May 15, 2002), *rev'd on other grounds*, 69 F. App'x 826 (9th Cir. 2003) (rejecting claim for specific performance to enforce a commercial lease where it would require "extensive" or "continuous" "court supervision" long into the future); *see also Uretek (USA), Inc. v. Ureteknologia de Mexico S.A. de C.V.*, No. H-11-3060, 2013 WL 3280151, at *8–9 (S.D. Tex. June 27, 2013) ("The specific performance UdeM seeks would require an injunction compelling Uretek to perform contractual obligations for as many as 10 additional years, with the prospect of disputes over Uretek's compliance with the exclusivity and noncompete contract provisions coming to this court for resolution and supervision. The need for such an order, which is not capable of present performance, weighs strongly against specific performance.").

Even without the explicit request for an injunction, TeamHealth Plaintiffs' request for declaratory relief would by itself require this Court not only to determine continuously into the future whether particular reimbursement rates allowed by Defendants were the "usual and customary rates," but also to maintain jurisdiction in perpetuity to interpret and supervise the putative implied-in-fact contracts and determine whether the Defendants' offered reimbursement

[5] In this Motion, Defendants do not seek judgment as a matter of law on the implied-in-fact contract claim, though they will dispute at trial that any such implied-in-fact contract exists. Curiously, by seeking open-ended equitable relief with no end date, the TeamHealth Plaintiffs reveal their audacious theory, which appears to be that when the TeamHealth Plaintiffs terminated any written contract with any Defendant, an implied-in-fact contract arose to pay them ***more*** than the written contract—a contract with no end date, and that can never be terminated by the Defendant. The scope of such an implied-in-fact contract is without precedent in Nevada law and is justified by neither course of dealing nor any other evidence.

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satisfied those implied contractual terms. To put it lightly, this outcome would not promote judicial economy or commercial fairness of the arms-length transactions between the parties.[6] TeamHealth Plaintiffs cannot explain how granting a mandatory injunction compelling ongoing specific performance of an unwritten contract would be appropriate when balancing the hardships between the parties, as they must to obtain the specific performance they seek. *Fowler v. Sisolak*, No. 2:19-cv-01418, 2020 WL 7495430, at *1 (D. Nev. Dec. 18, 2020) (citing *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc)) (noting that mandatory injunctions should be denied "unless the facts and law clearly favor the moving party").

The TeamHealth Plaintiffs request an unprecedented judicial overreach that would guarantee them excessive reimbursement rates in perpetuity. The Court should reject their request and dismiss TeamHealth Plaintiffs' claim for declaratory judgment.

C. Nearly 500 At-Issue Claims with January 2020 dates of service are barred as a matter of law by NRS 439B.751(2) and NRS 439B.754

TeamHealth Plaintiffs dispute more than 1,100 claims with dates of service in January 2020; indeed, January 2020 is the month with the most At-Issue Claims in this lawsuit. **Ex. 41**, Deal Rebuttal Rep. ¶¶ 19–20, Ex. 2.; **Ex. 39**, Deal Decl. Ex. A. As discussed *supra* in section B.1, effective on January 1, 2020, the Nevada Legislature implemented a comprehensive and binding arbitration process to resolve payment disputes over the reimbursement of out-of-network emergency medicine services. NRS 439B.751(2) and NRS 439B.754 codify the statutory dispute resolution process that is the exclusive remedy for any payment disputes regarding out-of-network emergency medicine services. Thus, any At-Issue Claims governed by NRS 439B.751(2) and NRS 439B.754(2) necessarily fail as a matter of law.

About 40 percent of the January 2020 At-Issue Claims were subject to the mandatory arbitration provisions of NRS 439B.751(2) and NRS 439B.754. Whether a claim is subject to

[6] As explained *infra* in section III.B.1, granting declaratory relief in the manner sought by the TeamHealth Plaintiffs would also contravene the intent of the Nevada Legislature that carefully crafted an exclusive and mandatory arbitration scheme to resolve payment disputes over out-of-network emergency medicine services. Clearly, the legislature's intent was not to burden courts with the task of permanently supervising the reasonableness of out-of-network reimbursement for individual benefit claims.

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these statutes depends on whether the particular TeamHealth Plaintiff and the particular Defendant had a network contract in the 12 months preceding the date of service. *See* NRS 439B.751(2). Any At-Issue Claims with dates of services that are 12 months after the end of a contractual relationship with a third-party payor are subject to NRS 439B.751(2) and 439B.754. Of the eight Defendants in this case, SHL, SHO, and HPN were the only Defendants that had a network contract in effect with any TeamHealth Plaintiff within the 12 month period preceding January 1, 2020.

First, TPN and Ruby Crest have *never* been in network with any Defendant. All of their At-Issue Claims with January 2020 dates of service are subject to the requirements of NRS 439B.751(2) and NRS 439B.754 and are barred as a matter of law.

Second, Fremont never had a contract with UHG. Because Fremont never had a contract with UHG, perforce no contract existed in the 12 months preceding the January 2020 dates of service. All Fremont claims against UHG with January 2020 dates of service are subject to NRS 439B.751(2) and NRS 439B.754 and are precluded as a matter of law.

Third, Fremont terminated its contract with UHIC and its affiliates, including UHS, Oxford, and UMR, as of June 30, 2017. *See* **Ex. 48**, FESM000763 and **Ex. 49**, FESM000764; **Ex. 25**, DEF011411–12, DEF011421. Therefore, no contract was in force in the 12 months preceding any January 2020 date of service. All Fremont claims against UHIC, UHS, Oxford, and UMR with January 2020 dates of service fail as a matter of law because those At-Issue Claims are subject to the mandatory arbitration procedure set forth in NRS 439B.751(2) and NRS 439B.754.

The above three categories encompass 422 disputed claims with dates of service in January 2020. **Ex. 39**, Deal Decl. Ex. I. Nevada's mandatory dispute-resolution framework applies to these benefit claims, and therefore judgment should be entered in favor of Defendants as a matter of law with respect to these 422 claims.

D. Defendants are entitled to judgment on At-Issue Claims outside the scope of the Amended Complaint

The most current list of At-Issue Claims contain several categories of benefit claims that

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do not meet the criteria set forth in the FAC.[7] **Ex. 39**, Deal Decl. ¶ 8 & Ex. A. The operative complaint defines the health benefits claims that were allegedly underpaid as follows: claims that are (1) not subject to a contract that governs reimbursement rates, (2) paid by a Defendant to one of the TeamHealth Plaintiffs, and (3) not made pursuant to any government-funded health insurance program such as Medicare or Medicaid. *See* FAC ¶¶ 40–41. At every stage of this litigation, TeamHealth Plaintiffs have acted consistent with an intent to pursue only the benefit claims that match these criteria. *See, e.g.*, **Ex. 42**, Phillips Rep. at 6 n.3, 7–8; **Ex. 43**, Phillips Dep. at 133:19–134:21; **Ex. 50**, Ocasio Dep. at 32:11–25 (confirming that the only reimbursement claims at issue are out-of-network commercial claims, not government claims).

This Court should grant Defendants summary judgment on the At-Issue Claims in the categories described below because they fall outside the scope of the operative complaint.

1. Medicare or Medicaid Claims

TeamHealth Plaintiffs' list of At-Issue Claims identifies 62 benefit claims that were paid in connection with the Medicare or Medicaid program. *See* **Ex. 39**, Deal Decl. ¶ 9, Ex. A (62 claims are marked "Y" in the "Government Funded" field of claims data), Exs. B & C; **Ex. 11**, Bradley Decl. ¶ 9 (identifying data values that indicate claims paid pursuant to Medicare Supplement health benefit plan); **Ex. 23**, Hare Decl. ¶ 9 (identifying data values that indicate claims paid pursuant to Medicaid). Both in the FAC and in discovery, TeamHealth Plaintiffs expressly disclaimed that they were contesting benefit claims paid in connection with government healthcare programs. *See* FAC ¶ 41 ("The Non-Participating Claims involve only commercial [products]. They do not involve Medicare Advantage or Medicaid products."); **Ex.**

[7] The TeamHealth Plaintiffs have served six different spreadsheets that purport to identify the disputed claims. They served four lists during fact discovery and then two more during expert discovery. *See* **Ex. 51**, FESM000011; **Ex. 52**, FESM000344; **Ex. 53**, FESM003527; **Ex. 54**, FESM020911_CONFIDENTIAL; **Ex. 55**, FESM020911 – UHC NV ED 2104; **Ex. 56**, FESM020911-Final List of Claims; **Ex. 57**, 08_24_Disputed_Claims. The most recent version of this list was provided only with the TeamHealth Plaintiffs' rebuttal expert reports, which were served on August 31, 2021. *See* **Ex. 38**, Phillips Dep. Ex. 6. With each iteration, the TeamHealth Plaintiffs reduce the number of disputed claims—from more than 23,000 disputed claims in a previous spreadsheet to 12,081 claims in the "final" list of At-Issue Claims. The latest revisions appear to remove categories of claims that are vulnerable to summary judgment, such as claims that were adjudicated pursuant to network agreements. *See* **Ex. 40**, Leathers Dep. at 56:8–57:8; **Ex. 43**, Phillips Dep. 62:6–66:3.

50, Ocasio Dep. at 32:11–25 ("We're only pulling in commercial claims … . And if we deem [any claim] to be any type of Medicare or Medicaid reimbursements, we will remove those claims from the data set."). Because TeamHealth Plaintiffs expressly excluded this category of claims in their FAC and in discovery, Defendants should be granted summary judgment on these 62 At-Issue Claims.

2. Claims Resolved Through Negotiated Agreements

Certain benefit claims that TeamHealth Plaintiffs submitted to certain Defendants were adjudicated and/or priced using the Data iSight service offered by MultiPlan. TeamHealth Plaintiffs had the option to contest the allowed amounts for such claims—that is, they could dispute the allowed amount and seek to negotiate a higher payment. **Ex. 35**, Edwards Dep. at 172:1–22, 175:25–176:3. When such a negotiation resulted in an agreement that produced additional payment for the disputed claim, TeamHealth Plaintiffs executed letters of agreement with Data iSight in which they accepted the negotiated reimbursement as "payment in full" for the appealed claim. *See id.* at 186:3–23; *see also* **Ex. 36**, FESM001489.

The list of At-Issue Claims contains 30 claims submitted to Defendants that were later resolved through a negotiated resolution between TeamHealth Plaintiffs and Data iSight. **Ex. 39**, Deal Decl. ¶ 9, Ex. A (claims resolved through Data iSight appeals are marked "Y" in the "Data iSight (LOA Only)" column of the Matching Spreadsheet), & Ex. G; *see also* **Ex. 58**, FESM009464 ("Negotiations Completed All Time"). These are benefit claims that TeamHealth Plaintiffs' corporate designee admitted were resolved through the negotiated appeals process with Data iSight. **Ex. 2**, TPN NRCP 30(b)(6) Dep. at 249:20–253:15. For each of these negotiated benefit claims, there was a written agreement between the relevant TeamHealth Plaintiff and Data iSight in which the TeamHealth Plaintiff accepted the agreed-upon reimbursement as full payment of its claim. *See id.* at 258:23–259:22; *e.g.*, **Ex. 36**, FESM001489. This group of At-Issue Claims therefore fails as a matter of law because TeamHealth Plaintiffs have no legal right to seek additional compensation from Defendants for these negotiated claims.

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3. Denied Benefit Claims

TeamHealth Plaintiffs have expressly limited their disputed benefit claims to those that Defendants "adjudicated as covered, and allowed as payable." FAC ¶ 40. They have emphasized time and again that this is a "rate of payment" case, not a "right to payment" case. In fact, in seeking to remand this case from federal court, they conceded that if their right to payment ***were*** at issue, their benefit claims would be completely preempted by ERISA. *See* Am. Mot. to Remand, *Fremont Emergency Servs. (Mandavia), Ltd. v. UnitedHealth Group, Inc.*, Case No. 2:19-cv-832 JCM (VCF), ECF 49 at 2 (D. Nev. Jan. 15, 2020) ("Only right-to-payment claims are completely preempted. Rate-of-payment claims, like those asserted here, are not preempted … ."). In short, TeamHealth Plaintiffs have asserted that none of the benefit claims they are challenging involve denials of coverage, and that this Court's very jurisdiction is founded on a federal court's finding that their disputed claims are limited in this way.

Nevertheless, the list of At-Issue Claims contains 1,791 benefit claims in which Defendants ***denied coverage*** for some of the services identified on the claim form. **Ex. 39**, Deal Decl. ¶ 9, Ex. A (claims that were partially denied are marked "Y" in the "Denied" column of the Matching Spreadsheet), Ex. D. These benefit claims were not adjudicated as fully covered and payable, indeed, Defendants did ***not*** "adjudicat[e] them as covered." FAC ¶ 40. TeamHealth Plaintiffs' causes of action fail as a matter of law with respect to any disputed claim for which Defendants denied coverage for some of the services identified on the claim forms.[8]

4. Claims that TeamHealth Plaintiffs Did Not Submit to Defendants

For other At-Issue Claims, there is no evidence that TeamHealth Plaintiffs ever submitted the benefit claim forms to Defendants. In addition, for some of these At-Issue Claims, there is actually evidence that the claims were submitted to an ***entirely separate insurance company*** that is not a defendant in this case. Defendants cannot pay—much less underpay—a benefit claim that was never submitted to them or was submitted to a different insurance company.

[8] The TeamHealth Plaintiffs should be estopped from putting such claims at issue here. In the alternative, this case is subject to removal to federal court. *Borrero v. United Healthcare of N.Y., Inc.*, 610 F.3d 1296, 1302 (11th Cir. 2010) (so-called "hybrid" claims that both partially deny coverage and allow payment for other services on the claim form are completely preempted by ERISA).

There are 287 At-Issue Claims for which there is no evidence that the TeamHealth Plaintiffs actually submitted the claim forms to any Defendant. **Ex. 39**, Deal Decl. ¶ 9, Ex. A (claims with no matching records in Defendants' claims data are marked "Y" in the "Unmatched" column of the Matching Spreadsheet), Ex. H. For these claims, there is no corresponding entry in Defendants' own records that matches those claims. *Id.* ¶ 9. There is therefore no evidence that these benefit claims were ever submitted to Defendants, that they were adjudicated as covered, or that payment was allowed for those claims.

For 158 of the At-Issue Claims, the evidence shows these benefit claims were submitted to ***other insurance companies*** not named in the FAC. **Ex. 39**, Deal Decl. ¶ 9 & Exs. E & F; **Ex. 11**, Bradley Decl. ¶¶ 8–9; **Ex. 22**, Ericson Decl. ¶¶ 9–10. For instance, some of these At-Issue Claims were submitted to UnitedHealthcare Insurance Company of Illinois, UnitedHealthcare Insurance Company of New York, and UnitedHealthcare Insurance Company of North Carolina, *see* **Ex. 11**, Bradley Decl. ¶¶ 8–9; **Ex. 22**, Ericson Decl. ¶¶ 9–10, **Ex. 39**, Deal Decl. ¶ 8 & Ex. F, none of which were named as defendants in the FAC and none of which will be represented at trial.

Summary judgment should enter in Defendants' favor for these 445 At-Issue Claims.

E. There is no evidence of causation to support TeamHealth Plaintiffs' RICO allegations

TeamHealth Plaintiffs' cause of action under RICO requires proof that the predicate criminal acts allegedly committed by the Defendants actually caused their injury. The only predicate acts alleged by TeamHealth Plaintiffs for which there is ***any*** evidence in the record are certain alleged misrepresentations regarding Data iSight.[9] *See* FAC ¶¶ 177–178.

[9] In addition to these allegedly fraudulent statements, TeamHealth Plaintiffs allege two other predicate acts: (1) involuntary servitude, and (2) obtaining money by false pretenses. FAC ¶ 110. TeamHealth Plaintiffs have identified absolutely no evidence that Defendants ***forced*** them to provide emergency medicine services to anyone. *See* NRS 200.463 (forced labor by physical harm or restraint, threatened harm or restraint, or through abuse of legal process). Nor is there any evidence that Defendants obtained money from TeamHealth Plaintiffs, much less by false pretenses. *See* NRS 207.360(28). To the extent TeamHealth Plaintiffs rely on the alleged misrepresentations about Data iSight to support alleged violation of NRS 207.360(28), the RICO claims fail for lack of causation for the reasons discussed in this Section.

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Causation is a required element of any RICO claim. "To recover under RICO … the plaintiff must show that the defendant's RICO violation proximately caused the plaintiff's injury." *See Allum v. Valley Bank of Nev.*, 109 Nev. 280, 282, 849 P.2d 297, 300 (1993); *Hemi Grp., LLC v. City of N.Y.*, 559 U.S. 1, 17–18 (2010) ("This Court has interpreted RICO broadly, consistent with its terms, but we have also held that its reach is limited by the 'requirement of a direct causal connection' between the predicate wrong and the harm."). Where the predicate act is mail or wire fraud, a plaintiff must at least prove that "*someone* relied on the defendant's misrepresentations" in order to show "but-for causation" between the predicate act and the alleged injury. *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 658 (2008).

TeamHealth Plaintiffs' causation theory requires proof that various alleged misrepresentations about Data iSight (*i.e.*, the alleged RICO predicate acts) proximately caused them to render the emergency medicine services for which they contend they were underpaid (*i.e.*, their alleged injury). Specifically, they allege that certain Defendants made statements on websites and in other publications that they contend falsely represented to providers the degree of transparency and objectivity in the Data iSight service that these Defendants utilized to recommend pricing for some portion of the At-Issue Claims.[10] FAC ¶¶ 177–178; **Ex. 59**, Pls.' Resp. to Defs.' ROG No. 8 (Sept. 28, 2020). TeamHealth Plaintiffs further allege, without explanation, that these purported misrepresentations somehow caused them injury in the form of underpaid reimbursement claims for healthcare services that they allegedly rendered to members of health benefit plans insured or administered by Defendants. *Id.* ¶¶ 268–269.

There is no evidence of reliance or ***any*** causal link between, on the one hand, Defendants' alleged misrepresentations about Data iSight and, on the other hand, TeamHealth Plaintiffs' decision to render the disputed emergency medicine services or the alleged underpayments for those services. In a prototypical RICO case premised on fraud, the plaintiff will argue that, but for the misrepresentation, the plaintiff would have done something

[10] The TeamHealth Plaintiffs do ***not*** allege that Defendants' mere use of Data iSight was itself a predicate act. Nor could they allege that contracting with MultiPlan could constitute fraud, since such contracts, would not, by definition, constitute communications to the TeamHealth Plaintiffs.

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differently. Although the plaintiff's direct reliance on a misrepresentation is not an essential element in every RICO case, the U.S. Supreme Court has suggested that "it may well be that a RICO plaintiff alleging injury by reason of a pattern of mail fraud must establish at least third-party reliance in order to prove causation." *Bridge*, 553 U.S. at 659. "This is because, logically, a plaintiff cannot even establish but-for causation if *no one* relied on the defendant's alleged misrepresentation." *Painters & Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharms. Co.*, 943 F.3d 1243, 1259 (9th Cir. 2019) (emphasis in original).

But TeamHealth Plaintiffs do not allege, much less offer evidence, that *anyone* relied on any misrepresentations. In other words, TeamHealth Plaintiffs do not allege and have not proven that *anyone*, had they known that some representations by Defendants were untrue, would have done *anything* different. TeamHealth Plaintiffs have produced no evidence that, absent any particular misrepresentations about Data iSight, they would have made different decisions regarding whether and how to render the disputed emergency medicine services. To the contrary, TeamHealth Plaintiffs concede that they would have rendered the exact same healthcare services regardless of whether Defendants made any alleged misrepresentations about Data iSight—in fact, they contend that "federal and state law requires" that they do so "without regard to insurance status or ability to pay." FAC ¶ 21; *see also* **Ex. 3**, Ruby Crest NRCP 30(b)(6) Dep., 123:17–23. Thus, any alleged misrepresentations about Data iSight had ***no plausible effect*** on whether TeamHealth Plaintiffs would have provided the services reported in the At-Issue Claims.

A federal court in Florida recently dismissed for the same reason nearly identical RICO allegations brought by other TeamHealth affiliates. In *Florida Emergency Physicians Kang & Associates, M.D., Inc. v. United Healthcare of Florida, Inc.*, TeamHealth-owned physician staffing companies in Florida brought RICO claims against Defendants' affiliates and MultiPlan based on the same alleged racketeering scheme. *See* No. 20-60757, 2021 WL 2525262, at *2–3 (S.D. Fla. Mar. 16, 2021). In that case, the federal court held that the plaintiffs "fail[ed] to set out allegations which permit the Court to draw a reasonable inference that Defendants' actions proximately caused the harm alleged." *Id.* at *7. Although the court in that case decided the

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issue on the pleadings, the record here presents this Court with an even more clear resolution of the same allegations: TeamHealth Plaintiffs cannot prove that their alleged harm "was plausibly incurred as a direct result of Defendants[']' alleged fraudulent misrepresentations." *Id.* For the same reason the court in Florida dismissed the RICO claims in that case, this Court should grant summary judgment to Defendants on TeamHealth Plaintiffs' RICO claims.

F. Alternatively, the undisputed evidence requires limiting TeamHealth Plaintiffs' RICO claims to those involving Data iSight

TeamHealth Plaintiffs have made clear that their RICO cause of action concerns only those benefit claims for which Defendants used the Data iSight service to adjudicate and/or price the claims. Their own expert witness determined that only two of the Defendants—UHC and UMR—adjudicated and/or priced benefit claims using the Data iSight service during the period at issue, and did so relatively infrequently; more than 90% of the At-Issue claims were never touched by that service. **Ex. 40**, Leathers Dep. 64:13–20 (data presents "no indication" that SHL, SHO, HPN, Oxford, UHG, or UHIC "priced or adjudicated any claims using Data iSight"). If the Court declines to grant Defendants summary judgment on the RICO claims in their entirety, the RICO cause of action should be narrowed to include only the At-Issue Claims (1) that were submitted to UHC or UMR, ***and*** (2) that relied on Data iSight to adjudicate and/or price those claims.

TeamHealth Plaintiffs' RICO claim rests on allegations that Defendants used Data iSight to process certain reimbursement claims; as a matter of simple logic, the RICO cause of action fails for any At-Issue Claim that was not adjudicated and/or priced using Data iSight. The FAC limits the RICO claim to the use of Data iSight to adjudicate and/or price certain reimbursement claims. *See* FAC ¶¶ 175–188 (predicate acts concern Data iSight); *id.* ¶ 269 ("unlawful acts" concern Data iSight); *id.* ¶¶ 128–174 (alleged misrepresentations relate to Data iSight).

The TeamHealth Plaintiffs confirmed during discovery that their RICO cause of action concerns only those reimbursement claims that involved the use of Data iSight. *See* **Ex. 58**, Ps' Resp. to Ds' ROG No. 7 (stating that the alleged false claims relate to use of Data iSight); **Ex. 3**, Ruby Crest NRCP 30(b)(6) Dep. at 108:2–24 (testifying that the alleged false statements related

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to Data iSight); *id.* at 132:10–14 (RICO cause of action is based on alleged agreement between Defendants and MultiPlan concerning their use of Data iSight). Indeed, TeamHealth Plaintiffs' corporate designee conceded during his deposition that if a Defendant did not use Data iSight to adjudicate and/or price any claims, then that Defendant is not part of the alleged RICO scheme:

> Q: If Sierra Health-Care is reimbursing out-of-network claims from Ruby Crest and is not utilizing Data iSight, Data iSight service, or any other service reference database offered by MultiPlan; if that is the case, do you agree then that the claims that are being priced by Sierra are not part of the racketeering scheme alleged in the Complaint?
>
> A: Yes.

Ex. 3, Ruby Crest NRCP 30(b)(6) Dep. at 137:19–138:5. Defendants should be granted summary judgment on the RICO cause of action for every At-Issue Claim that was not adjudicated and/or priced using Data iSight, and for any Defendant that did not utilize the Data iSight service.

The undisputed evidence shows that only 793 of the At-Issue Claims—less than 10% of the total—were adjudicated and/or priced using Data iSight. *See* **Ex. 33**, Leathers Dep. Ex. 16 (identifying 793 Data iSight claims). This Court should grant Defendants summary judgment on the RICO claim for every At-Issue Claim except these 793 "Data iSight" claims.

The undisputed evidence also shows that most Defendants had no contract with MultiPlan to use Data iSight to adjudicate and/or price any reimbursement claims:

- Neither SHL nor HPN use MultiPlan to price emergency medicine claims. *See* **Ex. 9**, Sierra NRCP 30(b)(6) Dep. at 115:25–116:6. None of the At-Issue Claims submitted to these Defendants were adjudicated and/or priced using Data iSight. *See* **Ex. 23**, Hare Decl. ¶¶ 6–7; **Ex. 40**, Leathers Dep. at 64:1–20.
- Oxford currently utilizes Data iSight but did not start doing so until January 1, 2021. **Ex. 14**, Oxford NRCP 30(b)(6) Dep. at 22:23–23:11. The latest dates of service for the At-Issue Claims submitted to Oxford are dated January 2020. *See* **Ex. 39**, Deal Decl. Ex. A. And in fact, none of the At-Issue Claims submitted to Oxford were adjudicated and/or priced using Data iSight. **Ex. 40**, Leathers Dep.

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at 64:1–20; **Ex. 39**, Deal Decl. Ex. A.

- As discussed *supra*, UHG is a holding company that does not process or price benefit claims. None of the At-Issue Claims were reimbursed by UHG, and UHG did not use Data iSight to adjudicate and/or price any benefit claims. *See* **Ex. 22**, Ericson Decl. ¶ 8; **Ex. 39**, Deal Decl. Ex. A; **Ex. 40**, Leathers Dep. at 64:1–20.
- As discussed *supra*, SHO is a provider network that does not process any claims. Reimbursement claims for health plans that contract with SHO are processed by a third-party administrator. SHO itself was not involved with the adjudication or pricing of any benefit claims, and has never used the Data iSight service. **Ex. 23**, Hare Decl. ¶ 5; **Ex. 40**, Leathers Dep. at 64:1–20.

Because none of these Defendants used Data iSight to adjudicate and/or price reimbursement claims, summary judgment should be granted on the RICO cause of action asserted against them.

G. No evidence supports a "special relationship" required to prove a breach of the implied covenant of good faith and fair dealing

TeamHealth Plaintiffs assert a claim for "tortious breach of the implied covenant of good faith and fair dealing" in which they allege Defendants breached an implied-in-fact contract with TeamHealth Plaintiffs in bad faith. *See* FAC ¶¶ 208–213. Defendants are entitled to summary judgment on this claim because there is no evidence of a "special relationship" that could give rise to any fiduciary duties owed by Defendants to the TeamHealth Plaintiffs, much less any breach of those fiduciary duties.

In Nevada, there is no liability for a tortious breach where the underlying agreements have been heavily negotiated and both parties are sophisticated commercial actors. *See Aluevich v. Harrah's*, 99 Nev. 215, 217–218, 660 P.2d 986, 987 (1983). Bad faith tort actions are limited to "cases involving special relationships" that give rise to fiduciary duties on the part of the defendants. *Great Am. Ins. Co. v. Gen. Builders, Inc.*, 113 Nev. 346, 354–355, 934 P.2d 257, 263 (1997) (citing *K Mart Corp. v. Ponsock*, 103 Nev. 39, 732 P.2d 1364 (1987)). These are "rare and exceptional cases," and where both parties are experienced commercial entities represented by experienced agents, there is no "special relationship" between the parties that

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would give rise to fiduciary duties. *Id.*

There is no genuine issue of material fact related to whether TeamHealth Plaintiffs are sophisticated commercial actors. Their own expert witness describes them as "perhaps the largest provider of physician staffing services in the country," and stated that "they are certainly a very large—certainly have revenues in the multiples of billions." **Ex. 43**, Phillips Dep. at 184:1–9; *see also id.* at 185:6–186:16 (TeamHealth acquired "dozens, hundreds" of physician practices and manage them centrally under a "TeamHealth corporate umbrella"). TeamHealth's former Vice President for Managed Care even testified that TeamHealth expected to be paid above-average reimbursement rates in part because it was so "sophisticated in its negotiations and understanding of information." **Ex. 60**, Dep. of David Greenberg (May 27, 2021) ("Greenberg Dep.") at 90:3–10. TeamHealth was a publicly traded company until it was acquired by the Blackstone Group at a valuation of $6.1 billion. **Ex. 4**, Deal Rep. at 10. TeamHealth describes itself as "the nation's largest clinical practice." **Ex. 2**, TPN NRCP 30(b)(6) at 52:7–21. TeamHealth manages nationwide operations that are divided into regions, each with its own vice president. **Ex. 61**, Dep. of Brad Blevins (May 19, 2021) ("Blevins Dep.") at 89:18–92:14. Its billing centers provide services to physicians in 47 states, and it touts what it describes as "a sophisticated coding and billing operation designed to meet the unique requirements for multi-specialty physician services." **Ex. 5**, Bristow Dep. at 99:2–5 & Ex. 4. TeamHealth staffs over 20,000 affiliated healthcare professionals in about 3,400 hospitals, and submits tens of thousands of reimbursement claims annually to Defendants alone. **Ex. 2**, TPN NRCP 30(b)(6) at 39:9–40:9; **Ex. 4**, Deal Rep. at 10.

There is also no genuine dispute that TeamHealth Plaintiffs engaged in hard-nosed negotiations with Defendants. By its nature, an implied-in-fact contract is not expressly negotiated. However, even as TeamHealth Plaintiffs allegedly formed an implied-in-fact contract with Defendants, it is undisputed that they were involved in complex and extensive contract negotiations with Defendants over the same issues that they allege are governed by the terms of an implied-in-fact contract—namely, the payment rates at which Defendants would reimburse them for emergency medicine services. *See* FAC ¶ 91; *id.* ¶ 104; *id.* ¶¶ 193–197.

TeamHealth Plaintiffs' corporate designee testified at length on these negotiations, which spanned multiple years. TeamHealth started the negotiations in the fall of 2017 through an overture by their Chief Medical Officer to a senior executive at UHS. **Ex. 5**, Bristow Dep. at 227:5–17. Their top executives met with Defendants' senior executives several times in Tennessee, Minneapolis, and New York to discuss potential network rates. *Id.* at 237:3–242:3, 294:8–296:22, 327:6–15. TeamHealth even leveraged its position as a large customer of UHC, and threatened to terminate UHC as the administrator of its own health benefits plan if UHC did not accede to their rate demands. **Ex. 1**, Fremont NRCP 30(b)(6) Dep. at 219:2–225:6, 253:14–24, 256:19–257:20. The contract negotiations, which did not culminate in a network agreement between TeamHealth and Defendants, persisted for nearly two years. **Ex. 5**, Bristow Dep. at 276:4–14, 294:8–296:22, 312:5–313:9, 317:8–318:25; 348:1–14; **Ex. 62**, DEF010937; **Ex. 2**, TPN NRCP 30(b)(6) Dep. at 179:21–180:3.

On these undisputed facts, no reasonable jury could find that Defendants were "in a superior or entrusted position of knowledge," with fiduciary duties owed to TeamHealth Plaintiffs. *See* FAC ¶ 209. TeamHealth Plaintiffs were not a "weaker, 'trusting' party" at an inherent disadvantage in negotiations. *Great Am. Ins. Co.*, 113 Nev. at 355, 934 P.2d at 263. To the contrary, the undisputed record confirms that TeamHealth Plaintiffs were "experienced commercial entities represented in the present transaction by professional and experienced agents." *Id.* In fact, the lead negotiator for Fremont testified that TeamHealth and Defendants had equal bargaining power. **Ex. 31**, Harris Dep. at 90:20–25. Given this record evidence, under Nevada law, there can be no tortious breach of the covenant of good faith and fair dealing, and this Court should grant summary judgment on this cause of action as well.

H. There is no evidence that could support an award of punitive damages

There is no evidence of "grievous and perfidious misconduct" sufficient to create a genuine issue of material fact on the question of punitive damages. *Great Am. Ins. Co.*, 113 Nev. at 355, 934 P.2d at 263. Defendants allegedly underpaid TeamHealth Plaintiffs on reimbursement claims—a subject that is routinely negotiated by healthcare providers and health plan administrators. No reasonable jury could find this harm, which is "easily compensated with

money damages," to rise to the level of "grievous and perfidious misconduct." *Great Am. Ins. Co.*, 934 P.2d at 263. Indeed, the Nevada Supreme Court has reversed awards of punitive damages under similar circumstances. *Id.* at 264.

IV. CONCLUSION

For the foregoing reasons, this Court should grant Defendants summary judgment on the issues and causes of action described in this Motion. Granting this Motion will greatly simplify the presentation of evidence to the jury and materially shorten the length of trial.

Dated this 21st day of September, 2021.

/s/ D. Lee Roberts, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of September, 2021, a true and correct copy of the foregoing **DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT** 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.

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

DEFENDANTS' MOTION IN LIMINE NO. 1: MOTION TO AUTHORIZE DEFENDANTS TO OFFER EVIDENCE RELATING TO PLAINTIFFS' AGREEMENTS WITH OTHER MARKET PLAYERS AND RELATED NEGOTIATIONS

(HEARING REQUESTED)

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

Defendants.

Defendants UnitedHealth Group, Inc., UnitedHealthcare Insurance Company ("UHIC"), United HealthCare Services, Inc. ("UHS", and together with UHIC, "UHC"), UMR, Inc. ("UMR"), Oxford Health Plans, Inc. ("Oxford"), Sierra Health and Life Insurance Co., Inc. ("SHL"), Sierra Health-Care Options, Inc. ("SHO"), and Health Plan of Nevada, Inc. ("HPN") (collectively "Defendants"), by and through their attorneys of the law firm of Weinberg Wheeler Hudgins Gunn & Dial, LLC, hereby submit the following Motion in Limine No. 1: Motion to authorize Defendants to offer evidence and argument relating to Plaintiffs' contractual agreements with other market players and related negotiations ("Motion").

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

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This action concerns the rate of payment for thousands of claims for emergency medical services. TeamHealth Plaintiffs[1] premise their lawsuit on the allegation that they were denied the

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

"reasonable value" for medical services that they provided to patients who were members of health plans insured or administered by Defendants. To defend against TeamHealth Plaintiffs' claims, therefore, Defendants must be permitted to introduce evidence relevant to the "reasonable value" of TeamHealth Plaintiffs' services. Such evidence includes the contracts and negotiations concerning reimbursement rates for similar services as offered by other payors or insurers and as contemplated by TeamHealth Plaintiffs.

Defendants sought discovery on these documents and moved to compel their production. However, in Report and Recommendation #3 the Special Master held that documents "regarding expected reimbursement rates, analysis of charges, setting of charges and collections" were irrelevant to TeamHealth Plaintiffs' claims and denied Defendants' motion. This Court adopted that holding on August 9, 2021.

Notwithstanding this Court's discovery orders, the Nevada Supreme Court has held that prior contracts, offers, and "***any other evidence*** regarding the value of services," may be considered to determine the "reasonable value" of services. *Las Vegas Sands Corp. v. Suen*, 132 Nev. 998 (table), *reported at* 2016 WL 4076421 at *9, 14 (2016) (unpublished) (emphasis added) (overturning a damages award based "exclusively on contract damages" for a quantum meruit theory). And "reasonable value" is often defined as the amount for which a seller is willing to sell its services and for which a buyer is willing to pay. TeamHealth Plaintiffs' contracts and negotiations both before and during the period in dispute, while not conclusive, constitute evidence of the price for which they are willing to sell their services and for which other payors or insurers are willing to pay. Accordingly, Defendants seek an order allowing for the presentation of evidence and argument relevant to the "reasonable value" of TeamHealth Plaintiffs' services to be admitted at trial.

II. LEGAL ARGUMENT

A. Legal Standard for Motion in Limine

The Nevada Supreme Court has tacitly approved the use of motions in limine to be within the purview of the district court's discretionary power concerning rulings on the admissibility of evidence. *See State ex. rel Dept. of Highway v. Nevada Aggregates & Asphalt Co.*, 92 Nev. 370,

551 P.2d 1095 (1976). The scope of a motion in limine is rather broad, applying to "any kind of evidence which could be objected to at trial, either as irrelevant or subject to discretionary exclusion as unduly prejudicial." *Clemens v. Am. Warranty Corp.*, 193 Cal. App. 3d 444, 451, 238 Cal. Rptr. 339, 342 (1987). "The usual purpose of motions in limine is to preclude the presentation of evidence deemed inadmissible and prejudicial by the moving party. A typical order in limine excludes the challenged evidence and directs counsel, parties, and witnesses not to refer to the excluded matters during trial. Motions in limine serve other purposes as well. They permit more careful consideration of evidentiary issues than would take place in the heat of battle during trial. They minimize side-bar conferences and disruptions during trial, allowing for an uninterrupted flow of evidence." *R & B Auto Ctr., Inc. v. Farmers Grp., Inc.*, 140 Cal. App. 4th 327, 371–72, 44 Cal. Rptr. 3d 426, 462 (2006) (citing *Kelly* v. *New W. Fed. Sav.*, 49 Cal. App. 4th 659, 669–70, 56 Cal. Rptr. 2d 803 (1996)). Such a motion can also be advantageous in avoiding what is obviously a futile attempt to "unring the bell" should the court grant a motion to strike during proceedings before the jury. *Blanks v. Seyfarth Shaw LLP*, 171 Cal. App. 4th 336, 375, 89 Cal. Rptr. 3d 710, 741 (2009) (citation omitted).

B. Relevant Evidence

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

C. TeamHealth Plaintiffs' Contracts and Negotiations With Other Payors or Insurers Before and During the Period in Dispute Are Relevant to Determining the "Reasonable Value" of Their Services

TeamHealth Plaintiffs' contracts and negotiations with other payors or insurers are relevant to the determination of the "reasonable value" for plaintiffs' services. TeamHealth Plaintiffs represent a substantial portion of the emergency medical services in Nevada; they

allege that they staff the emergency departments of multiple hospitals and medical centers throughout the state, including many of the largest medical facilities in Southern Nevada. FAC ¶¶ 3–5. TeamHealth Plaintiffs' contracts or negotiations with other payors are directly relevant to the reasonable value of their services, because they show what amounts the TeamHealth Plaintiffs are willing to accept.

The "reasonable value" of services "is the price that a willing buyer would pay to a willing seller, neither being under compulsion to buy or sell, and both having full knowledge of all pertinent facts." *Children's Hosp. Cent. Cal. v. Blue Cross of Cal.*, 226 Cal. App. 4th 1260, 1274, 172 Cal. Rptr. 3d 861, 872 (2014) (citation and quotations omitted); *see also Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 380, 283 P.3d 250, 256 (2012) (stating that "reasonable value" is often defined as the "market price."); *NorthBay Healthcare Grp. - Hosp. Div. v. Blue Shield of Cal. Life & Health Ins.*, No. 17-cv-02929, 2019 WL 7938444, at *2 (N.D. Cal. Apr. 2, 2019); *Pokhan v. Peters*, No. A-6120-08T1, 2011 WL 920396, at *4 (N.J. Super. Ct. App. Div. Mar. 18, 2011). In other words, the "reasonable value" of a services is the "going rate." *Children's Hosp. Cent. Cal.*, 226 Cal. App. 4th at 1274, 172 Cal. Rptr. 3d at 872; *Crosskey Architects, LLC v. POKO Partners, LLC*, No. HHDCV-156056962, 2017 WL 3174530, at *9 (Conn. Super. Ct. June 21, 2017), *aff'd,* 192 Conn. App. 378, 218 A.3d 133 (2019).

Although the Nevada Supreme Court has not specifically addressed this issue in the context of out-of-network emergency medical services, courts in other jurisdictions determine the "going rate" of a service by "accept[ing] a wide variety of evidence" to determine the "reasonable value" of the services. *Children's Hosp. Cent. Cal.*, 226 Cal. App. 4th at 1274, 172 Cal. Rptr. 3d at 872. Relevant evidence includes among other things: (i) a party's testimony "as to the value of [its] services"; (ii) a party's "agreements to pay and accept a particular price"; (iii) a "price agreed upon by the parties," including in "a written contract"; and, (iv) a "professional's customary charges and earnings." *Id.* at 1274–75, 172 Cal. Rptr. 3d at 872.

And notably, in the context of medical services, "the scope of the rates accepted by or paid to [a medical provider] by other payors [or insurers] indicates the value of the services in the marketplace" and is therefore relevant to the "reasonable value" analysis. *Id.* at 1275, 172

Cal. Rptr. 3d at 873. Ultimately, the evidence to be considered is that which reveals "the price that would be agreed upon by a willing buyer and a willing seller negotiating at arm's length"—including a medical provider at issue in a pending dispute. *Id.* at 1275, 172 Cal. Rptr. 3d at 872. As explained by Defendants' expert Bruce Deal, "the correct economic approach to determining reasonable value is to examine actual market transactions and observe rates paid in the marketplace between willing buyers and willing sellers in a competitive market." **Exhibit 1**, Expert Report of Bruce Deal (July 30, 2021) ("Deal Rep.") at 3. This "market framework" is a standard and accepted economic methodology for determining reasonable value, one which Mr. Deal has applied dozens of times in his work as an expert on the reasonable value of healthcare services. *Id.* at 36. Leif Murphy, the president and Chief Executive Officer of TeamHealth, also endorsed a similar framework when, according to Mr. Bristow's notes, he explained to Dan Schumacher (UHG's Chief Strategy and Growth Officer) that "UCR [usual and customary rate] [is] ultimately defined by our in-network rates with the same payor, rates from other payors, and rates from the defendant to other providers." **Exhibit 2**, Email from L. Murphy to M. Wiechart (Apr. 18, 2019) (FESM008944).

As Mr. Deal explains, with respect to emergency department services, only payments for contracted services (as opposed to payments for non-contracted services) are relevant to determining reasonable value because a key assumption of the market framework is that either party must have the option to walk away from the transaction. **Exhibit 1**, Deal Rep. at 41. While providers and payors negotiating a network agreement have the option to walk away, a patient receiving services from an out-of-network emergency physician generally does not have the ability to shop around and select another provider. *Id.* Mr. Deal therefore calculated benchmarks for assessing reasonable value based on the allowed amounts that TeamHealth Plaintiffs actually received from other contracted commercial payors (the "Seller Benchmark") and another using the amounts allowed by United Defendants to other contracted ED providers (the "Buyer Benchmark"). *Id.* at 42–48.

Under Nevada law, a jury may determine the "reasonable value" of services by "considering the terms of any offers or proposals between the parties or ***any other evidence***

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regarding the value of services." *Las Vegas Sands Corp.*, 132 Nev. 998, 2016 WL 4076421, at *4 (alterations omitted) (emphasis added). The phrase "any other evidence" is broadly interpreted. *See id.* For instance, "customary method[s] and rate[s] of compensation" may be considered when analyzing a services' "reasonable value." *Flamingo Realty, Inc. v. Midwest Dev., Inc.*, 110 Nev. 984, 988, 879 P.2d 69, 71 (1994).

TeamHealth Plaintiffs are a force of the "going rate" in the market for emergency medical services in Nevada. Indeed, TeamHealth Plaintiffs tout their significant presence in the emergency medical field in the First Amended Complaint ("FAC"). They admit to staffing at least 10 emergency medical departments throughout Nevada. FAC ¶¶ 3–5. The emergency departments include several large medical facilities, *e.g.*, the multiple Dignity Health hospital campuses. *See id.* ¶ 3. Because of TeamHealth Plaintiffs' significant role in Nevada's market for emergency medical services, their contracts and negotiations concerning reimbursement rates for such services is especially relevant to the "reasonable value" analysis for the services. This is particularly true for contracts between the plaintiffs and other payors or market participants rather than merely those between the plaintiffs and the defendants. *See Children's Hosp. Cent. Cal.*, 226 Cal. App. 4th at 1275, 172 Cal. Rptr. 3d at 873.

Other contracted rates between TeamHealth Plaintiffs and other third parties also serve as valuable reference points for assessing the reasonable value of the at-issue services because they reflect reimbursement amounts that the TeamHealth Plaintiffs willingly agreed to accept for the same services in the same geographic area as the at-issue services. **Exhibit 1**, Deal Rep. at 64. For example, subsequent to terminating their network agreement with UHIC, Fremont entered into a direct agreement with MGM Resorts International, a large employer in the Las Vegas area, to accept an "all-inclusive case rate of $320.00" for the same services in the same geography as the at-issue issue services, but at a far lower rate than TeamHealth Plaintiffs are demanding from the Defendants. **Exhibit 3**, MGM Resorts Health and Welfare Plan Participating Provider Agreement (Feb. 27, 2019) (DEF011280); **Exhibit 4**, Amendment No. 1 to the MGM Resorts Health and Welfare Plan Participating Provider Agreement (May 29, 2020) (DEF011294). In addition, TeamHealth negotiated and accepted far lower reimbursement payments with another

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major health insurance company. *See* **Exhibit 5**, TH-United Contribution and Comparison Report (FESM008947); **Exhibit 6**, TeamHealth Presentation, Emergency Medicine (Apr. 2019) (DEF525474).

For this reason, this Court should permit Defendants to present evidence related to TeamHealth Plaintiffs' contracts and negotiations for payments made directly with employers who sponsor self-funded plans; their contracts and negotiations with other payors or market players; their wrap rental agreements; and the payment of claims pursuant to the forgoing contracts or agreements. The reimbursement rates contained in these categories of evidence are relevant to the "going rate" for the at issue services. Indeed, the evidence not only sheds light on what a "willing buyer would pay to a willing seller," the contracts show the amounts that willing buyers—*i.e.*, other payors and market participants—have already agreed to pay for the services at issue to willing sellers—*i.e.*, TeamHealth Plaintiffs specifically.

III. CONCLUSION

Defendants must be permitted to present evidence relevant to the core issue of this lawsuit, *i.e.*, whether TeamHealth Plaintiffs were reimbursed a "reasonable value" for the emergency medical services provided. The evidence relevant to the "reasonable value" analysis includes contracts and negotiations for reimbursement rates between TeamHealth Plaintiffs and other payors or market participants.

Dated this 21st day of September, 2021.

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I hereby certify that on the 21st day of September, 2021, a true and correct copy of the foregoing **DEFENDANTS' MOTION IN LIMINE NO. 1: MOTION TO AUTHORIZE DEFENDANTS TO OFFER EVIDENCE RELATING TO PLAINTIFFS' AGREEMENTS WITH OTHER MARKET PLAYERS AND RELATED NEGOTIATIONS** was electronically filed/served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

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

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

Defendants.

I, COLBY L. BALKENBUSH, declare as follows:

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

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

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

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

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

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

MIL 2. Motion offered in the alternative to MIL No. 1, to preclude Plaintiffs from offering evidence relating to Defendants' agreements with other market players and related

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negotiations.

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

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

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

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

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

MIL 8. Motion offered in the alternative to MIL No. 7, to preclude Plaintiffs from offering evidence as to the qualitative value, relative value, societal value, or difficulty of the services they provided.

MIL 9. Motion to authorize Defendants to offer evidence of Plaintiffs organizational, management, and ownership structure, including flow of funds between related entities, operating companies, parent companies, and subsidiaries.

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

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

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

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

MIL 14. Motion offered in the alternative to MIL No. 13 to preclude Plaintiffs from contesting Defendants' defenses relating to claims that were subject to a settlement agreement between CollectRX and Data iSight; and Defendants' adoption of specific negotiation thresholds for reimbursement claims appealed or contested by Plaintiffs.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MIL 35. Motion to pre-admit certain evidence.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Executed: September 21, 2021.

/s/ Colby L. Balkenbush
Colby L. Balkenbush

EXHIBIT 1

FILED UNDER SEAL

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EXHIBIT 1

EXHIBIT 2

FILED UNDER SEAL

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EXHIBIT 2

EXHIBIT 3

FILED UNDER SEAL

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EXHIBIT 3

EXHIBIT 4

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EXHIBIT 4

EXHIBIT 5

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EXHIBIT 5

EXHIBIT 6

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EXHIBIT 6

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

DEFENDANTS' MOTION IN LIMINE NO. 2: MOTION OFFERED IN THE ALTERNATIVE TO MIL NO. 1, TO PRECLUDE PLAINTIFFS FROM OFFERING EVIDENCE RELATING TO DEFENDANTS' AGREEMENTS WITH OTHER MARKET PLAYERS AND RELATED NEGOTIATIONS (HEARING REQUESTED)

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Case Number: A-19-792978-B

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

Defendants.

Defendants UnitedHealth Group, Inc., UnitedHealthcare Insurance Company ("UHIC"), United HealthCare Services, Inc. ("UHS", and together with UHIC, "UHC"), UMR, Inc. ("UMR"), Oxford Health Plans, Inc. ("Oxford"), Sierra Health and Life Insurance Co., Inc. ("SHL"), Sierra Health-Care Options, Inc. ("SHO"), and Health Plan of Nevada, Inc. ("HPN") (collectively "Defendants") hereby submit the following Motion in Limine No. 2: Motion offered in the alternative to MIL No. 1, to preclude Plaintiffs from offering evidence relating to Defendants' agreements with other market players and related negotiations ("Motion").

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

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This motion is a counterpart to Defendants' Motion in Limine No. 1, in which Defendants seek an order admitting certain evidence relevant to the "reasonable value" of the emergency medical services provided to the Defendants' insureds by TeamHealth Plaintiffs.[1]

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

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Specifically, Defendants seek to admit TeamHealth Plaintiffs' contracts with, negotiations with, and payments accepted from non-party payors or insurers. Such evidence is relevant to the primary dispute in this matter, that is, whether TeamHealth Plaintiffs were denied a "reasonable value" in reimbursement for their services.

Evidence of objective, reasonable metrics for the value of TeamHealth Plaintiffs' services is especially important in light of their attempts to obfuscate the issue. During discovery, TeamHealth Plaintiffs' witnesses maintained that their services were *priceless* because of the important role of physicians in the community. *See* **Exhibit 1**, Dep. of Dr. Scott Scherr ("Scherr Dep.") (May 18, 2021) at 45:10–17 ("I mean, we are the safety net for our community."); *id.* at 50:17–51:1 ("[C]an you really put a price tag on the emergent care that we provide … ? I don't think you can put a price tag on that."). In the absence of evidence concerning TeamHealth Plaintiffs' contracts, negotiations, and accepted payments with other payors, Defendants will be left with little to rebut TeamHealth Plaintiffs' evidence on this point.

If the Court denies Motion in Limine No. 1, the Court should grant this Motion to prevent the jury from being exposed to lopsided evidence on the issue of the "reasonable value" of TeamHealth Plaintiffs' services. Indeed, it would be unfair and prejudicial to allow TeamHealth Plaintiffs to present evidence of Defendants' contracts, negotiations, or payments concerning third parties while simultaneously denying Defendants the same opportunity, *i.e.*, to offer the same type of evidence in rebuttal.

II. LEGAL ARGUMENT

A. Legal Standard for Motion in Limine

The Nevada Supreme Court has tacitly approved the use of motions in limine to be within the purview of the district court's discretionary power concerning rulings on the admissibility of evidence. *See State ex. rel Dept. of Highway v. Nevada Aggregates & Asphalt Co.*, 92 Nev. 370, 551 P.2d 1095 (1976). The scope of a motion in limine is rather broad, applying to "any kind of evidence which could be objected to at trial, either as irrelevant or subject to discretionary exclusion as unduly prejudicial." *Clemens v. Am. Warranty Corp.*, 193 Cal. App. 3d 444, 451, 238 Cal. Rptr. 339, 342 (1987). "The usual purpose of motions in limine is to preclude the

presentation of evidence deemed inadmissible and prejudicial by the moving party. A typical order in limine excludes the challenged evidence and directs counsel, parties, and witnesses not to refer to the excluded matters during trial. Motions in limine serve other purposes as well. They permit more careful consideration of evidentiary issues than would take place in the heat of battle during trial. They minimize side-bar conferences and disruptions during trial, allowing for an uninterrupted flow of evidence." *R & B Auto Ctr., Inc. v. Farmers Grp., Inc.*, 140 Cal. App. 4th 327, 371–72, 44 Cal. Rptr. 3d 426, 462 (2006) (citing *Kelly* v. *New W. Fed. Sav.*, 49 Cal. App. 4th 659, 669–70, 56 Cal. Rptr. 2d 803 (1996)). Such a motion can also be advantageous in avoiding what is obviously a futile attempt to "unring the bell" should the court grant a motion to strike during proceedings before the jury. *Blanks v. Seyfarth Shaw LLP*, 171 Cal. App. 4th 336, 375, 89 Cal. Rptr. 3d 710, 741 (2009) (citation omitted).

B. Defendants Will Be Unfairly Prejudiced if the Court Allows TeamHealth Plaintiffs to Introduce the Same Type Evidence that the Court Disallowed the Defendants to Introduce

The core issue in this matter is whether TeamHealth Plaintiffs were reimbursed a "reasonable value" for the emergency services that they provided to the defendants insureds. *See generally* FAC. Because this issue is the gravamen of TeamHealth Plaintiffs' complaint, the court must not allow TeamHealth Plaintiffs to introduce evidence of non-party contracts, negotiations, or payments if it precludes Defendants from doing the same. Such a ruling would unfairly prejudice Defendants so severely that any probative value of the TeamHealth Plaintiffs' unilateral evidence would be outweighed. Even relevant evidence may be excluded from trial "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues[,] or of misleading the jury." NRS 48.035(1).

Courts have recognized that lopsided evidence may require a new trial where the lopsided evidence results in injustice. *Echevarria v. Ruiz Hernandez*, 364 F. Supp. 2d 149, 152 (D.P.R. 2005) ("A new trial may be granted only if the evidence is "grotesquely lopsided" in favor of the movant, and if it is obvious that the jury verdict, if allowed to stand, would result in a blatant miscarriage of justice[.]") (citing *Sánchez v. Puerto Rico Oil Co.*, 37 F.3d 712, 717 (1st Cir. 1994)). *Doherty v. Doherty Ins. Agency, Inc.*, 878 F.2d 546, 551 (1st Cir. 1989) ("If the weight of

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the evidence is not grotesquely lopsided, it is irrelevant that the judge, were he sitting jury-waived, would likely have found the other way."); *see also Marchese v. Goldsmith*, No. CIV. A. 92-6952, 1994 WL 263301, at *6 (E.D. Pa. June 13, 1994) ("Where the evidence is sharply in contrast, as it was in this case, a new trial is inappropriate."), *aff'd,* 47 F.3d 1161 (3d Cir. 1995).

And courts have also recognized that exclusion of one party's certain evidence requires the exclusion of the other party's similar evidence. *See, e.g., Centralian Controls Pty, Ltd. v. Maverick Int'l, Ltd.*, No. 1:16-CV-37, 2018 WL 4113400, at *5 (E.D. Tex. Aug. 29, 2018) (applying the idiom "what is sauce for the goose is sauce for the gander" to preclude either party's expert from offering testimony not specifically set forth in written reports).

Here, TeamHealth Plaintiffs maintain that evidence of their agreements, both directly with UMR clients and with other market participants—as well as the negotiations of those agreements—are irrelevant, and have prevented Defendants from obtaining further discovery on those agreements and negotiations. If this Court denies Defendants' Motion in Limine No. 1, it should grant this Motion to protect the jury from hearing lopsided evidence on this lawsuit's core issue. Otherwise, the jury will necessarily determine the "reasonable value" of TeamHealth Plaintiffs services based on one-sided evidence from TeamHealth Plaintiffs, without the benefit of rebuttal evidence from Defendants. The results would be unfairly prejudicial to Defendants; Defendants would not be able to adequately defend against TeamHealth Plaintiffs' primary allegation. Thus, such circumstances would result in TeamHealth Plaintiffs unfairly controlling the narrative as to the "going rate" for the services, which they could establish without presenting any evidence of lower rates that TeamHealth Plaintiffs themselves—as sellers of the at-issue services—may have accepted from nonparty payors or insurers. *See* NRS 48.035 (relevant evidence is inadmissible where its probative value is substantially outweighed by the danger of "unfair prejudice" or "of misleading the jury"). This would also mislead the jury. If Defendants cannot introduce their evidence on this point, then the Court should exclude all similar evidence, including TeamHealth Plaintiffs' evidence of contracts, negotiations, and payments between Defendants and third parties.

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III. CONCLUSION

If this Court denies Defendants' Motion in Limine No. 1, it should grant this Motion and issue an order excluding all evidence of contracts, negotiations, or payments between the defendants and third parties. It would be unfairly prejudicial and fundamentally unfair to allow TeamHealth Plaintiffs to admit the same type of evidence, especially given that the evidence weighs directly on the Parties' principal dispute. In the interest of fairness, evidence of both sides' contracts, negotiations, and payments concerning third parties should either be excluded or permitted—but not one or the other.

Dated this 21st day of September, 2021.

/s/ Colby L. Balkenbush

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of September, 2021, a true and correct copy of the foregoing **DEFENDANTS' MOTION IN LIMINE NO. 2: MOTION OFFERED IN THE ALTERNATIVE TO MIL NO. 1, TO PRECLUDE PLAINTIFFS FROM OFFERING EVIDENCE RELATING TO DEFENDANTS' AGREEMENTS WITH OTHER MARKET PLAYERS AND RELATED NEGOTIATIONS** was electronically filed/served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

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

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

Defendants.

I, COLBY L. BALKENBUSH, declare as follows:

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

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

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

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

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

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

MIL 2. Motion offered in the alternative to MIL No. 1, to preclude Plaintiffs from offering evidence relating to Defendants' agreements with other market players and related

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negotiations.

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

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

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

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

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

MIL 8. Motion offered in the alternative to MIL No. 7, to preclude Plaintiffs from offering evidence as to the qualitative value, relative value, societal value, or difficulty of the services they provided.

MIL 9. Motion to authorize Defendants to offer evidence of Plaintiffs organizational, management, and ownership structure, including flow of funds between related entities, operating companies, parent companies, and subsidiaries.

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

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

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

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

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MIL 14. Motion offered in the alternative to MIL No. 13 to preclude Plaintiffs from contesting Defendants' defenses relating to claims that were subject to a settlement agreement between CollectRX and Data iSight; and Defendants' adoption of specific negotiation thresholds for reimbursement claims appealed or contested by Plaintiffs.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MIL 35. Motion to pre-admit certain evidence.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Executed: September 21, 2021.

/s/ Colby L. Balkenbush
Colby L. Balkenbush

EXHIBIT 1

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EXHIBIT 1

DISTRICT COURT

CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., a Nevada professional corporation; TEAM PHYSICIANS OF NEVADA-MANDAVIA, P.C., a Nevada professional corporation; CRUM, STEFANKO AND JONES, LTD. dba RUBY CREST EMERGENCY MEDICINE, a Nevada professional Corporation, Plaintiffs, vs. UNITEDHEALTH GROUP, INC., a Delaware corporation; UNITED HEALTHCARE INSURANCE COMPANY, a Connecticut corporation; UNITED HEALTH CARE SERVICES INC., dba UNITEDHEALTHCARE, a Minnesota corporation; UMR, INC., dba UNITED MEDICAL RESOURCES, a Delaware corporation, OXFORD HEALTH PLANS, INC., a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., a Nevada corporation; SIERRA HEALTH-CARE OPTIONS, INC., a Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20, Defendants. _____	CASE NO: A-19-792978-B DEPT NO: 27 ***ATTORNEYS' EYES ONLY*** VIDEOTAPED DEPOSITION OF DR. SCOTT SCHERR TUESDAY, MAY 18, 2021 REPORTED BY: BRITTANY CASTREJON, RPR, CRR, NV CCR #926 JOB NO.: 760293

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

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702-938-3838
lroberts@wwhgd.com

Also Present: Terrell Holloway, Videographer

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BY MR. ROBERTS:

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

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

BY MR. ROBERTS:

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

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

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

BY MR. ROBERTS:

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

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

MR. ROBERTS: Let me restate.

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

Can you restate that question?

MR. ROBERTS: Yes.

BY MR. ROBERTS:

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

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

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

BY MR. ROBERTS:

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

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

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

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

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STATE OF NEVADA)
) SS:
COUNTY OF CLARK)

CERTIFICATE OF REPORTER

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

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

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

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

Brittany J. Castrejon

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

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Steven D. Grierson
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,

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

MOTION IN LIMINE NO. 4 TO PRECLUDE REFERENCES TO DEFENDANTS' DECISION MAKING PROCESSES AND REASONABLENESS OF BILLED CHARGES IF MOTION IN LIMINE NUMBER NO. 3 IS DENIED

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vs.

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

Defendants.

(HEARING REQUESTED)

Defendants UnitedHealth Group, Inc., UnitedHealthcare Insurance Company ("UHIC"), United HealthCare Services, Inc. ("UHS", and together with UHIC, "UHC"), UMR, Inc. ("UMR"), Oxford Health Plans, Inc. ("Oxford"), Sierra Health and Life Insurance Co., Inc. ("SHL"), Sierra Health-Care Options, Inc. ("SHO"), and Health Plan of Nevada, Inc. ("HPN") (collectively "Defendants") hereby move to preclude references to Defendants' decision-making process and the reasonableness of Plaintiffs' billed charges if Motion in Limine No. 3, filed concurrently herewith, is denied.

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

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants requested that this Court allow them to discuss the TeamHealth Plaintiffs' decision making and strategy regarding how the Plaintiffs set their billed charges. Mot. in Limine No. 3, filed concurrently herewith. Specifically, the evidence pertaining to how Plaintiffs set their billed charges is necessary for Defendants to justify their rates of reimbursement, which Plaintiffs allege are unreasonably low. Critically, Plaintiffs are now seeking to recover their full billed

charges from the Defendants rather than simply the "usual and customary rate" or a "reasonable rate," which is what Plaintiffs initially sought in their First Amended Complaint ("FAC"). FAC at ¶¶ 21, 53-54 (alleging that Defendants must reimburse Plaintiffs at the usual and customary rate or the reasonable rate and alleging that this is 75-90% of Plaintiffs' billed charges). Therefore, Defendants must be permitted to introduce evidence demonstrating that Plaintiffs' billed charges are arbitrary and unreasonable. *See generally* Mot. in Limine No. 3.

But if this Court refuses to allow Defendants to introduce evidence of Plaintiffs' strategy for setting their billed charges, this Court should similarly restrict Plaintiffs from referencing Defendants' strategy for setting rates—whether that be in network rates or the out-of-network rates paid—and from introducing Plaintiffs' own evidence of how their billed charges are determined.[1] Essentially, the outcome of Motion in Limine No. 3 should dictate whether the instant Motion is granted or denied. Fairness dictates that if one party is permitted to introduce evidence pertaining to a topic, the other party must be permitted to do so as well, or both parties should be precluded from offering the irrelevant evidence.

II. LEGAL ARGUMENT

A. Legal Standard for Motions in Limine

The trial court has broad discretion in determining the admissibility of evidence and such discretion will not be reversed on appeal absent palpable abuse. *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 492, 117 P.3d 219, 226 (2005). The scope of a motion in limine is rather broad, applying to "any kind of evidence which could be objected to at trial, either as irrelevant or subject to discretionary exclusion as unduly prejudicial." *Clemens v. Am. Warranty Corp.*, 193 Cal. App. 3d 444, 451, 238 Cal. Rptr. 339, 342 (Ct. App. 1987). "The usual purpose of motions in limine is to preclude the presentation of evidence deemed inadmissible and prejudicial by the moving party. A typical order in limine excludes the challenged evidence and directs counsel, parties, and witnesses not to refer to the excluded matters during trial. Motions in limine serve other purposes as well. They permit more careful consideration of evidentiary

[1] Similarly, should this Court grant Motion in Limine No. 3, the instant motion would be rendered moot.

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issues than would take place in the heat of battle during trial. They minimize sidebar conferences and disruptions during trial, allowing for an uninterrupted flow of evidence." *R & B Auto Ctr., Inc. v. Farmers Grp., Inc.*, 140 Cal. App. 4th 327, 371-72, 44 Cal. Rptr. 3d 426, 462 (2006) *citing Kelly* v. *New West Federal Savings*, 49 Cal.App.4th 659, 669-70, 56 Cal.Rptr.2d 803 (1996). Such a motion can also be advantageous in avoiding what is obviously a futile attempt to "unring the bell" should the court grant a motion to strike during proceedings before the jury. *Blanks v. Shaw*, 171 Cal. App. 4th 336, 375, 89 Cal. Rptr. 3d 710, 741 (2009) (citation omitted).

B. If the Court Determines that Evidence of Plaintiffs' Decision-Making and Process for Setting Billed Charges is Not Relevant to Whether the Rates Paid on Those Charges Were Reasonable, the Scope of Relevance Will Be Affected.

Relevant evidence is defined as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015. Additionally, if one party is permitted to introduce certain evidence—whether or not that evidence is relevant—the opposing party must be permitted to introduce evidence explaining it. *Nguyen v. Sw. Leasing & Rental Inc.*, 282 F.3d 1061, 1068 (9th Cir. 2002); *see also Hall v. Ortiz*, Case No. 58042, 129 Nev. 1120 (Oct. 31, 2013) (applying the same doctrine under Nevada law).

Throughout this case, Plaintiffs have argued reasonableness of reimbursement rates paid by Defendants in terms of the percentage paid on the amount billed. *See, e.g.,* FAC ¶ 54 (alleging that "a reasonable reimbursement rate…for emergency services is 75-90% of the…billed charge). While this Court denied Defendants the ability to pursue discovery into how Plaintiffs' billed charges are determined, *see* Ord. Den. Defs.' Mot. to Compel Responses to Defs.' First and Second Req. for Production on Ord. Shortening Time (Feb. 4, 2021), at ¶ 11, this Court permitted discovery on ***the same topic*** for Plaintiffs. That is, how Defendants determine rates of reimbursement. Ord. Granting Pl.'s Mot. to Compel Defs.' List of Witnesses, Production of Documents and Ans. To Interrogatories on Ord. Shortening Time (Oct. 27, 2020), at ¶ 6 (allowing Plaintiffs to take discovery on "[m]arket and reimbursement data," "decision

making and strategy," and "the FAIR Health Database"— all which are used by Plaintiffs to determine its billed charges).

Despite this, and as explained more fully in Motion in Limine No. 3, Defendants incidentally uncovered evidence pertaining to how Plaintiffs' charges are determined that implicates the claims and defenses in this action. This evidence is relevant to refute Plaintiffs' argument that they are entitled to be paid their full billed charges because those charges are reasonable and to refute assertions pertaining to how Defendants make decisions about the reimbursement rates for Plaintiffs' billed charges. But if this Court denies Motion in Limine No. 3, that decision implicates the scope of relevance as it relates to Plaintiffs' references at trial.

First, if this Court determines that Plaintiffs' decision-making processes regarding their billed charges are not relevant under NRS 48.015, then arguments and evidence that those charges are reasonable from the outset (before Defendants act on them) so too must not be relevant. The inquiry in that instance would be limited to the charges themselves and their relationship to the reimbursement rates. Thus, if this Court denies Motion in Limine No. 3, Plaintiffs should be precluded from asserting their billed charges were reasonable and not set arbitrarily.

Similarly, if this Court determines that only the reimbursement rates paid are relevant, so as to exclude references to how Plaintiffs determined the billed charges, then references by Plaintiffs to Defendants' decision-making process related to setting reimbursement rates for those charges must also be excluded under NRS 48.015. Essentially, by determining that Plaintiffs' strategy in setting their billed charges is not relevant, this Court would be determining that the "how" of the billed charges and reimbursement rates are not relevant and must create a level playing field for both sides by precluding either side from introducing evidence of how billed charges and reimbursement rates are set.

Then, if this Court limits the scope of relevance to the reimbursement rates for the disputed claims themselves, any discussion regarding how Defendants determine ***in-network*** reimbursement rates is not relevant under NRS 48.015, as the charges at issue in this case pertain only to ***out-of-network*** charges.

Ultimately, if Plaintiffs are permitted to reference any of these topics and evidence, fairness dictates that Defendants must too be allowed to do so and, by extension, must be allowed to introduce evidence on the topics at issue in Motion in Limine No. 3. *See Nguyen*, 282 F.3d at 1068 ("Although this explanation [why evidence was introduced] amply justifies the tactical decision, it does not insulate Plaintiffs from the consequences of that choice.").

III. CONCLUSION

In sum, if Plaintiffs' decision making process and strategy in setting their billed charges is not relevant, Plaintiffs must similarly be excluded from referencing Defendants' decision-making process for reimbursement rates and asserting that their billed charges were reasonable and not arbitrarily set. Accordingly, should this Court should deny Motion in Limine No. 3, it should grant the instant Motion.

Dated this 21st day of September, 2021.

/s/ Colby L. Balkenbush

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of September, 2021, a true and correct copy of the foregoing **MOTION IN LIMINE NO. 4 TO PRECLUDE REFERENCES TO DEFENDANTS' DECISION MAKING PROCESSES AND REASONABLENESS OF BILLED CHARGES IF MOTION IN LIMINE NO. 3 IS DENIED** was electronically filed/served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

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

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

Defendants.

I, COLBY L. BALKENBUSH, declare as follows:

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

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

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

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

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

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

MIL 2. Motion offered in the alternative to MIL No. 1, to preclude Plaintiffs from offering evidence relating to Defendants' agreements with other market players and related

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negotiations.

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

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

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

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

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

MIL 8. Motion offered in the alternative to MIL No. 7, to preclude Plaintiffs from offering evidence as to the qualitative value, relative value, societal value, or difficulty of the services they provided.

MIL 9. Motion to authorize Defendants to offer evidence of Plaintiffs organizational, management, and ownership structure, including flow of funds between related entities, operating companies, parent companies, and subsidiaries.

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

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

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

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

MIL 14. Motion offered in the alternative to MIL No. 13 to preclude Plaintiffs from contesting Defendants' defenses relating to claims that were subject to a settlement agreement between CollectRX and Data iSight; and Defendants' adoption of specific negotiation thresholds for reimbursement claims appealed or contested by Plaintiffs.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MIL 35. Motion to pre-admit certain evidence.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Executed: September 21, 2021.

/s/ Colby L. Balkenbush
Colby L. Balkenbush

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

DEFENDANTS' MOTION IN LIMINE NO. 10 TO EXCLUDE EVIDENCE OF DEFENDANTS' CORPORATE STRUCTURE (ALTERNATIVE MOTION TO BE CONSIDERED ONLY IF COURT DENIES DEFENDANTS' COUNTERPART MOTION IN LIMINE NO. 9)

(HEARING REQUESTED)

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

Defendants.

Defendants UnitedHealth Group, Inc., UnitedHealthcare Insurance Company ("UHIC"), United HealthCare Services, Inc. ("UHS", and together with UHIC, "UHC"), UMR, Inc. ("UMR"), Oxford Health Plans, Inc. ("Oxford"), Sierra Health and Life Insurance Co., Inc. ("SHL"), Sierra Health-Care Options, Inc. ("SHO"), and Health Plan of Nevada, Inc. ("HPN") (collectively "Defendants"), hereby request a limine order excluding all evidence of Defendants' corporate structure, affiliate relationships, financial reporting, and/or the flow of administrative fees or insurance premium revenue among affiliates.

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

Dated this 21st day of September, 2021.

/s/ Colby L. Balkenbush

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Non-party TeamHealth Holdings, Inc. ("TeamHealth") is the controlling intermediary between its affiliated entities and health plans like those administered or issued by Defendants. TeamHealth, in turn, is itself ultimately owned and/or controlled by private equity business Blackstone, Inc. ("Blackstone"), a publicly traded company (NYSE: BX). TeamHealth Plaintiffs'[1] own pleadings contend that they are a "part of the" the TeamHealth "organization," Compl. ¶ 3, and that TeamHealth has negotiated and dealt with UnitedHealthcare on the TeamHealth Plaintiffs' behalf, *see id.* ¶¶ 108–109—thus making it the TeamHealth Plaintiffs' agent for purposes of this case.

Defendants are also part of a national enterprise with affiliated entities. Defendants anticipate that TeamHealth Plaintiffs will attempt to adduce evidence concerning Defendants' corporate structure, affiliate relationships, financial reporting, and/or the flow of administrative fees or insurance premium revenue among affiliates.

Defendants' Motion in Limine No. 9 to Admit Evidence of Plaintiffs' Corporate Structure and Controlling Affiliates seeks an order permitting Defendants to present evidence at trial concerning TeamHealth Plaintiffs' corporate structure and relationships with TeamHealth and Blackstone. In the event the Court denies that motion, in fairness, then, it should grant this Motion. There must be, to preserve justice, no uneven ruling on this issue.

II. LEGAL ARGUMENT

A. Legal Standard for Motions in Limine

The Nevada Supreme Court has tacitly approved the use of motions in limine to be within the purview of the district court's discretionary power concerning rulings on the admissibility of evidence. *See State ex. rel Dept. of Highway v. Nevada Aggregates & Asphalt Co.*, 92 Nev. 370,

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

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551 P.2d 1095 (1976). The scope of a motion in limine is rather broad, applying to "any kind of evidence which could be objected to at trial, either as irrelevant or subject to discretionary exclusion as unduly prejudicial." *Clemens v. Am. Warranty Corp.*, 193 Cal. App. 3d 444, 451, 238 Cal. Rptr. 339, 342 (1987). "The usual purpose of motions in limine is to preclude the presentation of evidence deemed inadmissible and prejudicial by the moving party. A typical order in limine excludes the challenged evidence and directs counsel, parties, and witnesses not to refer to the excluded matters during trial. Motions in limine serve other purposes as well. They permit more careful consideration of evidentiary issues than would take place in the heat of battle during trial. They minimize side-bar conferences and disruptions during trial, allowing for an uninterrupted flow of evidence." *R & B Auto Ctr., Inc. v. Farmers Grp., Inc.*, 140 Cal. App. 4th 327, 371–72, 44 Cal. Rptr. 3d 426, 462 (2006) (citing *Kelly* v. *New W. Fed. Sav.*, 49 Cal. App. 4th 659, 669–70, 56 Cal. Rptr. 2d 803 (1996)). Such a motion can also be advantageous in avoiding what is obviously a futile attempt to "unring the bell" should the court grant a motion to strike during proceedings before the jury. *Blanks v. Seyfarth Shaw LLP*, 171 Cal. App. 4th 336, 375, 89 Cal. Rptr. 3d 710, 741 (2009) (citation omitted).

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B. This Court Must Treat The Parties Equally Concerning Evidence of Corporate Structure

If this Court rules that Defendants cannot present evidence at trial about TeamHealth Plaintiffs' corporate structure, then it should likewise preclude TeamHealth Plaintiffs from presenting evidence of Defendants' corporate structure. *See, e.g., Centralian Controls Pty, Ltd. v. Maverick Int'l, Ltd.*, No. 1:16-CV-37, 2018 WL 4113400, at *5 (E.D. Tex. Aug. 29, 2018) (applying the idiom "what is sauce for the goose is sauce for the gander" to preclude either party's expert from offering testimony not specifically set forth in written reports).

Defendants anticipate that TeamHealth Plaintiffs will argue that they should continue to have it both ways—that is, evidence of their corporate structure is irrelevant, but evidence of Defendants' corporate structure is necessary evidence of their claims. But if anything, Defendants have the stronger need for such evidence. TeamHealth (not TeamHealth Plaintiffs) terminated the network contracts with Defendants at issue in this case. TeamHealth (not

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TeamHealth Plaintiffs) negotiated with United to become a network provider on a ***nationwide*** basis between 2017 and 2019. After TeamHealth ended those negotiations, TeamHealth Plaintiffs submitted reimbursement requests for the full amount of their billed charges in amounts that they unilaterally set. Those reimbursement requests form the basis of this legal action. Defendants seek to introduce evidence of TeamHealth Plaintiffs' corporate structure to add context to key events such as meetings between Defendants and TeamHealth and the broader TeamHealth negotiation strategy. Without describing TeamHealth Plaintiffs' corporate structure, Defendants cannot meaningfully describe these negotiations and the motives they reveal.

By contrast, TeamHealth Plaintiffs have no need to present evidence of Defendants' corporate structure. TeamHealth Plaintiffs allege that Defendants, or some of them, are obligated by Nevada law to reimburse their full billed charges and their failure to receive those charges resulted in underpayments of $9.3 million. TeamHealth Plaintiffs seek simply to enforce a liquidated debt against Defendants, or some of them. One needs no context on corporate structure to enforce a debt. It is enough that the identity of the obligor is known.

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III. CONCLUSION

This Court should grant this motion and issue a limine order excluding all evidence of Defendants' corporate structure, affiliate relationships, financial reporting, and/or the flow of administrative fees or insurance premium revenue among affiliates. Defendants' Motion in Limine No. 9 seeks the admittance of counterpart evidence on these same subjects from TeamHealth Plaintiffs. In the event the Court denies that motion, in fairness, then, it should grant this Motion. In other words, evidence of both sides' corporate structure should either be excluded or permitted. There must be, to preserve justice, no uneven ruling on this issue.

Dated this 21st day of September, 2021.

/s/ Colby L. Balkenbush

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of September, 2021, a true and correct copy of the foregoing **DEFENDANTS' MOTION IN LIMINE NO. 10 TO EXCLUDE EVIDENCE OF DEFENDANTS' CORPORATE STRUCTURE (ALTERNATIVE MOTION TO BE CONSIDERED ONLY IF COURT DENIES DEFENDANTS' COUNTERPART MOTION IN LIMINE NO. 9)** 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.

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

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

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

Defendants.

I, COLBY L. BALKENBUSH, declare as follows:

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

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

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

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

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

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

MIL 2. Motion offered in the alternative to MIL No. 1, to preclude Plaintiffs from offering evidence relating to Defendants' agreements with other market players and related

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negotiations.

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

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

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

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

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

MIL 8. Motion offered in the alternative to MIL No. 7, to preclude Plaintiffs from offering evidence as to the qualitative value, relative value, societal value, or difficulty of the services they provided.

MIL 9. Motion to authorize Defendants to offer evidence of Plaintiffs organizational, management, and ownership structure, including flow of funds between related entities, operating companies, parent companies, and subsidiaries.

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

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

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

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

MIL 14. Motion offered in the alternative to MIL No. 13 to preclude Plaintiffs from contesting Defendants' defenses relating to claims that were subject to a settlement agreement between CollectRX and Data iSight; and Defendants' adoption of specific negotiation thresholds for reimbursement claims appealed or contested by Plaintiffs.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MIL 35. Motion to pre-admit certain evidence.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Executed: September 21, 2021.

/s/ Colby L. Balkenbush
Colby L. Balkenbush

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

DEFENDANTS' MOTION IN LIMINE NO. 13: MOTION TO AUTHORIZE DEFENDANTS TO OFFER EVIDENCE RELATING TO PLAINTIFFS' COLLECTION PRACTICES FOR HEALTHCARE CLAIMS

(HEARING REQUESTED)

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

Defendants.

Defendants UnitedHealth Group, Inc., UnitedHealthcare Insurance Company ("UHIC"), United HealthCare Services, Inc. ("UHS", and together with UHIC, "UHC"), UMR, Inc. ("UMR"), Oxford Health Plans, Inc. ("Oxford"), Sierra Health and Life Insurance Co., Inc. ("SHL"), Sierra Health-Care Options, Inc. ("SHO"), and Health Plan of Nevada, Inc. ("HPN") (collectively "Defendants"), hereby submit the following Motion in Limine 13: Motion to authorize Defendants to offer evidence relating to Plaintiffs' collection practices for healthcare claims ("Motion").

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

Dated this 21st day of September, 2021.

/s/ Colby L. Balkenbush

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This action concerns the rate of payment for thousands of claims for emergency medicine services. For a certain number of those claims, Defendants contracted with MultiPlan, Inc. ("MultiPlan") to use its Data iSight service to recommend pricing for emergency services. Data iSight also offered a negotiation service if an out-of-network provider appealed the reimbursement recommended by Data iSight. The TeamHealth Plaintiffs[1] appealed some of those initial Data iSight claims and then negotiated resolutions for those disputed claims. Likewise, for a certain number of those disputed claims, TeamHealth Plaintiffs hired Collect Rx to challenge and negotiate the rate of payment, including by appealing initial reimbursement amounts through Data iSight. Collect Rx is a collections company that acted as TeamHealth Plaintiffs' agent to challenge, and in some cases resolve, the rate of payment for emergency medicine services.

While TeamHealth Plaintiffs have obtained a great deal of discovery from MultiPlan, including the structure of compensation Defendants paid MultiPlan, this Court precluded Defendants from taking robust discovery on Collect Rx. Nonetheless, TeamHealth Plaintiffs voluntarily produced documents showing that the compensation structure for Collect Rx is remarkably similar to that of MultiPlan. It would therefore be incongruous and unfair to allow TeamHealth Plaintiffs to argue that Defendants' claims negotiator had an unreasonable incentive to price claims low without affording Defendants the right to present evidence and argument that the TeamHealth Plaintiffs' negotiator had an unreasonable incentive to seek to secure exorbitantly high reimbursements through its negotiations with MultiPlan.

At times, Collect Rx was able to use the appellate mechanisms in Data iSight to obtain a higher reimbursement and accept payment in full satisfaction of those claims on behalf of

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

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TeamHealth Plaintiffs. When this happens, these individual claims are finally resolved. Yet about 30 of these claims still appear in the spreadsheet of At-Issue Claims produced by TeamHealth Plaintiffs. TeamHealth Plaintiffs cannot seek reimbursement on claims that have been settled while using the Court's discovery rulings as a shield to prevent Defendants from mentioning Collect Rx, the entity that accepted payment in full on TeamHealth Plaintiffs' behalf.

Candidly, Defendants disagree with this Court's previous rulings on this issue. Based on evidence that TeamHealth Plaintiffs voluntarily produced, TeamHealth Plaintiffs' use of Collect Rx ***is*** relevant to this case. Dozens of the claims that TeamHealth Plaintiffs include in their final spreadsheet of At-Issue Claims are claims that Collect Rx individually negotiated and obtained agreements in which TeamHealth Plaintiffs accepted the negotiated reimbursement rates as payment in full for those claims. Their use of Collect Rx, including the payment structure they devised with Collect Rx, are therefore directly relevant to the claims at issue in this case. For these reasons, this Court should permit Defendants to present evidence on TeamHealth Plaintiffs' use of Collect Rx and their practices in collecting reimbursement payments from Defendants.

In a simultaneously filed Motion in Limine No. 14, Defendants argue that in the event that this Motion is denied, and the Court does not allow Defendants to introduce evidence and argument concerning TeamHealth Plaintiffs' use of Collect Rx, then it should not allow TeamHealth Plaintiffs to introduce evidence related to corollary issues. If evidence of TeamHealth Plaintiffs' compensation of its outside negotiator Collect Rx is irrelevant, then so too is evidence of Defendants' payment of its outside negotiator MultiPlan. And if Defendants cannot present evidence and argument that dozens of At-Issue Claims were paid in full based on the agreement of Collect Rx acting as TeamHealth Plaintiffs' agent, then TeamHealth Plaintiffs should not be permitted to offer evidence that those claims were underpaid. Moreover, TeamHealth Plaintiffs should not be permitted to offer evidence of Defendants' negotiation thresholds, which it put in place in response to TeamHealth Plaintiffs' hiring of Collect Rx to engage in mass collection actions against Defendants on Data iSight claims.

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II. LEGAL ARGUMENT

A. Legal Standard for Motions in Limine

The Nevada Supreme Court has tacitly approved the use of motions in limine to be within the purview of the district court's discretionary power concerning rulings on the admissibility of evidence. *See State ex. rel Dept. of Highway v. Nevada Aggregates & Asphalt Co.*, 92 Nev. 370, 551 P.2d 1095 (1976). The scope of a motion in limine is rather broad, applying to "any kind of evidence which could be objected to at trial, either as irrelevant or subject to discretionary exclusion as unduly prejudicial." *Clemens v. Am. Warranty Corp.*, 193 Cal. App. 3d 444, 451, 238 Cal. Rptr. 339, 342 (1987). "The usual purpose of motions in limine is to preclude the presentation of evidence deemed inadmissible and prejudicial by the moving party. A typical order in limine excludes the challenged evidence and directs counsel, parties, and witnesses not to refer to the excluded matters during trial. Motions in limine serve other purposes as well. They permit more careful consideration of evidentiary issues than would take place in the heat of battle during trial. They minimize side-bar conferences and disruptions during trial, allowing for an uninterrupted flow of evidence." *R & B Auto Ctr., Inc. v. Farmers Grp., Inc.*, 140 Cal. App. 4th 327, 371–72, 44 Cal. Rptr. 3d 426, 462 (2006) (citing *Kelly* v. *New W. Fed. Sav.*, 49 Cal. App. 4th 659, 669–70, 56 Cal. Rptr. 2d 803 (1996)). Such a motion can also be advantageous in avoiding what is obviously a futile attempt to "unring the bell" should the court grant a motion to strike during proceedings before the jury. *Blanks v. Seyfarth Shaw LLP*, 171 Cal. App. 4th 336, 375, 89 Cal. Rptr. 3d 710, 741 (2009) (citation omitted).

B. Relevant Evidence

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

C. This Court Should Permit Defendants to Present Evidence on TeamHealth Plaintiffs' Collection Practices and Use of Collect Rx

On August 9, 2021, this Court affirmed and adopted the Special Master's Report and Recommendation No. 3 ("R&R #3"), which held that documents that "ostensibly relate[d] to … Collect Rx" are irrelevant to the claims and defenses of this case. *See* Order Affirming & Adopting R&R No. 3 (Aug. 9, 2021); R&R #3 ¶ 6(c) (Apr. 14, 2014). Defendants have consistently objected to this holding, Obj. to R&R #3 at 9–10 (Apr. 28, 2021), and the record that has been developed in the months following R&R #3 make clear that TeamHealth Plaintiffs' collections practices and use of Collect Rx to seek higher payments from Defendants are relevant to this case. For that reason, this Court should permit Defendants to present evidence on these topics at trial.

This action concerns the proper rate of payment for thousands of individual claims for emergency medicine services. TeamHealth Plaintiffs have produced a final list of reimbursement claims that it contends are at issue in this case. **Exhibit 1**, Disputed Claims Spreadsheet (Aug. 24, 2021). This list includes 30 claims that were resolved through individually negotiated agreements between Collect Rx (acting as an agent of TeamHealth Plaintiffs) and MultiPlan, after the claims were originally priced through Data iSight and TeamHealth Plaintiffs, through Collect Rx, appealed using the Data iSight service's appeal process. **Exhibit 2**, Declaration of Bruce Deal in Support of Defendants' Motion for Partial Summary Judgment at ¶ 9; **Exhibit 3**, Declaration of Bruce Deal in Support of Defendants' Motion for Partial Summary Judgment at Ex. A. In other words, for these 30 claims, the jury must decide whether or not further reimbursement is precluded because Collect Rx, acting as an agent of TeamHealth Plaintiffs, settled any dispute through the appellate mechanisms that exist within the Data iSight service. For each of these claims, TeamHealth Plaintiffs expressly accepted the negotiated reimbursement payments as "payment in full." *See* **Exhibit 4**, Dep. of Kent Bristow ("Bristow Dep.") (May 13, 2021) at 249:20–259:22; **Exhibit 5**, Letter of Agreement (July 31, 2019) (FESM001489). TeamHealth Plaintiffs' use of Collect Rx to negotiate higher reimbursement payments for these claims is therefore directly relevant to whether Defendants underpaid the claims in breach of an implied-in-fact contract or whether any

such contract claim was settled through an agreement by Collect Rx.

Moreover, TeamHealth Plaintiffs have sought and received evidence related to the compensation Defendants pay MultiPlan for its Data iSight service. It is unclear what if any relevance MultiPlan's compensation for use of the Data iSight service plays in this rate of payment case, but it is likewise incongruous and unfair for TeamHealth Plaintiffs to present evidence to the jury about how much Defendants pay their outside negotiator, MultiPlan, but not how much TeamHealth Plaintiffs pay their outside negotiator, Collect Rx. But that is precisely what R&R #3 allows if applied to trial. Defendants have produced the compensation agreement between Defendants and MultiPlan, *see, e.g.*, **Exhibit 6**, Amendment to Network Access Agreement (Oct. 1, 2017) (DEF505846), and TeamHealth Plaintiffs have elicited testimony on the payment methodology created by this contract, *see* **Exhibit 7**, Dep. of Rebecca Paradise ("May 19 Paradise Dep.") (May 19, 2021) at 26:2–12, 87:21–89:5, 217:17–218:23; **Exhibit 8**, Dep. of Rebecca Paradise ("May 18 Paradise Dep.") (May 18, 2021) at 29:11–32:4, 42:17–43:24, 58:1–63:17, 98:19–100:15. TeamHealth Plaintiffs will argue that MultiPlan was given a profit motive to unfairly cut reimbursement payments to healthcare providers. But in fact, the compensation methodology between Defendants and MultiPlan is the same as the compensation methodology between TeamHealth and Collect Rx, based on the contract between CollectRx and TeamHealth Plaintiffs that was voluntarily produced in this litigation. *See* **Exhibit 9**, Letter from Collect Rx to Kent Bristow (Oct. 28, 2019) (FESM001546) (contract between Collect Rx and TeamHealth). If MultiPlan had an improper motive acting on behalf of Defendants, then so did Collect Rx acting on behalf of TeamHealth Plaintiffs. Defendants should be permitted to use this evidence of the Collect Rx payment methodology at trial to rebut TeamHealth Plaintiffs' arguments related to MultiPlan. *Nguyen v. Sw. Leasing & Rental Inc.*, 282 F.3d 1061, 1068 (9th Cir. 2002) (if one party is permitted to introduce certain evidence—whether or not that evidence is relevant—the opposing party must be permitted to introduce evidence explaining it); *see also Hall v. Ortiz*, No. 58042, 129 Nev. 1120, *reported at* 2013 WL 7155073 (2013) (unpublished) (applying the same doctrine under Nevada law).

TeamHealth Plaintiffs also intend to offer evidence that Defendants adopted a set of

negotiation parameters in 2019 that was specifically for use in negotiations with TeamHealth affiliates and other providers that were "billing egregiously, taking advantage of [United plan] members through balance billing tactics, [and] escalating their billed charges as TeamHealth [did]." **Exhibit 8**, May 18 Paradise Dep. at 54:3–21. TeamHealth Plaintiffs hired Collect Rx to challenge Data iSight's pricing recommendations *en masse*, and MultiPlan reported that Collect Rx was "hounding MultiPlan to reimburse at a very high rate." *See* **Exhibit 10**, Dep. of John Haben (May 21, 2021) at 276:24–277:3; **Exhibit 11**, Dep. of Jacqueline Kienzle ("Kienzle Dep.") (June 30, 2021) at 254:8–18; **Exhibit 12**, Email from J. Shrader to P. O'Connor (Nov. 22, 2019) (FESM017472); **Exhibit 13**, Email from J. Shrader to K. Bristow (Oct. 18, 2019) (FESM020890). In response, Defendants implemented a negotiation threshold in 2019 that set limits the amounts that MultiPlan could accept in its negotiations with Collect Rx. *See* **Exhibit 8**, May 18 Paradise Dep. at 54:3–21; **Exhibit 10**, Haben Dep. at 275:19-277:3; **Exhibit 11**, Kienzle Dep. at 235:4-237:21 & Ex. 41. If Defendants are barred from presenting evidence on Collect Rx, they will be unable to rebut TeamHealth Plaintiffs' evidence on negotiation thresholds that were targeted at TeamHealth and Collect Rx, among other bad actors. *See Nguyen*, 282 F.3d at 1068. Said another way, if Plaintiffs are permitted to present evidence of Defendants' negotiation parameters and argue that those parameters unfairly targeted Plaintiffs, Defendants must be permitted to respond by introducing evidence of the reason they implemented those parameters, namely, the questionable collection practices of CollectRx and its incentive structure.

This Court should level the playing field by allowing Defendants to present evidence on Collect Rx and TeamHealth Plaintiffs' collections practices at trial.

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III. CONCLUSION

For the foregoing reasons, this Court should enter an order permitting Defendants to present evidence on TeamHealth Plaintiffs' collections practices and use of Collect Rx.

Dated this 21st day of September, 2021.

/s/ Colby L. Balkenbush

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of September, 2021, a true and correct copy of the foregoing **DEFENDANTS' MOTION IN LIMINE NO. 13: MOTION TO AUTHORIZE DEFENDANTS TO OFFER EVIDENCE RELATING TO PLAINTIFFS' COLLECTION PRACTICES FOR HEALTHCARE CLAIMS** 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.

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

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

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

Defendants.

I, COLBY L. BALKENBUSH, declare as follows:

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

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

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

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

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

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

MIL 2. Motion offered in the alternative to MIL No. 1, to preclude Plaintiffs from offering evidence relating to Defendants' agreements with other market players and related

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negotiations.

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

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

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

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

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

MIL 8. Motion offered in the alternative to MIL No. 7, to preclude Plaintiffs from offering evidence as to the qualitative value, relative value, societal value, or difficulty of the services they provided.

MIL 9. Motion to authorize Defendants to offer evidence of Plaintiffs organizational, management, and ownership structure, including flow of funds between related entities, operating companies, parent companies, and subsidiaries.

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

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

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

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

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MIL 14. Motion offered in the alternative to MIL No. 13 to preclude Plaintiffs from contesting Defendants' defenses relating to claims that were subject to a settlement agreement between CollectRX and Data iSight; and Defendants' adoption of specific negotiation thresholds for reimbursement claims appealed or contested by Plaintiffs.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MIL 35. Motion to pre-admit certain evidence.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Executed: September 21, 2021.

/s/ Colby L. Balkenbush
Colby L. Balkenbush

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EXHIBIT 1

FILED UNDER SEAL

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EXHIBIT 1

EXHIBIT 2

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EXHIBIT 2

EXHIBIT 3

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EXHIBIT 3

EXHIBIT 4

FILED UNDER SEAL

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EXHIBIT 4

EXHIBIT 5

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EXHIBIT 5

EXHIBIT 6

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EXHIBIT 11

EXHIBIT 12

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EXHIBIT 12

EXHIBIT 13

FILED UNDER SEAL

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EXHIBIT 13

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

DEFENDANTS' MOTION IN LIMINE NO. 14: MOTION OFFERED IN THE ALTERNATIVE TO MIL NO. 13 TO PRECLUDE PLAINTIFFS FROM CONTESTING DEFENDANTS' DEFENSES RELATING TO CLAIMS THAT WERE SUBJECT TO A SETTLEMENT AGREEMENT BETWEEN COLLECTRX AND DATA

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WEINBERG WHEELER HUDGINS GUNN & DIAL
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UNITEDHEALTH GROUP, INC., a Delaware corporation; UNITED HEALTHCARE INSURANCE COMPANY, a Connecticut corporation; UNITED HEALTH CARE SERVICES INC., dba UNITEDHEALTHCARE, a Minnesota corporation; UMR, INC., dba UNITED MEDICAL RESOURCES, a Delaware corporation; OXFORD HEALTH PLANS, INC., a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., a Nevada corporation; SIERRA HEALTH-CARE OPTIONS, INC., a Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation; DOES 1-10; ROE ENTITIES 11-20, Defendants.	**ISIGHT; AND DEFENDANTS' ADOPTION OF SPECIFIC NEGOTIATION THRESHOLDS FOR REIMBURSEMENT CLAIMS APPEALED OR CONTESTED BY PLAINTIFFS** **(HEARING REQUESTED)**

Defendants UnitedHealth Group, Inc., UnitedHealthcare Insurance Company ("UHIC"), United HealthCare Services, Inc. ("UHS", and together with UHIC, "UHC"), UMR, Inc. ("UMR"), Oxford Health Plans, Inc. ("Oxford"), Sierra Health and Life Insurance Co., Inc. ("SHL"), Sierra Health-Care Options, Inc. ("SHO"), and Health Plan of Nevada, Inc. ("HPN") (collectively "Defendants") hereby submit the following Motion in Limine 14: Motion offered in the alternative to MIL No. 13 to preclude Plaintiffs from contesting Defendants' defenses relating to claims that were subject to a settlement agreement between CollectRX and Data iSight; and Defendants' adoption of specific negotiation thresholds for reimbursement claims appealed or contested by Plaintiffs ("Motion").

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

Dated this 21st day of September, 2021.

/s/ Colby L. Balkenbush

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This action concerns the rate of payment for thousands of claims for emergency medicine services. For a certain number of those claims, Defendants contracted with MultiPlan, Inc. ("MultiPlan") to use its Data iSight service to recommend pricing for emergency services. Data iSight also offered a negotiation service if an out-of-network provider appealed the reimbursement recommended by Data iSight. The TeamHealth Plaintiffs[1] appealed some of those initial Data iSight claims and then negotiated resolutions for these disputed claims. Likewise, for a certain number of those disputed claims, TeamHealth Plaintiffs hired Collect Rx to challenge and negotiate the rate of payment, including by appealing initial reimbursement amounts through Data iSight. Collect Rx is a collections company that acted as TeamHealth Plaintiffs' agent to challenge, and in some cases resolve, the rate of payment for emergency medical services.

While TeamHealth Plaintiffs have obtained a great deal of discovery from MultiPlan, including the structure of compensation Defendants paid MultiPlan, this Court precluded Defendants from taking robust discovery on Collect Rx. Defendants submit that TeamHealth Plaintiffs' collection practices and relationship with Collect Rx are relevant to the claims in this case. TeamHealth Plaintiffs used their agent Collect Rx to negotiate acceptable payment in full from Defendants for dozens of claims included in the final spreadsheet of At-Issue Claims. These are claims where Collect Rx availed itself of the appellate mechanisms within Data iSight to appeal the original reimbursement and negotiate a higher one, accepting that higher reimbursement as payment in full on behalf TeamHealth Plaintiffs. In addition, Defendants anticipate that TeamHealth Plaintiffs will present evidence and argument that Defendants used MultiPlan and Data iSight to set negotiation thresholds during Data iSight's negotiations with

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

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Collect Rx over TeamHealth claims. But those thresholds were a reaction to TeamHealth Plaintiffs retaining Collect Rx to aggressively challenge the reimbursement of thousands of emergency medicine claims *en masse* and to seek exorbitantly high reimbursement rates.

This Motion is brought in the alternative to Defendants' simultaneously filed Motion in Limine No. 13. In that motion, Defendants request that they be permitted to present evidence and argument at trial concerning TeamHealth Plaintiffs' use of Collect Rx notwithstanding this Court's discovery orders on this subject. Only if that motion is denied, and the Court does ***not*** allow Defendants to introduce evidence and argument concerning TeamHealth Plaintiffs' use of Collect Rx, then this Court should not allow TeamHealth Plaintiffs to introduce evidence related to corollary issues. If evidence of TeamHealth Plaintiffs' compensation of its outside negotiator is irrelevant, then so too is evidence of Defendants' payment of its outside negotiator, MultiPlan and Data iSight. And if Defendants cannot present evidence and argument that dozens of At-Issue Claims were paid in full based on the agreements negotiated by Collect Rx acting as TeamHealth Plaintiffs' agent, then TeamHealth Plaintiffs should not be permitted to offer evidence that those claims were underpaid. Moreover, TeamHealth Plaintiffs should not be permitted to offer evidence of Defendants' negotiation thresholds, which were adopted in response to TeamHealth Plaintiffs' retention of Collect Rx to engage in aggressive and mass collection actions against Defendants on Data iSight claims.

II. LEGAL ARGUMENT

A. Legal Standard for Motion in Limine

The scope of a motion in limine is rather broad, applying to "any kind of evidence which could be objected to at trial, either as irrelevant or subject to discretionary exclusion as unduly prejudicial." *Clemens v. Am. Warranty Corp.*, 193 Cal. App. 3d 444, 451, 238 Cal. Rptr. 339, 342 (1987). "The usual purpose of motions in limine is to preclude the presentation of evidence deemed inadmissible and prejudicial by the moving party. A typical order in limine excludes the challenged evidence and directs counsel, parties, and witnesses not to refer to the excluded matters during trial. Motions in limine serve other purposes as well. They permit more careful consideration of evidentiary issues than would take place in the heat of battle during trial. They

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

B. Relevant Evidence

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

C. If This Court Maintains that Evidence Related to Collect Rx Is Irrelevant, Then TeamHealth Plaintiffs Should Be Precluded from Introducing Evidence and Argument Related to Collect Rx's Negotiations of Disputed Claims or Negotiation Thresholds that Defendants Implemented for Negotiations with TeamHealth by MultiPlan or Data iSight

If this Court does not permit Defendants to introduce evidence related to TeamHealth Plaintiffs' use of Collect Rx to aggressively pursue collections of thousands of claims priced and/or adjudicated by Data iSight, then TeamHealth Plaintiffs should be precluded from offering the same type of evidence and argument. What is irrelevant for Defendants' use must be irrelevant for TeamHealth Plaintiffs' use. *Centralian Controls Pty, Ltd. v. Maverick Int'l, Ltd.*, No. 1:16-CV-37, 2018 WL 4113400, at *5 (E.D. Tex. Aug. 29, 2018) (recognizing that the exclusion of one party's certain evidence requires the exclusion of other party's similar evidence). Specifically, this Court should prevent TeamHealth Plaintiffs from introducing two categories of evidence:

First, TeamHealth Plaintiffs should not be permitted to introduce evidence related to 30

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disputed claims as to which Collect Rx negotiated reimbursements on behalf of the TeamHealth Plaintiffs and for which TeamHealth agreed to accept as payment in full. *See* **Exhibit 1**, Declaration of Bruce Deal in Support of Defendants' Motion for Partial Summary Judgment at Ex. A; **Exhibit 2**, FESM001489 (letter of agreement between Collect Rx and Data iSight, showing TeamHealth Plaintiffs accepted negotiated rate as "payment in full"). TeamHealth Plaintiffs cannot at once challenge claims finally resolved by its agent Collect Rx while preventing Defendants from presenting evidence that Collect Rx *did* resolve those claims. TeamHealth Plaintiffs bear the burden of proof as to every single disputed claim. They cannot at once pursue reimbursement claims that they previously settled and argue that presenting evidence that they were in fact settled should be excluded. It would be unfairly prejudicial to allow TeamHealth Plaintiffs to introduce evidence in support of additional payment on these claims while Defendants are precluded from introducing evidence related to Collect Rx's negotiations and settlement of these same disputed claims.

Second, TeamHealth Plaintiffs should be precluded from introducing evidence related to negotiation thresholds for TeamHealth entities that the Defendants implemented in 2019 in response to aggressive collections actions undertaken by Collect Rx on TeamHealth's behalf. TeamHealth Plaintiffs cannot unfairly mislead the jury by telling them only half of the story. *See Myers v. State*, 476 P.3d 470, *reported at* 2020 WL 6955594, at *4 (Nev. Ct. App. 2020) (affirming exclusion of evidence that "could confuse the issues or mislead the jury"). Negotiation thresholds were imposed to address the administrative burden created by the TeamHealth Plaintiffs' retention of Collect Rx to pursue aggressive and massive collection activity against Defendants on thousands of out-of-network claims adjudicated and/or priced using Data iSight. *See* **Exhibit 3**, Dep. of Rebecca Paradise (May 18, 2021) at 53:25–21; **Exhibit 4**, Dep. of John Haben (May 21, 2021) at 275:17–277:3. Evidence related to the existence or contents of these negotiation thresholds is inseparable from the issue of TeamHealth Plaintiffs' engagement and use of Collect Rx to pursue collections *en masse* relating to claims adjudicated and/or priced using the Data iSight service. If TeamHealth Plaintiffs' retention of Collect Rx is deemed irrelevant, it follows that TeamHealth Plaintiffs should be barred from

introducing evidence or argument regarding Defendants' reaction to Collect Rx's behavior in aggressively challenging thousands of disputed claims at once.

III. CONCLUSION

For the foregoing reasons, this Court should enter an order that precludes TeamHealth Plaintiffs from introducing any evidence or argument in support of disputed claims that were subject to agreements that were individually negotiated by Collect Rx and as to which the TeamHealth Plaintiffs agreed to accept payment in full, and precludes TeamHealth Plaintiffs from offering testimony or argument related to Defendants' TeamHealth-specific negotiation thresholds that were imposed in response to TeamHealth's engagement of Collect Rx to pursue aggressive collection activities.

Dated this 21st day of September, 2021.

/s/ Colby L. Balkenbush

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of September, 2021, a true and correct copy of the foregoing **DEFENDANTS' MOTION IN LIMINE NO. 14: MOTION OFFERED IN THE ALTERNATIVE TO MIL NO. 13 TO PRECLUDE PLAINTIFFS FROM CONTESTING DEFENDANTS' DEFENSES RELATING TO CLAIMS THAT WERE SUBJECT TO A SETTLEMENT AGREEMENT BETWEEN COLLECTRX AND DATA ISIGHT; AND DEFENDANTS' ADOPTION OF SPECIFIC NEGOTIATION THRESHOLDS FOR REIMBURSEMENT CLAIMS APPEALED OR CONTESTED BY PLAINTIFFS** 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

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Plaintiffs,

vs.

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

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

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

Defendants.

I, COLBY L. BALKENBUSH, declare as follows:

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

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

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

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

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

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

MIL 2. Motion offered in the alternative to MIL No. 1, to preclude Plaintiffs from offering evidence relating to Defendants' agreements with other market players and related

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negotiations.

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

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

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

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

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

MIL 8. Motion offered in the alternative to MIL No. 7, to preclude Plaintiffs from offering evidence as to the qualitative value, relative value, societal value, or difficulty of the services they provided.

MIL 9. Motion to authorize Defendants to offer evidence of Plaintiffs organizational, management, and ownership structure, including flow of funds between related entities, operating companies, parent companies, and subsidiaries.

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

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

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

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

MIL 14. Motion offered in the alternative to MIL No. 13 to preclude Plaintiffs from contesting Defendants' defenses relating to claims that were subject to a settlement agreement between CollectRX and Data iSight; and Defendants' adoption of specific negotiation thresholds for reimbursement claims appealed or contested by Plaintiffs.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MIL 35. Motion to pre-admit certain evidence.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Executed: September 21, 2021.

/s/ Colby L. Balkenbush
Colby L. Balkenbush

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EXHIBIT 1

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EXHIBIT 1

EXHIBIT 2

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EXHIBIT 2

EXHIBIT 3

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EXHIBIT 3

EXHIBIT 4

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EXHIBIT 4

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

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

(HEARING REQUESTED)

Case Number: A-19-792978-B

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

Defendants.

Defendants UnitedHealth Group, Inc., UnitedHealthcare Insurance Company ("UHIC"), United HealthCare Services, Inc. ("UHS", and together with UHIC, "UHC"), UMR, Inc. ("UMR"), Oxford Health Plans, Inc. ("Oxford"), Sierra Health and Life Insurance Co., Inc. ("SHL"), Sierra Health-Care Options, Inc. ("SHO"), and Health Plan of Nevada, Inc. ("HPN") (collectively "Defendants"), hereby submit the following Motion in Limine No. 24 ("Motion") to preclude the for-profit physician staffing companies owned by TeamHealth Holding, Inc. – Fremont Emergency Services (Mandavia), Ltd., Team Physician Services of Nevada-Mandavia, P.C., Crum Stefanko and Jones LTD. dba Ruby Crest Emergency medicine (collectively, "TeamHealth Plaintiffs" or "Plaintiffs")[1] from referring to themselves as medical professionals, emergency room physicians or health care providers.

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

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

Dated this 21st day of September, 2021.

/s/ Colby L. Balkenbush

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Throughout their briefing to date, TeamHealth Plaintiffs have referred to themselves as the "Healthcare Providers." In doing so, they have conveyed the false impression that they are doctors or medical professionals. TeamHealth Plaintiffs are not doctors or healthcare providers. They are Nevada based companies that act as subsidiaries of a private-equity backed emergency room staffing company. The Court should not allow them to hold themselves out to the jury as if they were medical professionals or call themselves healthcare providers. Nor should TeamHealth Plaintiffs be permitted to play to the jury's emotions by claiming that any award of damages would result in a payment to a doctor, which it would not.

The parties conferred in good faith regarding this motion in limine in compliance with Local Rule 2.47, with the conference occurring on September 17, 2021. The parties were unable to reach agreement due to a good faith dispute as to the law and the facts at issue in this action. *See* attached Declaration of Colby Balkenbush, Esq.

II. LEGAL ARGUMENT

A. Legal Standard for Motion in Limine

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

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

B. Relevant Evidence

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

C. TeamHealth Plaintiffs Should be Precluded from Referring to Themselves as Healthcare Providers, Doctors, or Medical Professionals of any Kind

Throughout this litigation, TeamHealth Plaintiffs have referred to themselves as "healthcare providers." As a result, a reader of their briefs could be forgiven for thinking that they are medical professionals of some kind. They are not. TeamHealth Plaintiffs are companies that contract with medical professionals and then, for a fee, staff hospital emergency departments with those retained medical professionals: more like the "Uber" of emergency rooms than the cast of Grey's Anatomy. They are part of a massive nationwide conglomerate called TeamHealth Holdings, Inc. ("TeamHealth"), **Exhibit 1**, Dep. of Kent Bristow (May 28, 2021) at 55:16–25; **Exhibit 2**, Dep. of Kent Bristow (May 13, 2021) at 220:7–11; **Exhibit 3**, Dep. of Kent Bristow (May 14, 2021) at 18:14–21:5, which was a publicly traded company until it was acquired in 2016 by a private equity firm, the Blackstone Group for $6.1 billion. *See* **Exhibit 4**, Expert Report of Bruce Deal at 10 (July 30, 2021). Since that acquisition, TeamHealth has used its subsidiaries, including TeamHealth Plaintiffs, to pursue a nationwide

strategy to increase TeamHealth's emergency room fees, first in arms-length negotiation, and when that failed, through litigation. This litigation is but one front in that systematic assault.

TeamHealth Plaintiffs have sought to conceal their true identity in this litigation, and with some success. *See* Report and Recommendation No. 2 (Mar. 29, 2021) (holding that documents concerning corporate structures of TeamHealth Plaintiffs were not relevant). Moreover, they have affirmatively implied a false identity by referring to themselves as the "Healthcare Providers." The medical profession is a respected profession in Nevada and across the nation. But TeamHealth Plaintiffs are not themselves medical doctors; they are companies that enter independent contractor relationships with licensed medical professionals who are then hired out to hospital emergency departments in Nevada or elsewhere. They are merely a for-profit staffing company.

Defendants expect that TeamHealth Plaintiffs will continue this strategy at trial, and will seek to play to the jury's emotional affinity to the medical profession. They may even seek to argue that granting damages in their favor will result in a much-needed payment to medical doctors and healthcare providers, who are suffering for resources in the middle of a pandemic.[2] None of this would be true. If damages were granted to TeamHealth Plaintiffs, it would result in a payment to TeamHealth Plaintiffs and ultimately TeamHealth, who will have no obligation to share such funds with any doctor. *See* **Exhibit 5**, Rebuttal Expert Report of Bruce Deal (Sept. 17, 2021) at ¶¶ 6-25 (explaining that the agreements between each TeamHealth Plaintiff and TeamHealth provides that the physicians are paid a set compensation and that any net collections are kept as income to TeamHealth). Aside from plainly being untrue, TeamHealth Plaintiffs' subterfuge cannot possibly be relevant to the core question for decision: the reasonable value of the disputed emergency medicine services in this case whether. *See, e.g., State v. Eighth Jud. Dist. Ct. (Armstrong)*, 127 Nev. 927, 933, 267 P.3d 777, 781 (2011) (noting that "unfair prejudice" under NRS 48.035 is "an appeal to the emotional and sympathetic tendencies of a jury, rather than the jury's intellectual ability to evaluate evidence" (internal quotation marks

[2] *See* Defendants' Motion in Limine No. 37 to Exclude References to the COVID-19 Global Pandemic.

omitted)); *see also United States v. Skillman*, 922 F.2d 1370, 1374 (9th Cir. 1990) (holding that unfair prejudice under FRE 403—which is substantially similar to NRS 48.035—"appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause a jury to base its decision on something other than the established propositions in the case.").

For the reasons articulated above, Defendants request that the Court preclude TeamHealth Plaintiffs from referring to themselves as medical doctors, emergency medicine physicians or healthcare providers. Defendants further request that the Court authorize Defendants to refer to TeamHealth Plaintiffs as, "TeamHealth Plaintiffs" a name that is factually aligned with their true corporate identity.

III. CONCLUSION

Defendants request that the Court grant this Motion and enter an order precluding TeamHealth Plaintiffs from making any reference during trial that they are medical doctors, emergency medicine physicians, or healthcare providers.

Dated this 21st day of September, 2021.

/s/ Colby L. Balkenbush

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of September, 2021, a true and correct copy of the foregoing **DEFENDANTS' MOTION IN LIMINE NO. 24 PRECLUDING TEAMHEALTH PLAINTIFFS FROM REFERRING TO THEMSELVES AS HEALTHCARE PROFESSIONALS** 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.

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

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

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

Defendants.

I, COLBY L. BALKENBUSH, declare as follows:

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

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

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

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

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

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

MIL 2. Motion offered in the alternative to MIL No. 1, to preclude Plaintiffs from offering evidence relating to Defendants' agreements with other market players and related

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negotiations.

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

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

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

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

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

MIL 8. Motion offered in the alternative to MIL No. 7, to preclude Plaintiffs from offering evidence as to the qualitative value, relative value, societal value, or difficulty of the services they provided.

MIL 9. Motion to authorize Defendants to offer evidence of Plaintiffs organizational, management, and ownership structure, including flow of funds between related entities, operating companies, parent companies, and subsidiaries.

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

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

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

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

MIL 14. Motion offered in the alternative to MIL No. 13 to preclude Plaintiffs from contesting Defendants' defenses relating to claims that were subject to a settlement agreement between CollectRX and Data iSight; and Defendants' adoption of specific negotiation thresholds for reimbursement claims appealed or contested by Plaintiffs.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MIL 35. Motion to pre-admit certain evidence.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Executed: September 21, 2021.

/s/ Colby L. Balkenbush
Colby L. Balkenbush

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EXHIBIT 1

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EXHIBIT 1

DEPOSITION OF KENT BRISTOW
30(B)(6) WITNESS FOR
FREMONT EMERGENCY SERVICES(MANDAVIA) LTD.

MAY 28, 2021

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

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

Job No. 758214

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Associate General Counsel

Denise Zamore (Via Video)
Ryan Wong (Via Video)

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APPEARANCES: (Continued)

TEAMHEALTH DEFENDANTS
CLIENT REPRESENTATIVE:

Carole Owen, Esq. (Via Video)

VIDEOGRAPHER: Andrew Irwin

MR. BLALACK: All right. Hannah, we're going to go back to doing it the old-fashioned way.

BY MR. BLALACK:

Q. So let's now, sir, turn to Fremont, the plaintiff Fremont. And you mentioned that TeamHealth acquired Fremont, I think you said, sometime in 2015. Am I right about that?

MR. FINEBERG: Object to form.

THE WITNESS: Yes, I believe it was the later part of '15.

BY MR. BLALACK:

Q. See if we can just kind of pin that down.

(Exhibit 3 marked)

BY MR. BLALACK:

Q. Now, sir, the document marked for identification to your deposition as Fremont Exhibit 3 purports to be a press release issued by TeamHealth, announcing the acquisition of three emergency department medical groups in Las Vegas, Nevada.

Do you see that?

A. Yes.

Q. And it's dated October 26th, 2015. Is that right?

A. Yes.

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Q. Does that help orient you to the portion of the year in 2015 when the Fremont acquisition was completed?

A. Yes.

Q. Were you involved in the process of acquiring the plaintiffs affiliated with Fremont?

MR. FINEBERG: Object to form.

THE WITNESS: I would have had some involvement, yes.

BY MR. BLALACK:

Q. Okay. And am I correct, sir, that unlike plaintiffs Team Physicians and plaintiff Ruby Crest, the Fremont physicians staff more than one emergency department? Is that right?

A. Yes.

Q. How many do they staff?

A. Today?

Q. We'll start with today, and then we'll go -- go backwards.

A. I believe today we staff five --

Q. Okay.

A. -- emergency rooms.

Q. At the time of the acquisition in October of 2015, how many emergency rooms did Fremont staff?

A. My recollection is six, but I'm not

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C E R T I F I C A T E

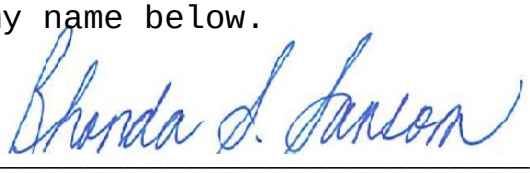
STATE OF TENNESSEE

COUNTY OF KNOX

I, Rhonda S. Sansom, RPR, CRR, CRC, LCR #685, licensed court reporter in and for the State of Tennessee, do hereby certify that the above videoconference deposition of KENT BRISTOW, as the 30(b)(6) Witness for Fremont Emergency Physicians (Mandavia), Ltd., was reported by me and that the foregoing 291 pages of the transcript is a true and accurate record to the best of my knowledge, skills, and ability.

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

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



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

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EXHIBIT 2

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EXHIBIT 2

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

MAY 13, 2021

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

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

Job No. 758196

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UNITED DEFENDANTS CLIENT REPRESENTATIVES:

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Associate General Counsel

Denise Zamore (Via Video)
Ryan Wong (Via Video)

VIDEOGRAPHER:

Andrew Irwin

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A. Chris is the CFO -- chief financial officer -- over the West Region Operations.

Q. And when you say "West Region Operations," you mean the TeamHealth West Region Operations?

A. Yes.

Q. So am I correct, sir, that all of the officers and directors listed in the filings of Exhibit 18 are employees of TeamHealth?

MR. FINEBERG: Object to form.

THE WITNESS: Yes.

BY MR. BLALACK:

Q. Now, are you familiar with something called a professional and support services agreement that TeamHealth enters into with physician practices?

MR. FINEBERG: Object to form.

THE WITNESS: Vaguely aware of those, yes.

MR. BLALACK: Okay. Let me show you a document. Let's mark this as Team Physicians 18 -- I'm sorry, I knew I was going to get it wrong eventually. Team Physicians 19.

BY MR. BLALACK:

Q. All right. Mr. Bristow, the document offered for identification as Team Physicians Exhibit

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C E R T I F I C A T E

STATE OF TENNESSEE

COUNTY OF KNOX

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

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

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

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

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EXHIBIT 3

FILED UNDER SEAL

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EXHIBIT 3

EXHIBIT 4

FILED UNDER SEAL

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EXHIBIT 4

EXHIBIT 5

FILED UNDER SEAL

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EXHIBIT 5

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

DEFENDANTS' MOTION IN LIMINE NO. 7 TO AUTHORIZE DEFENDANTS TO OFFER EVIDENCE OF THE COSTS OF THE SERVICES THAT PLAINTIFFS PROVIDED

HEARING REQUESTED

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

Defendants.

Defendants UnitedHealth Group, Inc., UnitedHealthcare Insurance Company ("UHIC"), United HealthCare Services, Inc. ("UHS", and together with UHIC, "UHC"), UMR, Inc. ("UMR"), Oxford Health Plans, Inc. ("Oxford"), Sierra Health and Life Insurance Co., Inc. ("SHL"), Sierra Health-Care Options, Inc. ("SHO"), and Health Plan of Nevada, Inc. ("HPN") (collectively "Defendants"), by and through their attorneys of the law firm of Weinberg Wheeler Hudgins Gunn & Dial, LLC, hereby submit the following Motion *in Limine* No. 7 to authorize Defendants to offer argument and evidence of the costs of the services that Plaintiffs provided ("Motion").

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

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

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

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

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

The costs to provide a service are always relevant to that service's reasonable value, and it is especially relevant in this case. Under TeamHealth Plaintiffs' theory, their own billed charges establish the reasonable value of their services. But Defendants dispute that TeamHealth Plaintiffs' billed charges are reasonable to begin with. Accordingly, to the extent that TeamHealth Plaintiffs rely on their costs when determining what to bill for services, then their costs are probative of the reasonable rate for the services.

If TeamHealth Plaintiffs' billed charges are not related to their actual costs in any way, the jury should know that too. First, the jury should be able to consider whether a bill is unreasonable if it is completely untethered to the actual cost to provide the service. And second, evidence of costs is necessary for Defendants to present alternative calculations of the reasonable value of the emergency medicine services at issue.

Accordingly, Defendants seek an order that permits them to present argument and evidence at trial on the cost of TeamHealth Plaintiffs' emergency medicine services.

II. ARGUMENT AND CITATION OF AUTHORITY

A. Legal Standard for Motion in Limine

The Nevada Supreme Court has tacitly approved the use of motions in limine to be within the purview of the district court's discretionary power concerning rulings on the admissibility of evidence. *See State ex. rel Dept. of Highway v. Nevada Aggregates & Asphalt Co.*, 92 Nev. 370, 551 P.2d 1095 (1976). The scope of a motion in limine is rather broad, applying to "any kind of evidence which could be objected to at trial, either as irrelevant or subject to discretionary exclusion as unduly prejudicial." *Clemens v. Am. Warranty Corp.*, 193 Cal. App. 3d 444, 451, 238 Cal. Rptr. 339, 342 (1987). "The usual purpose of motions in limine is to preclude the

presentation of evidence deemed inadmissible and prejudicial by the moving party. A typical order in limine excludes the challenged evidence and directs counsel, parties, and witnesses not to refer to the excluded matters during trial. Motions in limine serve other purposes as well. They permit more careful consideration of evidentiary issues than would take place in the heat of battle during trial. They minimize side-bar conferences and disruptions during trial, allowing for an uninterrupted flow of evidence." *R & B Auto Ctr., Inc. v. Farmers Grp., Inc.*, 140 Cal. App. 4th 327, 371–72, 44 Cal. Rptr. 3d 426, 462 (2006) (citing *Kelly* v. *New W. Fed. Sav.*, 49 Cal. App. 4th 659, 669–70, 56 Cal. Rptr. 2d 803 (1996)). Such a motion can also be advantageous in avoiding what is obviously a futile attempt to "unring the bell" should the court grant a motion to strike during proceedings before the jury. *Blanks v. Seyfarth Shaw LLP*, 171 Cal. App. 4th 336, 375, 89 Cal. Rptr. 3d 710, 741 (2009) (citation omitted).

B. Relevant Evidence Standard

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

C. The Cost to Provide a Service Is Relevant To Its Reasonable Value and Must Be Admitted

This Court should allow Defendants to present evidence at trial of TeamHealth Plaintiffs' costs in performing the emergency medicine services at issue. As a general rule, the actual cost to provide a service is probative of the reasonable value of that service. *See Fairbanks N. Star Borough v. Tundra Tours, Inc.*, 719 P.2d 1020, 1030 (Alaska 1986) ("[E]vidence of actual costs is relevant to a determination of reasonable value."); NRS 48.025(1) (recognizing that "[a]ll relevant evidence is admissible" unless an exception applies); NRS 48.015 (Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the

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determination of the action more or less probable than it would be without the evidence.").

While actual costs are not determinative of the reasonable value of a service, they should be considered as part of the reasonableness analysis. *See, e.g.*, *Doe v. HCA Health Servs. of Tenn., Inc.*, 46 S.W.3d 191, 198-99 (Tenn. 2001) ("[A]ppellate decisions from other states suggest that 'reasonable value' in such cases is to be determined by considering the hospital's internal factors as well as the similar charges of other hospitals in the community."). In other contexts, like construction for example, "[a] reasonable sum for services rendered usually includes the actual cost, including general overhead attributable to the project, and a reasonable profit." *Biedenharn v. Culp*, 911 So. 2d 313, 318 (La. Ct. App. 2005); *see also City of Portland ex rel. Donohue & Fleskes Corp. v. Hoffman Constr. Co.*, 596 P.2d 1305, 1314 (Or. 1979) ("Evidence of the plaintiff's actual costs and the ordinary industry allowance for overhead and profit is relevant to the jury's determination of the reasonable value of the services and materials which were furnished."). A party should be entitled to show the actual cost of the service, then it is up to "both parties to respectively show the reasonableness or unreasonableness of those costs." *Peavey v. Pellandini*, 551 P.2d 610, 616 (Idaho 1976).

Where no contract sets the price for the healthcare services at issue, courts have held that actual costs of performing those services are relevant to determining the reasonable value of the services. *See e.g.*, *Victory Mem'l Hosp. v. Rice*, 493 N.E.2d 117, 119–20 (Ill. Ct. App. 1986) (recognizing that "any assessment of the reasonableness of a private hospital's charges must include consideration and recognition of the particular hospital's costs, functions and services"). In many cases, healthcare providers are allowed to defend the reasonable value of their services by showing the actual cost to provide the service. *See e.g.*, *Galloway v. Methodist Hosps., Inc.*, 658 N.E.2d 611, 614 (Ind. Ct. App. 1995) (hospital's expert testified that "charges were comparable to other facilities" and "based upon Hospital's budgetary needs"); *Ellis Hosp. v. Little*, 409 N.Y.S.2d 459, 461 (1978) (hospital's director of fiscal planning "testified that the cost of the hospital's operation was the basic consideration in establishing the charges for the services rendered"). Conversely, Defendants should be able to point to TeamHealth Plaintiffs' actual costs as evidence that its charges are not indicative of the reasonable value of its services.

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Further, where the reasonableness of a provider's charge is at issue, the cost of the service is particularly relevant. TeamHealth Plaintiffs have previously relied on court orders in parallel litigation brought by other TeamHealth affiliates in Florida. *E.g.*, **Exhibit 1**, Order Denying Mot. to Compel Discovery re: Pls.' Internal Cost Structure, *Gulf-to-Bay Anesthesiology Associates, LLC v. UnitedHealthCare of Florida, Inc.*, No. 17-CA-011207 (Fla. 13th Jud. Cir. Ct. Dec. 1, 2020) ("*Gulf-to-Bay* Order"). In that litigation, a state statute provided that the reimbursement was the lesser of (1) the provider's charges, (2) the usual and customary provider charges for similar services in the community, or (3) an agreed upon price. *See* **Exhibit 2**, Am. Compl., *Gulf-to-Bay Anesthesiology Associates, LLC v. UnitedHealthCare of Florida, Inc.*, No. 17-CA-011207 (Fla. 13th Jud. Cir. Ct. 2020) ("*Gulf-to-Bay* Am. Compl."). The *Gulf-to-Bay* court limited the analysis of the fair market value to consideration of amounts billed and accepted, finding that costs were irrelevant. **Exhibit 1**, *Gulf-to-Bay* Order at 6–7. Importantly, the complaint in *Gulf-to-Bay* ***did not allege that the reasonable rate was a percentage of the billed amount***, as TeamHealth Plaintiffs do in this case. *Compare* **Exhibit 2**, *Gulf-to-Bay* Am. Compl., *with* FAC ¶¶ 46, 54.

Just weeks after the *Gulf-to-Bay* order, a different judge at the trial court level in Florida distinguished the *Gulf-to-Bay* decision on the grounds that it did not involve a claim of unreasonable pricing. **Exhibit 3**, *Florida Emergency Physicians Kang & Ass., M.D., Inc. v. Sunshine State Health Plan, Inc.*, No. CACE19-013026, at 5 (Fla. 17th Jud. Cir. Ct. 2020). By contrast, the later decision involved defendants that were contesting the reasonableness of the plaintiffs' charging and pricing, so the court found that costs were relevant to the action. *Id.* at 5–6.

For similar reasons, Defendants here should also be allowed to present evidence at trial on TeamHealth Plaintiffs' billed amounts and how they relate to the costs of providing the emergency medicine services at issue. First, Defendants challenge the reasonableness of TeamHealth Plaintiffs original billed amounts and object to anchoring the reasonable-value analysis to those unreasonable amounts. And second, if TeamHealth Plaintiffs' costs are a component of how they determine what amount to bill, then those costs are necessarily relevant

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to the reasonable value of their services.

Evidence on TeamHealth Plaintiffs' costs is relevant even if TeamHealth Plaintiffs themselves do not consider their actual costs when determining what amount to bill for a service. *See Howell v. Hamilton Meats & Provisions, Inc.*, 257 P.3d 1130, 1144 (Cal. 2011) ("[A] medical care provider's billed price for particular services is not necessarily representative of either the cost of providing those services or their market value."); *see also* Mark A. Hall & Carl E. Schneider, *Patients as Consumers: Courts, Contracts, and the New Medical Marketplace*, 106 Mich. L. Rev. 643, 665 (2008) (noting that "rational markets do not produce such bizarre prices" as hospital bills and that "the vast majority of [charges] have no relation to anything, and certainly not to cost") (quoting Allen Dobson et al., *A study of Hospital Charge Setting Practices* (2005)). Even were that so, it is untenable for the jury to determine a fair market value for TeamHealth Plaintiffs' services that is completely untethered to costs. By excluding such evidence, this Court prevents Defendants from arguing alternative theories to calculate reasonable value other than the one that TeamHealth Plaintiffs have proposed. For example, instead of determining reasonable value by billed amount minus a percentage, it could instead be determined by actual costs plus a percentage. *See, e.g.*, *Eufaula Hosp. Corp. v. Lawrence*, 32 So. 3d 30, 38 (Ala. 2009) (in the context of certifying a class action, an expert testified that a reasonable value of the medical services could be 115% of costs).

As it stands, Defendants are limited in their ability to contest the TeamHealth Plaintiffs' position on how to calculate the reasonable value of services. Any evidence of the reasonable value of a service, including its actual cost, should be admitted at trial. *See Fairbanks N. Star Borough*, 719 P.2d at 1029. Defendants therefore request that this Court permit Defendants to submit evidence on the TeamHealth Plaintiffs' costs of performing the emergency medicine services at issue, which is closely related to the reasonable value of those services.

III. CONCLUSION

The actual costs of TeamHealth Plaintiffs' services are relevant to any analysis of the reasonable value of their emergency medicine services, but are particularly relevant in this case where TeamHealth Plaintiffs' purported reasonable rate is tied to its billed amount. As a result,

Defendants respectfully request that this Court enter an order that permits Defendants to present evidence and argument at trial on TeamHealth Plaintiffs' costs of providing emergency medicine services.

Dated this 21st day of September, 2021.

/s/ Colby L. Balkenbush

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of September, 2021, a true and correct copy of the foregoing **DEFENDANTS' MOTION IN LIMINE NO. 7 TO AUTHORIZE DEFENDANTS TO OFFER EVIDENCE OF THE COSTS OF THE SERVICES THAT PLAINTIFFS PROVIDED** was electronically filed/served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

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

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

Defendants.

I, COLBY L. BALKENBUSH, declare as follows:

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

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

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

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

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

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

MIL 2. Motion offered in the alternative to MIL No. 1, to preclude Plaintiffs from offering evidence relating to Defendants' agreements with other market players and related

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negotiations.

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

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

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

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

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

MIL 8. Motion offered in the alternative to MIL No. 7, to preclude Plaintiffs from offering evidence as to the qualitative value, relative value, societal value, or difficulty of the services they provided.

MIL 9. Motion to authorize Defendants to offer evidence of Plaintiffs organizational, management, and ownership structure, including flow of funds between related entities, operating companies, parent companies, and subsidiaries.

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

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

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

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

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MIL 14. Motion offered in the alternative to MIL No. 13 to preclude Plaintiffs from contesting Defendants' defenses relating to claims that were subject to a settlement agreement between CollectRX and Data iSight; and Defendants' adoption of specific negotiation thresholds for reimbursement claims appealed or contested by Plaintiffs.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MIL 35. Motion to pre-admit certain evidence.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Executed: September 21, 2021.

/s/ Colby L. Balkenbush
Colby L. Balkenbush

EXHIBIT 1

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EXHIBIT 1

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

GULF-TO-BAY ANESTHESIOLOGY ASSOCIATES, LLC,

CASE NO.: 17-CA-011207

Plaintiff,

v.

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

The Insurance Companies.
_____/

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

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

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

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

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

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

> (5) Reimbursement for services pursuant to this section by a provider who does not have a contract with the health maintenance organization shall be the lesser of:

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

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(a) The provider's charges;
(b) The usual and customary provider charges for similar services in the community where the services were provided; or
(c) The charge mutually agreed to by the health maintenance organization and the provider within 60 days of the submittal of the claim.

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

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

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

Id. at 845 (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Electronically Conformed 12/1/2020
Christopher Sabella
CIRCUIT COURT JUDGE

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Copies furnished to:
Counsel of Record

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

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EXHIBIT 2

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EXHIBIT 2

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

CASE NO: 17-CA-011207

GULF-TO-BAY ANESTHESIOLOGY
ASSOCIATES, LLC,

Plaintiff,

v.

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

Defendants.
_____/

AMENDED COMPLAINT

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Plaintiff, Gulf-to-Bay Anesthesiology Associates, LLC ("GTB" or "Plaintiff"), by and through undersigned counsel, hereby sues Defendants UnitedHealthcare of Florida, Inc. and UnitedHealthcare Insurance Company (collectively, "United" or "Defendants"), and alleges as follows:

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INTRODUCTION

1. This lawsuit arises from United's failure to correctly pay GTB for medically necessary professional anesthesia health care services provided to the residents of Tampa and surrounding communities. More specifically, as of October 2017, United has underpaid GTB for more than 1700 instances in which GTB has provided anesthesia care to United's Members[1] since May 21, 2017 for a total underpaid amount that exceeds $1.5 million, which amounts and

[1] As used herein, the term "Members" means persons covered under health plans that are issued, operated or administered by either Defendant.

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