

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.

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Case No. 85525

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

Petitioners,

vs.

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

Respondents,

vs.

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

Real Parties in Interest.

Case No. 85656

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CERTIFICATE OF SERVICE

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

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

1 Q So that would be a fallback service available if the provider in
2 question wasn't already in the wrap network?

3 A Yeah. Think about a waterfall. If they're not here, if they're
4 not here, you go here.

5 Q Now, does UnitedHealthcare pay a fee to access this wrap
6 network?

7 A Yes, we do.

8 Q And does United pay a fee to -- for the prospective
9 negotiation services that MultiPlan provides?

10 A Yes, we do.

11 Q When did UnitedHealthcare first start offering the shared
12 savings program?

13 A I believe back in 2003.

14 Q So almost 20 years ago.

15 A Almost 20 years ago.

16 Q Is the shared savings program still in use today?

17 A Yes, clients still ask for that periodically.

18 Q Has the shared savings program been in use continually
19 from back then, 2003 up to the present?

20 A Yes, it has.

21 Q Now, if you look down, it says -- let's see the phrase.

22 MR. BLALACK: Third bullet, Shane.

23 BY MR. BLALACK:

24 Q Where it says, "SSP is a contracted rate. Providers agree to
25 write off the discount. No balance billing to the members." Do you see

1 that?

2 A I do.

3 Q What's that describing?

4 A Basically it's what we talked about before. The provider in
5 that third party network has a contract rate. They agree to accept that
6 rate. They agree not to pursue the member. Obviously they can still
7 pursue it for the coinsurance.

8 Q Is the shared savings program available both to fully insured
9 clients and to self-funded clients?

10 A The shared savings program is available, but we have moved
11 off of that for fully insured.

12 Q Okay. Typically across your book of business, which of the
13 two types of products clients most frequently use?

14 A More frequent on the self-funded side than on the fully
15 insured side.

16 Q And can shared savings -- remember I asked you earlier
17 about whether the ENRP program applied to emergency services?

18 A Yes.

19 Q Does the shared savings program apply to out of network
20 emergency room services like those at issue in this case?

21 A It could.

22 Q And you mentioned that -- earlier, that there was balancing
23 billing protection in the shared savings program?

24 A Yes.

25 Q Now, down at the bottom right, you'll see a bullet that reads,

1 "SSP, SSPE for ASO clients charges a percentage of savings
2 administration." Do you see that?

3 A I do.

4 Q What does that mean?

5 A So for the wrap network and the wrap network enhanced, as
6 we've discussed before, there is a fee that clients agree to pay.

7 Q And is that fee percentage the same for every single
8 UnitedHealthcare client that chooses shared savings?

9 A No. It varies across the board.

10 Q What caused it -- what would cause it to vary?

11 A Well, clients negotiate. So we can't just roll a client or
12 migrate a client in. We -- they have to -- they sit across the table, or they
13 talk with the sales organization, and they'll negotiate the fee.

14 Q Could you explain to the jury, how is that shared savings fee
15 typically calculated?

16 A So in the -- back in 2003, it started at a very simple, and it's
17 still today, simple math, billed charges to allowed. So the more the
18 provider bills, the higher the billed charges. But it's the delta -- I'm sorry.
19 It's the difference between the billed and the allowed amount.

20 MR. BLALACK: Okay. Let me -- let me try to see if I
21 understand what you're referring to.

22 Shane, could you -- or Ms. White, could we toggle to the
23 LLC?

24 BY MR. BLALACK:

25 Q So let me see if I can do this. So Mr. Haben, if the billed

1 charge equals \$300, and the allowed amount under the benefit plan
2 equals \$300. In that setting, using that assumption, would there be a
3 shared savings fee that United could earn under the shared savings
4 program?

5 A No.

6 Q Why is that?

7 A Because the allowed amount equals the billed charge
8 amount and there's no savings.

9 Q Now, let's do a different example. Let's assume the billed
10 charge equals \$500, and the allowed amount under the benefit plan is
11 still 300. Under this scenario, could United, if the claim in question was
12 resolved using the shared savings program earn a shared savings fee?

13 A Yes.

14 Q Okay. Walk the jury through how you would calculate the
15 shared savings fee, the first step, and then we'll take it step by step.

16 A So first of all, you've got to calculate the savings. So that
17 would be the difference from the billed to the allowed, which is \$200.

18 Q All right. Even I could do that. Now, what would you do
19 next?

20 A So then you would take the fee. So let's just say it's 30
21 percent.

22 Q Okay.

23 A And you do 30 percent times the 200, and I believe the math
24 is \$60.

25 Q And again, I think that's correct, amazingly. All right. So

1 does that calculate how it would work?

2 A Yes. At a very simple level, yes.

3 Q All right. Now, let's use a different example. Let's say the
4 billed charge is 1,000, and the allowed amount under the benefit plan is
5 still 300. Under -- if that claim was adjudicated using the shared savings
6 program, would United be able to earn an administrative fee for that
7 client?

8 A Yes.

9 Q Would you go through the same exercise we went through in
10 example 2?

11 A Yes. So the savings is \$700.

12 Q And that would be multiplied by the fee?

13 A Yep, 30 percent. So I believe the math is 210.

14 Q Now, do you remember being questioned by Mr. Zavitsanos
15 about a shared savings calculation in one of UnitedHealthcare's
16 documents where the amount of the shared savings fee was greater than
17 the amount of the allowed payment under the shared savings program?

18 A Yes, I do.

19 Q Let me show you another example. Let's assume this time
20 that the billed charge equals \$1,500 --

21 A Can --

22 Q -- and the allowed amount again --

23 A Can you move that up, please?

24 Q Sorry.

25 A Thank you.

1 Q I must have done something here. The allowed amount
2 under the benefit plan is still 300. So I assume, based on your prior
3 testimony, in that example, UnitedHealthcare could earn a shared
4 savings fee?

5 A Yes. That would -- the difference would be 1,200.

6 Q Which would be multiplied by --

7 A 30 percent.

8 Q -- by 30 percent, which would produce a shared savings fee
9 of 400?

10 A Check my math on that. 360.

11 Q 360. My bad. This is why you're here.

12 A Thank you for using round numbers.

13 Q So this would be an example where the shared savings fee
14 would be higher than the allowed amount?

15 A That's correct.

16 Q Even though in all four examples, the allowed amount does
17 not change, correct?

18 A Yes. What changes is the billed charges is going up.

19 Q Thank you for that, sir.

20 A Yep.

21 MR. BLALACK: Ms. White, could we toggle back?

22 BY MR. BLALACK:

23 Q Now, sir, are the -- under the shared savings fees, is the
24 percentage based on savings the only variable being calculated in the
25 fees or are there any other terms that sometimes clients use for

1 calculating shared savings fees?

2 A For the wrap network and fee negotiation, it's typically a
3 percent of savings.

4 Q Do clients ever ask for and receive fee caps?

5 A Yes, they do.

6 Q What is a fee cap?

7 A The fee cap has been asked for now is out with clients and
8 used frequently. Usually, there's a cap on the amount that would be
9 charged for that specific claim as a fee from the client to United.

10 Q Okay. Now, when a client pays an administrative shared
11 savings fee to UnitedHealthcare, what is it paying for?

12 A So it's an extremely complicated process. If you've got to
13 think about this is that the claims come -- you're -- no matter what, par
14 and non-par claims come in to United. United will -- has established
15 logic to take those non-par claims and electronically put them into a file,
16 safely save them, save -- send them over to the vendor, so in a secured
17 environment. MultiPlan does what they do. They send the claim back.
18 We have to do adjudication logic inside of that to determine that claim.
19 So there's a lot of infrastructure, a lot of capital costs, a lot of full-time
20 equivalent -- so employees that we employ, both my group and others,
21 to be able to administer that.

22 Q Okay. Now, can you give the jury just a ballpark sense of
23 how many claims UnitedHealthcare would receive and adjudicate on a
24 given day?

25 A Millions.

1 Q Millions a day?

2 A Millions a day.

3 Q Now, let's talk about the next program.

4 MR. BLALACK: And Shane, can we bring up page 17 of the
5 Plaintiffs' Exhibit 134, please?

6 BY MR. BLALACK:

7 Q And sir, this --

8 A I'm sorry, what page?

9 Q Page 17.

10 A Thank you.

11 Q And I think you referred to this earlier as the outlier cost
12 management program. Do you see that?

13 A I do.

14 Q And this is also referred to as SSPE, correct?

15 A Correct.

16 Q And what's that acronym stand for?

17 A SSPE is shared savings program enhanced.

18 Q And in response to questions from Mr. Zavitsanos, I thought
19 you explained, but tell me if I'm wrong. Okay? The primary difference
20 between the shared savings program and the shared savings program
21 enhanced is that outlier cost management is added to the shared savings
22 program?

23 A That's correct.

24 Q Okay. Now, if you look in -- let's see where it is. Okay.

25 Under that blue box, the first bullet, it will say -- it says, "The application

1 of a repriced allowable determined by our measure, MultiPlan, using
2 their proprietary methodology, Data iSight." Do you see that?

3 A Yes, I do.

4 Q What does that describe?

5 A So that describes, as I kind of talked about earlier, Data iSight
6 is the repricing engine, the tool, that accepts the claims in, will determine
7 reimbursement amount, and send it back.

8 Q Okay. Now, if you go down to the next bullet, it says,
9 "Applies to claims paid at in-benefit level that have not achieved a
10 discount or reduction through any other OON program." Do you see
11 that?

12 A I do.

13 Q So that -- that acronym, I -- capital INN (phonetic), what is
14 that again?

15 A So again, as we -- if you go back to that one page, he had the
16 left-hand side, the right-hand side, no choice in-network highest benefit
17 level, choice, lowest benefit level. We are talking about those that are
18 the no-choice claims.

19 Q So when this slide was prepared, was outlier cost
20 management only available on the in-network benefit level?

21 A I believe so.

22 Q And when it refers to "did not achieve a discount or reduction
23 through any other out-of-network program", what does that mean?

24 A So again, think about the waterfall. Now, this is another
25 program at the -- at the end of the waterfall. Obviously, if it's a

1 nonparticipating provider, there's no wrap agreement with MultiPlan.
2 MultiPlan or the vendor then try to negotiate. The provider didn't -- they
3 didn't come to a resolution on that amount. Then outlier cost
4 management now is in place to be able to apply what we feel is a fair
5 and reasonable amount.

6 Q Okay. Now, because this is a program that only applies at
7 the in-network benefit level, does outlier cost management apply to out-
8 of-network emergency room claims?

9 A Yes, it does.

10 Q Okay. Now, how does Data iSight, and I am just focusing on
11 -- well, let me back up. Does Data iSight apply to all out-of-network
12 services or just out-of-network ER services?

13 A All out of -- all services, not just ER.

14 Q So this proprietary methodology that Mr. Zavitsanos
15 described to you is not limited to adjudicating an out-of-network
16 emergency room claim?

17 A No, it's not.

18 Q Is the methodology that UnitedHealthcare and Data iSight
19 use to adjudicate an out-of-network emergency room claim at all
20 different as compared to a non-emergency room out of network?

21 A Methodology is not any different.

22 Q So the Data iSight methodology that is used for a service is
23 the same whether it's out of network or it's in-network -- I mean, whether
24 it's ER or non-ER?

25 MR. ZAVITSANOS: Excuse me, Your Honor. Foundation,

1 speculation, and calling for a lay legal opinion.

2 THE COURT: Overruled.

3 BY MR. BLALACK:

4 Q Now, have you ever heard of something, sir, called the ER
5 override?

6 A Yes, I have.

7 Q What is the ER override?

8 A So there's the Affordable Care Act out, that's out there in -- in
9 the federal government that applies to emergency room services, so ER.
10 And in that, you have criteria you need to meet. So if you think about
11 kind of the waterfall --

12 Q And let me interrupt you, sir. I'm not going to have you go
13 through all three of the criteria. What I really just want to understand
14 and explain to the jury is how does the ER override, however that's
15 determined, apply or not apply to a claim that's being priced using the
16 Data iSight --

17 A Sure.

18 Q -- methodology? Do you understand --

19 A Okay.

20 Q -- what I'm saying?

21 A Yeah, I understand what you're saying. Basically, it's a floor.
22 Right? It's to ensure we're compliant with the Affordable Care Act.

23 Q So let's kind of walk through an example. Well, let me back
24 up. Yesterday, you talked about a number of different percentages of
25 Medicare, benchmarking, and overrides. Do you remember being

1 questioned about that --

2 A Yes.

3 Q -- by Mr. Zavitsanos? Do you recall what the ER override was
4 when it was instituted?

5 A When it first started, I believe it was 350 percent of Medicare.

6 Q Okay. And then you, I think, were questioned by Mr.
7 Zavitsanos and he indicated it went down at some point?

8 A Yes. It went down to 250 percent of Medicare.

9 Q Okay. So the ER override started at 350 percent of Medicare
10 and then it was reduced to 250 percent of Medicare?

11 A Yes, it was.

12 Q When was it reduced?

13 A I don't remember the exact date.

14 Q Okay. Now, let's hypothetically go through an example of a
15 claim that is sent to MultiPlan. An ER claim sent to MultiPlan, and it's
16 going to be adjudicated by MultiPlan. How would MultiPlan's
17 methodology and pricing recommendation interplay with the ER
18 override?

19 A So if a claim goes to Multi --

20 MR. ZAVITSANOS: Objection, Your Honor. Again,
21 speculation and foundation.

22 THE COURT: Overruled.

23 MR. ZAVITSANOS: Okay.

24 THE WITNESS: So the claim goes to MultiPlan. MultiPlan,
25 the claim will go in -- if it's OCM, will go into Data iSight. Data iSight will

1 calculate an amount that they feel is the reasonable reimbursement rate.
2 We tell MultiPlan if that amount is not greater than the floor, which at --
3 in the beginning was 350 percent of Medicare, now it changed to 250
4 percent of Medicare, then price that claim -- because then they do the
5 pricing and apply that to their Data iSight tool, so we don't have to do it,
6 and then they send that claim back to us. So that claim, if Data iSight is
7 lower than the floor that we give, that claims gets -- comes back at 250
8 percent of Medicare or 300.

9 Q And if it's -- converse is the case, if the Data iSight price is
10 higher than the floor, what happens?

11 A So the claim goes to Multi -- sorry, I've got to just start in my
12 head of the process. The claim goes to MultiPlan. Eventually, if it gets to
13 Data iSight, if that's what the client has in their benefits, Data iSight
14 prices the claim. Let's say that claim is greater than the floor, then we
15 will pay the Data iSight amount --

16 Q Okay.

17 A -- because that's reasonable.

18 Q I want to show you, sir, a slide that we showed the jury in
19 opening, and walk through this to make sure they understand how this
20 ER override works.

21 MR. BLALACK: So Shane, can you bring up slide 67, please?

22 BY MR. BLALACK:

23 Q Okay. So sir, I'm going to lay this out and then have you kind
24 of walk the jury through the mechanics of how the ER override works.
25 So we start with an emergency room visit. And that results in -- I'm just

1 going to quickly just walk the jury through a hypothetical here. So we
2 have an emergency room visit. What happens now?

3 A So the claims goes from United electronically out to
4 MultiPlan. MultiPlan will see that, they will apply Data iSight. They'll go
5 through, they'll do a compare and say the ER override says you -- the
6 floor, so to speak, is 350. You look at Data iSight, MultiPlan, their Data
7 iSight's lower, so the claim then will get repriced by MultiPlan, which is
8 at 350, because that's the greater, and they will send that back to United.
9 United will then take an administer that claim and pay 350.

10 Q Let's do now same scenario, except with a Data -- a service
11 that has a Data iSight rate above [indiscernible]. So now we have an
12 emergency room visit.

13 A Same thing. Claim comes in, goes out the Data iSight
14 electronically from United. Data iSight calculates it based under
15 methodology, says you should pay this recommended reasonable
16 amount is 400. They look at the ER override rule that's there in place.
17 The ER override, just the 150. So United will -- or, I'm sorry, MultiPlan
18 then will reprice the claim at 400 because that's the greater of the two,
19 and then they will send that claim back to United and United will pay that
20 claim at 400.

21 Q Okay. Thank you, sir. Sir, to your knowledge, were the ER
22 overrides that were used from United Healthcare to Data iSight during
23 the period at issue in this case, that same 350 percent or 250 percent,
24 regardless of who the ER provider was?

25 A That's correct.

1 MR. ZAVITSANOS: Foundation, Your Honor.

2 THE COURT: Overruled.

3 BY MR. BLALACK:

4 Q And was the ER override the same during the period at issue,
5 regardless of what the ER service was?

6 A Yes.

7 Q Now, typically, sir, what kind of a clients utilize medical cost
8 spent?

9 A Clients that wanted to address medical cost spent, typically
10 self-funded employer groups or the clients.

11 MR. BLALACK: And I wanted to ask you if you could bring up
12 that page again, Shane, page 7.

13 BY MR. BLALACK:

14 Q If you look at in the left-hand corner of the box, it says
15 member is balance bill. Do you see that?

16 A I do.

17 Q Could you explain what that is -- means to the jury?

18 A So with outlier cost management, the provider has not
19 agreed upon a rate. It's a reasonable reimbursement rate, but there are
20 situations where the member may be balanced billed by the provider. If
21 that is the case, then the vender will engage with the provider to try to
22 settle it.

23 Q And is that a negotiation service -- would that be called a
24 negotiation service?

25 A Yes, it is.

1 Q Would that be called a prospective, or retrospective?

2 A I would call it a retrospective, so after the initial payment's
3 been made.

4 Q And if that negotiation is successful, is -- does the out-of-
5 network provider agree to accept payment in full?

6 A Yes. We only allow for written agreement, so it can't be a
7 verbal, so if the payment -- I'm sorry, if the reimbursement amount is
8 agreed to between the vender and the provider, there's a written
9 agreement in MultiPlan since the claim back repriced.

10 Q Okay. And based on your time period administering that by
11 outlier cost management program, do you have any understanding
12 about the three which the rates paid using the outlier cost management
13 program have been accepted by provider?

14 A Accepted; very rarely rejected.

15 Q Now, are there client fees for the outlier cost management
16 program or the shared savings program enhanced?

17 A Yes, there is a fee for that program.

18 Q And are the fees calculated in any way similar, or different
19 from the standard shared savings fees you described to the jury already?

20 A It's the same methodology and the same fee.

21 Q Sir, when did UnitedHealthcare first start utilizing outlier cost
22 management?

23 A I believe it was in 2016 or so.

24 Q Okay. And was it used continually during the period at issue
25 in this case, meaning up through January of 2020?

1 A I guess it was.

2 Q To your knowledge, is it used today?

3 A I believe so.

4 Q All right. Let's move onto another program which the jury
5 heard a lot about. It's called the position reasonable and customary, or
6 position R&C program. And if you can go to page 14, please, of this
7 document. Now, sir, there's two things described here, physician and
8 facility, R&C; are those the same program or are they different?

9 A No, they are different.

10 Q Okay. Now, because this case -- I think all parties agreed is
11 limited to physician services, I'm just going to focus on one. Physician,
12 reasonable and customary, R& C, okay?

13 A Understood.

14 Q All right. Now, this was a program you were questioned
15 about last week by Mr. Zavitsanos, correct?

16 A Yes.

17 Q You see at the bottom left-hand box, it says professional
18 physician R&C?

19 A Yes, I do.

20 Q Okay. Could you describe what that -- or explain to the jury
21 what that is describing?

22 A So these are the -- I'm sorry, I've got to make sure I'm
23 looking at the right box. Physician --

24 Q Let's start with professional/physician R&C.

25 A Yeah. So this is where United purchases the claims charge

1 database from FAIR Health.

2 Q And does UnitedHealthcare rely on FAIR Health data for any
3 other out-of-network program it offers?

4 A No.

5 Q When did UnitedHealthcare first introduce the physician R&C
6 program?

7 A I don't remember, but I believe it was early 2000s.

8 Q Does UnitedHealthcare still to this day offer clients the
9 physician R&C program?

10 A It is still available.

11 Q And so are there any clients that still choose the physician
12 R&C program today?

13 A I would believe there's still clients.

14 Q Would you characterize this program as a popular program
15 among your clients?

16 A A what?

17 Q Popular?

18 A It is losing popularity.

19 MR. ZAVITSANOS: Your Honor, objection. Foundation.
20 Covering the issue we talked about earlier.

21 THE COURT: Sustained. The objection is sustained.

22 MR. BLALACK: Thank you, Your Honor.

23 MR. ZAVITSANOS: Move to strike, Your Honor.

24 THE COURT: The Court will disregard the last question and
25 answer. Well, the jury will disregard the last question and answer.

1 BY MR. BLALACK:

2 Q Sir, let me ask you this, do you see the column to the right --
3 if you could pull that down -- where it says applies to non-party claims
4 paid at ONN benefit level that did not achieve a discount under shared
5 savings? Do you see that?

6 A I do.

7 Q That ONN benefit level, could you again remind the jury what
8 that is?

9 A So again, my arm's going to get tired, but left-hand side is
10 the in-network benefit level, no choice. Out-of-network benefit level is
11 when you have a choice. You've made a decision to go out-of-network.

12 Q So for purposes of our case we're having a discussion about
13 here, which is out-of-network emergency room client, does the
14 physician, R&C program, ever apply to an out-of-network emergency
15 room client?

16 A No, it did not.

17 Q So all of the questioning that we had with you and Mr.
18 Zavitsanos over the last week relating to the physician R&C program
19 involved a claim that does not apply to out-of-network emergency room
20 services, correct?

21 A That is correct.

22 Q Now, the slide says the physician R&C prices claim using
23 FAIR Health bill charges database that's down in that blue box.

24 A I see that.

25 Q And how does that actually work? How does it price claim

1 based on the FAIR Health benchmark database?

2 A So we buy subscription from FAIR Health, much like our
3 competitors; they give us the charge database file, and then that's loaded
4 into our system for administration.

5 Q And you say a charged database, and that's what it says
6 down at the bottom, FAIR Health that is charged base. What are you
7 trying -- what is the company you maintain that sets FAIR that is charged
8 base?

9 A It's what the provider sets as their bill charges.

10 Q So going back to the Data iSight methodology and program
11 you use for outlier cost management, is that also a charge base data
12 source?

13 A It is not.

14 Q What is it based on?

15 A It's based on, as MultiPlan is presented to us, kind of a cost
16 plus database based on geographic location. So they'll look at the cost,
17 like in a certain market, maybe costs are more expensive than many --

18 Q Does it use charges?

19 A No, it does not.

20 Q Does it rely on claims -- paid claims as opposed to charges?

21 A It looks -- paid claims is one of the components, yes.

22 Q Okay. So is that the difference between the FAIR Health data
23 source and the Data iSight database?

24 A Yes.

25 MR. ZAVITSANOS: Objection, Your Honor. Again,

1 foundation. I think he --

2 THE COURT: Can you lay some more foundation for that?

3 BY MR. BLALACK:

4 Q Are you familiar, sir, based on operating these two programs
5 with the data sources of the two vendors that you utilized for these two
6 programs?

7 A Yes, I am.

8 Q How did you become familiar with it?

9 A I do -- I have a contract with both.

10 Q And have you received briefing from both on what the data
11 sources they use for the program?

12 A Yes, I do.

13 Q Are they presented to you on that?

14 A Yes, they do, and I talk -- I have talked to them during --

15 Q Is that something about what you have personal knowledge?

16 A Yes.

17 MR. BLALACK: Your Honor, I think I've laid sufficient
18 foundation.

19 MR. ZAVITSANOS: Your Honor, permission to voir dire on
20 how Data iSight works, which I think is what the question is.

21 MR. BLALACK: Your Honor, he just spent a week voir diring.

22 THE COURT: I'm going to overrule that. You can address it
23 on your redirect.

24 BY MR. BLALACK:

25 Q So, sir, do you know if the physician R&C program -- well,

1 strike that. Let me back up. Have you heard -- I think you saw reference
2 to some of the documents you were shown by Mr. Zavitsanos to a
3 percentile benchmark associated with FAIR Health?

4 A Yes, I am.

5 Q And do you recall what percentile he was directing you to in
6 this question?

7 A I believe the 80th.

8 Q Okay. Is the -- and first of all, so the jury understands, there's
9 probably some folks on there who know this all too well, but do you
10 know what the difference is between a percentile and a percentage?

11 A So percentage, and don't get confused because I continue to
12 work on it, but percentage is much like we were doing before, like you
13 take a ten percent off of 1,000 it's 100 hours, right. Percentiles, think
14 about it as kind of tranches, right. You know, if you're in the -- you
15 remember like SAT scores; I've got kids in college, if you're in that 80th
16 percentile, right, you're in the top ten. That's the way to think about it.

17 Q Is another way of saying if you're in the 80th percentile,
18 you're -- whatever your datapoint is, is at or less than 80 percent of the
19 other datapoints in the [indiscernible]?

20 A If you're in the 80th percentile, you're charging more than the
21 ones below you.

22 Q Now, does FAIR Health's -- excuse me, does physician R&C
23 always apply in that program, always apply the same FAIR Health
24 benchmark when it is used to price out, out-of-network funding?

25 A The same percentile?

1 Q In other words, when this program applies always only using
2 the 80 percentile? Or are there sometimes other percentiles?

3 A No, the clients will go up or down. Mostly, they'll go up to
4 80th to 75th or --

5 MR. ZAVITSANOS: Objection, Your Honor. Foundation. The
6 same issue we covered before.

7 THE COURT: Objection sustained on the foundation issue.
8 BY MR. BLALACK:

9 Q Mr. Haben, are you familiar with which options are available
10 for clients in terms of the percentiles within the physician R&C program
11 based on your running the program?

12 A I am.

13 Q And are you familiar with which percentiles United
14 Healthcare's clients, who choose the physician in the reasonable and
15 customary program?

16 MR. ZAVITSANOS: Same objection, Your Honor. I -- it's the
17 foundation, and it's the issue we discussed outside the presence of the
18 jury.

19 THE COURT: Overruled.
20 BY MR. BLALACK:

21 Q You are familiar, sir?

22 A Yes, I am.

23 Q Okay. So just to restate my question to your personal
24 knowledge, to give the jury a sense of which percentiles clients might
25 choose in your implementation of the reasonable and customary

1 physician charges?

2 A Clients could choose any percentile that they would like.
3 They have chosen 80th. They have moved down to 50th.

4 Q Now, it says in that blue box under physician R&C, it says no
5 client fee. Do you see that?

6 A I do.

7 Q Okay. Is that what I -- it appears to be? There's no
8 administrative fee charged by United Healthcare?

9 A Yes. Clients are not charged for this service.

10 Q Sir, I'd like to show you -- and I think we can --

11 MR. BLALACK: I'll show this exhibit, Your Honor, then I think
12 we can break after this.

13 BY MR. BLALACK:

14 Q But I'd like to show a document previously submitted as
15 Plaintiff's Exhibit 363.

16 MR. ZAVITSANOS: I'm sorry, did you say 363?

17 MR. BLALACK: 363 is what I have.

18 MR. ZAVITSANOS: Okay.

19 MR. BLALACK: And I believe that's in, as opposed to
20 conditional, but --

21 BY MR. BLALACK:

22 Q All right. It should be in the binder in front of you, Plaintiffs'
23 Exhibit 363.

24 A Okay.

25 MR. ZAVITSANOS: Hey, Lee, that's in.

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1 MR. BLALACK: That's admitted?

2 MR. ZAVITSANOS: Yeah.

3 BY MR. BLALACK:

4 Q All right. Sir, while you're finding that, I'll just orient the jury.
5 This is a website from UnitedHealthcare that was presented to you the
6 other day by Mr. Zavitsanos. Do you recall that?

7 A I do.

8 Q All right. And I want to just go back through this website to
9 show the jury some passages that Mr. Zavitsanos did not show them, to
10 make sure they have a full picture of what it is. So we'll start with the
11 very first paragraph. And, sir, you'll see a -- you see where it says
12 certain healthcare benefit plans?

13 A I do.

14 Q So I'll just read this out loud and then I'll ask you a few
15 questions. It says, "certain healthcare benefit plans administered or
16 assured by affiliates of United Health Group, Incorporated, provide out-
17 of-network medical and searchable benefits for members. With the out-
18 of-network benefits, members may be entitled to pay for covered
19 services if they use doctors and other healthcare professionals outside of
20 the United Health network. It says the member or healthcare
21 professional, depending on whether or not the member has assigned in
22 their claim. They send the claim for professional services to be paid by
23 United Health Group affiliate." Do you see that?

24 A I do.

25 Q Does that kind of generally describe the kind of claims

1 administration process that you've described for different out-of-network
2 claims in this case?

3 A Yes, it does.

4 Q Okay. Now, below that, it says, quote, "United Health Group
5 Affiliate will pay based on the terms of the member's healthcare benefit
6 plan, that in many cases, provides for a payment for a balance that are
7 the lower of either," and then it has two bullet points. Do you see that?

8 A I do.

9 Q Those two bullet points, they were the providers' actual
10 charge billed to the member, or -- and then it has a number of phrases,
11 the reasonable and customary amount, usual, customary, and
12 reasonable amount, prevailing rate. And it says, "For other similar terms
13 and based dependent on what other healthcare professionals in the
14 geographic area charge for their services." Do you see that, sir?

15 A I do.

16 Q So when the -- when the sentence says that payment will be
17 "based on the terms of the member's health plan", what does that mean?

18 A So the out-of-network program that applies is defined in the
19 member's benefit plan.

20 Q And how is that relevant to your role in the out-of-network
21 program's group, determining how to price a claim?

22 A It dictates how -- what program we would apply.

23 Q Now, then it says -- when it's referring to those phrases
24 there, the reasonable and customary, usual, customary, and reasonable,
25 are those terms that would actually be found in the health benefit plan

1 itself?

2 A I believe so.

3 Q So this website, is it discussing circumstances a health plan
4 would actually have one of these terms in the benefit plan?

5 A Yes.

6 Q Now, under the next heading it reads, "What do these terms
7 mean?" It says, "The terms, the reasonable and customary amount, the
8 usual, customary, and reasonable amount, and the prevailing rate are
9 among the standards that various healthcare benefit plans may use to
10 pay out-of-network benefits." Do you see that?

11 A I do.

12 Q When it says, "Among the standards that various healthcare
13 benefit plans may use", what does that mean?

14 A There could be other standards in the benefit plan.

15 Q So when it says that healthcare benefit plans may use these
16 standards -- may, does that mean that the standards are not always used
17 in United Healthcare's benefit plan?

18 A That's correct.

19 Q In fact, if you look at the next paragraph under -- see where it
20 says these?

21 A Yes, I do.

22 Q So read along with me, sir. It says, "These standards do not
23 apply to plans where reimbursement is determined using Medicare
24 rates." Do you see that?

25 A I do.

1 Q Would the ER override be an example of a reimbursement
2 that might be based on the Medicare rate?

3 A Yes, it could be.

4 Q And could ENRP be a program that could base
5 reimbursement on the Medicare?

6 A It could be. Yes.

7 Q So would the standards, reasonable and customary amount
8 or usual, customary, and reasonable amount apply to any health benefit
9 plan that ties out-of-network benefits to a Medicare rate?

10 MR. ZAVITSANOS: Calling for a legal conclusion, Your
11 Honor. It invades the providence of the jury.

12 MR. BLALACK: Your Honor, if could respond?

13 THE COURT: You may.

14 MR. BLALACK: I'm not asking him what the law says. I'm
15 asking him as a matter of the practice of the company, what programs
16 apply to what benefits.

17 THE COURT: You may clarify your question.

18 MR. BLALACK: Thank you, Your Honor.

19 BY MR. BLALACK:

20 Q So I -- so I want to be clear. I'm not asking you to render a
21 legal opinion. You're not a lawyer.

22 A I understand.

23 Q That's the job of the jury and the judge.

24 A Understood.

25 Q I'm asking just in terms of how you sat up your program.

1 You understand the question I'm asking?

2 A I do understand.

3 Q So my question is just with respect to how the programs are
4 created relative to the benefit plan language. With the standards
5 reasonable and customary amount or usual, customary, and reasonable
6 amount, apply to any health benefit plan that ties out-of-network benefits
7 to a Medicare rating?

8 A No.

9 MR. ZAVITSANOS: Excuse me, Your Honor. That's the same
10 question. Invades the province of the jury. That -- that is the ultimate
11 issue I believe here in this case.

12 MR. BLALACK: It's not, Your Honor. I'm not asking him to
13 decide what the State of Nevada requires for reimbursement. He's
14 already established, and I will agree, that the Plaintiffs in this case are
15 not part of this agreement. The question is what is the way the program
16 is set up and runs? I'm going to show this witness and the jury benefit
17 language that's tied to Medicare rates and establish that this standard
18 doesn't apply. That's all I'm really --

19 THE COURT: Reask again but clarify.

20 MR. BLALACK: Okay.

21 BY MR. BLALACK:

22 Q I want to be clear. I am not asking in any way, shape, or form
23 for any legal views, do you understand?

24 A Crystal clear.

25 Q I'm only asking how your programs apply standards that are

1 described in this exhibit, Plaintiffs' Exhibit 363, to benefit plans that don't
2 have the reasonable and customary language, but base reimbursed tied
3 to a Medicare rating. Do you understand the question I'm asking?

4 A I understand that.

5 Q My question is, would these standards apply to those kind of
6 benefits?

7 A No, they would not.

8 Q Now, in that same paragraph it also says, "Also, member's
9 healthcare benefit plan may define these standards differently, or
10 contain additional standards." And it is the language of the member's
11 healthcare benefit plan, or the plan's interpretation of such language that
12 is controlled." Do you see that?

13 A I do see that.

14 Q When it says, "A member's healthcare benefit plan may
15 define these standards differently, what does that statement mean?

16 A That means that we would need to refer to the benefit plan
17 for the determination on the allowed amount.

18 Q Okay. Now, if you'd look down underneath there, there's a
19 header that reads, "How does this affect members?" Do you see that?

20 A I see that.

21 Q I'm going to read that first sentence, and it's going to carry
22 over to the next page. It says, "If a healthcare benefit plan requires
23 payment using the term reasonable and customary, or some of the
24 language mentioned above with respect to medical or surgical
25 procedures that have been billed by healthcare professionals or

1 healthcare professional group practices, then affiliates of United Health
2 Group, most commonly referred to as schedule of charges completed by
3 FAIR Health team to determine the amount of the payment." Do you see
4 that?

5 A I do see that.

6 Q Does this mean that UnitedHealthcare would use the FAIR
7 Health database if the healthcare benefit plan views it as a reasonable
8 and customary or similar grade?

9 A Yes, it does.

10 Q What if the health plan -- health benefit plan does not use
11 one of those phrases or standards to define out-of-network
12 reimbursement?

13 A Then we will not refer to the FAIR Health handbooks.

14 Q In fact, if you go page -- I guess it's 5. I think it's 5. You'll
15 see, "I haven't agreed to important exclusions at the top. Bubble that
16 whole thing out for me.

17 Q All right. Let me read this to the jury. "The UnitedHealth
18 Group affiliates will not use the FAIR Health benchmarking databases to
19 determine out-of-network benefits for professional services is a
20 member's healthcare benefits plan does not require payment under
21 standards such as, "a reasonable and customary amount, the prevailing
22 rate, or similar terms. For example, if a member's plan provides for
23 payment based upon Medicare rates, UnitedHealth Group affiliates will
24 not use the FAIR Health benchmarking databases as a resource for
25 determining the payment amounts." Do you see that, sir?

1 A I do.

2 Q What's that paragraph mean?

3 A It basically means that if the benefit plan does not have their
4 FAIR Health -- I'm sorry, reasonable and customary, usual and customary
5 prevailing rate, we will not use their health --

6 Q And does that indicate --

7 THE COURT: And I'm going to ask you to wrap it up soon.

8 MR. BLALACK: Oh, yes, Your Honor. In fact, why don't we
9 just -- if you want to now, Your Honor, we can break, and I'll tie this off
10 when we come back.

11 THE COURT: Good enough. Thank you.

12 All right. So this is a long recess today, so the admonition is
13 even more important. Don't talk with each other or anyone else on any
14 subject connected with the trial. During our recess, don't read, watch, or
15 listen to any report of or commentary on the trial. Don't discuss this
16 case with anyone connected to it by any medium of information,
17 including without limitation, newspapers, television, radio, internets, or
18 texting.

19 Don't conduct any research on your own relating to the case.
20 Don't consult dictionaries, use the internet, or use reference materials.
21 Don't use social media about the jury. And don't talk, text, Tweet,
22 Google issues, or conduct any other type of book or computer research
23 with regard to any issue, party, witness, or attorney involved in this case.

24 Most importantly, do not form or express any opinion on any
25 subject connected with the trial until the matter is submitted to the jury.

1 Thank you for your kind attention this morning. Have a great lunch.
2 We'll see you at 1:10.

3 THE MARSHAL: All rise for the jury.

4 [Jury out at 11:51 a.m.]

5 [Outside the presence of the jury]

6 THE COURT: Okay. Looks like the room is now clear. Mr.
7 Blalack, I knew I was interrupting you --

8 MR. BLALACK: No. That was perfect, Your Honor.

9 THE COURT: -- right in the middle of your flow.

10 MR. BLALACK: That works fine. Thank you.

11 THE COURT: So I apologize.

12 MR. BLALACK: No. No problem at all. Anything to put on
13 the record, Plaintiff?

14 MR. ZAVITSANOS: No, Your Honor.

15 THE COURT: Defendant?

16 MR. BLALACK: Not from me, Your Honor.

17 THE COURT: Have a good lunch, guys. See you at 1:10.

18 [Recess taken from 11:52 a.m. to 1:13 p.m.]

19 [Outside the presence of the jury]

20 THE COURT: Thanks, everyone. Please remain seated.

21 Are we ready to bring in the jury?

22 MR. BLALACK: Mr. Roberts has one point, Your Honor, he
23 wanted to raise before I get started.

24 THE COURT: Okay. So, Andrew, I'll give you the high sign.

25 THE MARSHAL: Yes, ma'am.

1 THE COURT: Yes, Mr. Roberts.

2 MR. ROBERTS: Thank you, Your Honor. And I'll try to be
3 brief on this. But I did want to raise with the Court something that has
4 just come to our attention. And that is that exhibits that have been
5 admitted into evidence, to the point in the trial are being posted on the
6 public website of Team Health and are available to the public. And we
7 have been discussing, you know, at the bench a procedure where we
8 would have an opportunity to seek to redact and seal --

9 THE COURT: Are any of them AOE?

10 MR. BLALACK: Yeah, there are --

11 THE COURT: AEO.

12 MR. BLALACK: -- some that are AEO.

13 THE COURT: Yeah.

14 MR. ROBERTS: And so, I just wanted to alert the Court to the
15 fact that we would be filing a formal motion to seal under Rule 3 of the
16 Supreme Court Rules for sealing and redacting court documents. We
17 can move to seal an exhibit even after it has been admitted into
18 evidence. And I think that -- you know, we thought we would have an
19 opportunity to do that, because these exhibits are not yet available to the
20 public. But now --

21 THE COURT: You know, the case is locked during trial.

22 MR. ROBERTS: Right. But now we've got admitted exhibits
23 being posted to the -- for free public access to their website before we've
24 had an opportunity to seek to seal and redact specific portions of it.

25 THE COURT: I got it. All right. Mr. Zavitsanos, are you --

1 MR. ZAVITSANOS: Your Honor, so this is --

2 THE COURT: -- falling on the sword right now?

3 MR. ZAVITSANOS: No, Your Honor. I don't -- this is the first
4 I'm hearing of it. I've not -- I have not conferred with counsel. I would be
5 very surprised if AEO documents were put up on a website. I mean
6 that -- I would be very surprised. And I'd like to know exactly what --

7 THE COURT: I want a -- I will need a full report on the next
8 break. Take them down. Take them all down right now.

9 MR. ZAVITSANOS: Okay.

10 THE COURT: The case is locked during trial.

11 MR. ZAVITSANOS: Okay. I understand, Your Honor.

12 THE COURT: So take them down and give me a full report.

13 MR. ZAVITSANOS: Yes, Your Honor. May I go make a
14 phone call?

15 THE COURT: Yes, absolutely.

16 MR. ZAVITSANOS: Actually, Mr. Fineberg will do it.

17 THE COURT: All right. So, Andrew --

18 MR. BLALACK: Would you like me to put Mr. Haben on the
19 stand, Your Honor?

20 THE COURT: Yes, please. We can bring in the jury now.

21 [Pause]

22 THE MARSHAL: All rise for the jury.

23 [Jury in at 1:16 p.m.]

24 THE COURT: Thank you. Please be seated. We all hope you
25 had a nice lunch and are ready to work this afternoon.

1 All right. Please continue.

2 MR. BLALACK: Thank you, Your Honor.

3 BY MR. BLALACK:

4 Q Welcome back, Mr. Haben.

5 A Thank you.

6 Q I thought we could pick up with the jury where we left off,
7 which was discussing a website that is off -- well, it was a website
8 [indiscernible] it's Plaintiffs' Exhibit 363. We walked through with the
9 jury some of the language on that website regarding when the FAIR
10 Health data benchmarks would be used as a reference for determining
11 out-of-network reimbursement. And we discussed the various types of
12 language that would need to be in a health benefit plan for that to occur.
13 And we discussed the phrases that are up on the screen at the moment,
14 reasonable and customary, usual, customary and reasonable. So let's
15 just pick up there, tie that off, and move on to the next topic.

16 So again, just to summarize, Mr. Haben, would you explain to the
17 jury what this paragraph explains that's on the screen?

18 A Basically, what it says here is that United Health Group will
19 not use fair health to determine out of network services reimbursement if
20 the payment standards or their reference to reasonable customary, usual
21 customary, or prevailing rate are not in the benefit plan.

22 Q Now I want to talk about how the fair health benchmarks are
23 used in those cases where this language is present in the benefit plan.
24 Okay. And so, I'm going to direct you to page 3 of Plaintiffs' Exhibit 353.
25 You'll see a chart. And underneath that chart there's a paragraph that

1 says affiliates of United Healthcare frequently used the 80th percentile
2 FAIR Health benchmark database to calculate how much to pay for out-
3 of-network services of healthcare professional. Then there's a but.

4 But plan designers and administrators of particular
5 healthcare benefit plans may choose a different percentile for use with
6 applicable healthcare benefit plans. Do you see that, sir?

7 A I do.

8 Q Could you explain to the jury what that sentence means?

9 A So those that design the benefit plan, it could be the
10 employer group or if it's self-funded or the administrators aren't tied to
11 the 80th. They can pick a percentile as they desire.

12 Q Okay. Now I think we referred earlier to the 80th percentile in
13 discussing the FAIR health benchmarks. Do you recall that?

14 A Yes, I do.

15 Q And again, just to remind the jury, what is the 80th
16 percentile?

17 A Again, think about it as kind of like an SAT score. You're in
18 the top 20 percent. So 80 percent or below you, you're billing at, you
19 know, the 80th percentile or the top 20.

20 Q Okay. And so, you look in the example that's provided on
21 the website. It has a number of different percentiles, right, from 50th all
22 the way up to 95th.

23 A I do see that.

24 Q And, yeah, I take it that that sentence means that even for
25 those health plans that utilize the language that ties to the FAIR health

1 benchmark that those different percentiles might be used to set the
2 reference for determining out-of-network [indiscernible]?

3 MR. ZAVITSANOS: Excuse me, Your Honor. I know a little
4 leeway is in order, but leading.

5 MR. BLALACK: I'll rephrase.

6 MR. ZAVITSANOS: Pretty repeatedly.

7 THE COURT: Rephrase, please.

8 BY MR. BLALACK:

9 Q How does -- how do the different percentiles that are
10 reflected there apply or not apply depending on benefit plan language?

11 A So if the benefit plan language has reference to those terms
12 that we discussed before, usual customary, reasonable customary,
13 points it to FAIR health, and then inside the benefit plan it's going to say
14 the out-of-network benefits are being paid at -- or will be allowed at the
15 50th percentile, the 60th percentile, as an example. I believe these are
16 examples at the top.

17 Q Now does UnitedHealthcare represent in this website that it
18 will always use FAIR health to calculate the proper reimbursement for all
19 out-of-network services?

20 A No.

21 Q Does United Healthcare represent in this website that if a
22 client decides to use FAIR health to calculate the proper reimbursement,
23 UnitedHealthcare will always use the 80th percentile of the benchmark
24 [indiscernible]?

25 A No.

1 Q Does this website, based on the description of what's
2 involved, discuss in any way --

3 MR. BLALACK: Strike that. Let me rephrase.

4 BY MR. BLALACK:

5 Q Does this website discuss -- have a payment of out-of-
6 network services for emergency or non-emergency services?

7 A Non-emergency services.

8 Q How do you know that?

9 A Fair health is not being used for emergency services.

10 Q Now, Mr. Haben, we discussed the various out-of-network
11 programs that UnitedHealthcare offered the client in the last decade or
12 so. But before moving on, I want to make sure the jury is clear about
13 which of the programs apply or don't apply to the emergency room
14 services, which is what's at issue in this case. And so, what I'd like to do
15 is walk through those programs again, have you tell me which of these
16 programs relate to emergency services and which do not.

17 So what I'm going to do is I'm going to start by saying -- I'm going
18 to list off the program, and then you tell me which of these relate -- will
19 apply to an out of network emergency room service by profession. Do
20 you understand the question?

21 A I believe so.

22 Q Okay. I'm going to ask about -- I'm going to start ENRP.

23 A Yes.

24 MR. BLALACK: [Indiscernible]

25 BY MR. BLALACK:

1 Q So I believe you said ENRP does relate to emergency room
2 services.

3 A Yes, it could.

4 Q And does it relate also to non-emergency room services?

5 A It could periodically.

6 Q Okay. What about the shared savings program?

7 A Yes, it could.

8 Q And so, if I use the acronym SSP, will you recognize that as
9 the shared savings program?

10 A Yes, I do.

11 Q What about the outlier cost management program?

12 A Yes, it could.

13 Q If I use the acronym OCM, will you recognize that as the
14 outlier cost management program?

15 A Yes, I will.

16 Q And I believe you've already testified that the tool utilizing
17 OCM is Data iSight?

18 A Yes, it is.

19 Q And just to associate with this program I will put DIS, which I
20 think Mr. Zavitsanos discussed with you as being associated with OCM,
21 correct?

22 A Correct.

23 Q So, so far I've ENRP, shared savings program, OCM Data
24 iSight. Is that all accurate as emergency room service?

25 A Those three are accurate, yes.

1 Q Okay. And then what about the physician RMC FAIR Health
2 program?

3 A No, it does not.

4 Q Okay. Now I'll add on the final one is shared savings
5 program enhanced. Was it customary emergency room services?

6 A Yes, it would.

7 Q So before we move on, is my description there of which
8 programs involve emergency services and which programs do not; is
9 that accurate?

10 A Yes.

11 Q Okay.

12 MR. BLALACK: If you could toggle back to this one.

13 BY MR. BLALACK:

14 Q Now, Mr. Haben, I think you may have pointed this out
15 already, but just to make sure I'm clear, when an out-of-network provider
16 submits a claim to UnitedHealthcare or a member submits a claim for an
17 out of network service to UnitedHealthcare, how does UnitedHealthcare
18 determine which of these out of network programs will apply to
19 reimburse the claim?

20 A It's based on the benefit plan of the client.

21 Q So you would need to go look at the benefit plan or the
22 computer [indiscernible] tied to the benefit plan?

23 A The system is set up to identify the benefit plan requirement.

24 Q Okay. I'd like to show you a document, sir, and we're going
25 to -- because I don't think it's an exhibit yet -- in evidence yet. It's

1 Defense Exhibit 5502. So we're not going to publish it to the jury. If
2 you'd find that, and I'll ask you a few questions.

3 [Pause]

4 MR. ZAVITSANOS: And, counsel, if you'd give me just one
5 minute, please.

6 MR. BLALACK: Sure, absolutely.

7 MR. ZAVITSANOS: Thank you.

8 MR. BLALACK: I guess I'm going to lay a foundation and
9 then I'll move it into evidence.

10 BY MR. BLALACK:

11 Q You ready, sir?

12 A Yes, I am.

13 Q Okay. Sir, the document that's marked for identification is
14 Defense Exhibit 5502. Have you had a chance to look at that?

15 A Yes, I have.

16 Q And what is that document?

17 A It appears to be the Walmart summary plan description for
18 their 401(k) plan.

19 Q And was Walmart one of UnitedHealthcare's clients during
20 the period at issue in this case?

21 A Yes, they were.

22 Q And how do you know that this exhibit is a summary plan
23 description for Walmart?

24 A On the --

25 Q What do we look to?

1 A On the first page, it says summary plan description. It has
2 reference to Walmart. It's -- they have reference to I think their
3 information on their 401(k) plan.

4 Q And in fact, sir, if you turn to page 6 in the upper left-hand
5 corner, you'll see a heading that reads associates health and welfare
6 plan.

7 A I do see that.

8 Q And if you would, just review that to yourself and tell me --
9 kind of describe if this document is related to the health and welfare
10 benefit plan for employees at Walmart.

11 A Yes, it is.

12 Q Now, sir, during the course of your role as the head of out-of-
13 network programs, have you reviewed summary plan descriptions
14 before?

15 A I have seen them before.

16 Q Are you generally familiar with what they look like?

17 A Yes, I am.

18 Q And does this exhibit, Plaintiff's -- Defense Exhibit 5502,
19 appear to be similar in form and content to the summary plan
20 descriptions you've seen under the UnitedHealthcare plan?

21 A Yes, they are.

22 Q And, sir, do the summary plan descriptions typically contain
23 information about the out of network benefits or out of programs offered
24 under the plan?

25 A They talk about out of network benefits.

1 Q Okay. Now if you turn, sir, to 59 -- page 59, referring to the
2 number that's tied to the exhibit in the lower right-hand corner. You'll
3 see a description under header maximum allowable charge. Do you see
4 that?

5 A Yes, I do.

6 Q And underneath that, do you see a discussion of the out-of-
7 network benefits available under this plan?

8 A I do.

9 Q And do you see a discussion in the upper column for
10 UnitedHealthcare for what the out-of-network benefit and programs are
11 for this plan?

12 A I do.

13 Q And is one of those programs the shared savings program?

14 A Yes, it is.

15 MR. BLALACK: At this time, Your Honor, I'd move Defense
16 Exhibit 5502 into evidence.

17 THE COURT: Any objection?

18 MR. ZAVITSANOS: No, Your Honor.

19 THE COURT: Exhibit 5502 will be admitted.

20 [Defendants' Exhibit 5502 admitted into evidence]

21 MR. BLALACK: So at this point, I'd like to bring that up and
22 publish it to the jury. And so, what I'm showing the jury right now is the
23 first page of the Walmart plan and summary benefits program, which is
24 their summary plan description for their employees that was in place for
25 employees during the period at issue.

1 BY MR. BLALACK:

2 Q And I'm going to direct the jury now and publish to the jury
3 the page I was just discussing with you, Shane, it's on page 59. We'll
4 walk through that and explain that to them.

5 A I'm sorry. I couldn't hear you. What'd you say?

6 Q Page 59.

7 A Yes.

8 Q Do you have that in front of you?

9 A I do.

10 Q Okay. Do you see the header that reads maximum allowable
11 charge?

12 A I do.

13 MR. BLALACK: And could you blow up that first paragraph
14 under that heading?

15 BY MR. BLALACK:

16 Q It says maximum allowable charge, MAC. The maximum
17 amount the plan will cover and pay premium healthcare services,
18 medical services, equipment, supplies or benefits covered by the plan.
19 And then it says MAC -- the MAC applies to both in network and out of
20 network services; is that right, sir?

21 A That is correct.

22 Q Now if you look down below that paragraph, do you see a
23 reference where it talks about in network and out of network services?

24 A I do.

25 Q I'm going to focus on the out of network services since that's

1 what at issue in this case. It's that third paragraph in. We'll just read
2 that with -- to the jury. It says for covered out of network services; the
3 MAC is determined by each TPA as described below. In certain
4 circumstances, network benefits may be paid for out of network services
5 as described later in this section, under when network benefits are paid
6 for out of network expenses. Did I read that correctly, sir?

7 A Yes, you did.

8 Q Now, first of all, remind the jury. What's a TPA?

9 A A third-party administrator.

10 Q Now was United Healthcare a TPA for the Walmart plan?

11 A Yes, we were.

12 Q Were you the only TPA for the Walmart plan?

13 A No, we were not.

14 Q So this is a scenario where the client has more than one TPA;
15 is that right?

16 A It appears so.

17 Q Okay. How do we know that that's true?

18 A Inside the summary plan description, underneath that
19 description you have highlighted here, you'll see Aetna, and then there's
20 also reference to UnitedHealthcare. You'll see reference to
21 HealthSCOPE, and then you'll see a reference to Blue Advantage
22 Administrators of Arkansas.

23 Q Which is the blue plan?

24 A Yes, it is.

25 Q All right. So let's talk about UnitedHealthcare, first. So with

1 respect to UnitedHealthcare, if you go up onto the upper right-hand
2 corner --

3 MR. BLALACK: Blow that up, Shane.

4 BY MR. BLALACK:

5 Q It says UnitedHealthcare, that is 125 percent of Medicare's
6 maximum allowable charge for voluntary out-of-network services. Now
7 let me stop on that, "voluntary out-of-network services." What does that
8 mean to you? What is your understanding of "voluntary out-of-network
9 services"?

10 A It's another term for choice and no choice. So they have --
11 on the right-hand side of our prior grid, it's a no -- it is a choice, the
12 example that I gave before.

13 Q Would that be equivalent to what we referred to as the out-
14 of-network benefit program?

15 A Yes.

16 Q And then next it says, "for involuntary out-of-network
17 services," and that also is 125 percent of Medicare's maximum allowable
18 charge, unless the provider is in UnitedHealthcare's share savings
19 program." Did I read that right, sir?

20 A Yes, you did.

21 Q So with respect to that first clause, "for involuntary out-of-
22 network services," what do you understand that to mean?

23 A So that would be that you have no choice.

24 Q Would that be consistent with what you called "in-network
25 benefit level," earlier?

1 A Yes.

2 Q And would that include, what you would understand to be an
3 emergency room out-of-network services?

4 A Yes.

5 Q So it says, for involuntary out-of-network services the cost is
6 125 percent of Medicare's maximum allowable charge. Let's stop on that
7 first. When they refer to Medicare's maximum allowable charge, what
8 do you understand that to mean?

9 A Medicare's rate.

10 Q So that would be a benefit paying at 125 percent of the
11 Medicare rate?

12 A Yes.

13 Q But then it says, "If the provider is a participant in the
14 UnitedHealthcare's shared savings program, how would that apply if the
15 provider -- how would that apply if the provider is in the shared savings
16 program?

17 A So if there is a shared savings program discount available
18 and United decides to take that discount, then that discount would apply.

19 Q So if a member from Walmart was to go and receive
20 emergency room out-of-network care, would this language in the plan
21 documents be the foundation for determining how to reimburse that, sir?

22 A Yes, it would.

23 Q Now can you review quickly to yourself, similar language for
24 Aetna, HealthSCOPE, and the Blue Advantage plan?

25 A It's --

1 Q Look at it yourself, very quickly.

2 A Yeah. I need a minute.

3 [Witness reviews document]

4 MR. BLALACK: Shane, if you can bring up Aetna, real quick.

5 BY MR. BLALACK:

6 Q So while you're looking at this sir, my question is, how does
7 Aetna's out-of-network program benefits compare to the ones described
8 for UnitedHealthcare?

9 A It's very similar.

10 Q In what way?

11 A They have 125 percent of Medicare for involuntary services,
12 unless there's a provider in the Aetna's National Advantage Program,
13 which I believe was their first health group network.

14 Q So that's a wrap network?

15 A I believe so.

16 Q Okay. All right. Would you look now at the Blue Advantage,
17 the blue plan, in the next column, and just review those yourself, and I'll
18 ask you the same question, which is, how does the blue plan out-of-
19 network programs and benefits compare?

20 [Witness reviews document]

21 THE WITNESS: Sorry, it's a long paragraph.

22 MR. BLALACK: It's okay.

23 BY MR. BLALACK:

24 Q Okay. So my question is, how does the blue out-of-network
25 -- the blue plan out-of-network benefits and programs compare to what

1 UnitedHealthcare offers as a TPA to the Walmart plan members?

2 A It's similar. They have a MAC program; it looks like about
3 125 percent.

4 Q Now, sir, you can put that down, and we'll move on to a new
5 document. So let's look at another example of a plan document. I think
6 this one is not yet in evidence, so let's not publish it. I'll direct you, sir to
7 Defense Exhibit 5503. Do you have that, sir?

8 A Yes.

9 Q Sir, I'm directing you to a document that is entitled
10 "UnitedHealthcare Choice Plus Certificate of Coverage, for [indiscernible]
11 camp or Roseman University of Health Sciences. Do you see that?

12 A I do.

13 Q It has an effective date July 1, 2017. Do you see that?

14 A I do.

15 Q Now can you tell the jury what this document is, what type of
16 document it is?

17 A It's a COC, or certificate of coverage , underwritten by
18 UnitedHealthcare, so it looks like a fully insured plan.

19 Q Okay. So I think you mentioned earlier the certificate of
20 coverage is an insurance contract between the health -- full insurer,
21 health insurer, and the members of an employer benefit plan that
22 sponsors that company?

23 A That's correct.

24 Q And in your role as head of out-of-network programs have
25 you reviewed certificates of coverage, in terms of their form and

1 substance, in the same way you reviewed summary plan descriptions --

2 A Yes.

3 Q -- and administrative services?

4 A Yes, I have.

5 MR. ZAVITSANOS: Excuse me, Your Honor. My apologies.

6 Just to speed things up, I don't know if counsel is laying a

7 foundation to admit the exhibit. I would just invite him to ask first --

8 MR. BLALACK: That's right.

9 MR. ZAVITSANOS: We don't have an objection to this, so --

10 MR. BLALACK: Well, we're going to look at that, we just

11 saved some time. Thank you, sir.

12 THE COURT: And what's the number again, please?

13 MR. BLALACK: It is Defense Exhibit 5503.

14 THE COURT: 5503 will be admitted.

15 [Defendants' Exhibit 5503 admitted into evidence]

16 MR. BLALACK: Thank you. Thank you, counsel.

17 BY MR. BLALACK:

18 Q All right. Can you tell me, sir, I'm going to direct to a specific

19 page, first of all, page

20 THE COURT: So on the break talk to the clerk, she didn't

21 have that on your exhibit list.

22 MR. BLALACK: Okay. Well, at the break we'll do that.

23 THE COURT: Yeah. At the break.

24 BY MR. BLALACK:

25 Q So, sir, page 3 -- or excuse me, 7, in this exhibit, is schedule

1 of benefits. Do you see that?

2 A I do.

3 Q And underneath that it says [indiscernible] benefits.

4 A Yes, I do.

5 Q And it says, "You can choose to receive network benefits, or
6 non-network benefits. Do you see that?

7 A I do see that.

8 Q Do you know what the term "network benefits" and "non-
9 network" benefits refers to?

10 A Yes. In-network benefits are participating -- per participating
11 providers, or in the situation we talk about, are non-network, non par.

12 Q Okay. And so that would be the difference between the out-
13 of-network benefit level, and the in-network benefit level?

14 A Yes.

15 Q Okay. And I'm going to go the section of the certificate of
16 coverage that discusses the out of network benefit partner. And this is
17 on page 31 of this document. And if you look --

18 MR. ZAVITSANOS: And, counsel, you're referring to the trial
19 director number?

20 MR. BLALACK: I am, sir, yes.

21 MR. ZAVITSANOS: Thank you.

22 MR. BLALACK: This would be 25 of the actual document and 31 of
23 exhibit number.

24 BY MR. BLALACK:

25 Q Now, sir, can you see, at the header at the bottom it reads:

1 "For emergency health services provided by non-network provider"?

2 A I do.

3 Q And you understand that in this case what we are focused on
4 are non-network providers rendering emergency room professional
5 services?

6 A Yes, they do.

7 Q Would this be the portion of the certificate of coverage where
8 UnitedHealthcare will look to determine what the appropriate benefit is,
9 for reimbursement of such a plan?

10 A Yes.

11 Q And if you look under that section it says, "For emergency
12 health services provided by the non-network provider, the eligible
13 expense is a rate agreed upon by the non-network provider or
14 determined based upon the higher of the median amount negotiated
15 with network providers for the same service, 125 percent of the publish
16 rates allowed by the centers for Medicare and Medicaid services, for the
17 same or similar service. It would indicate [indiscernible]. Do you see
18 that?

19 A Yes, I do.

20 Q All right. Just to make sure I understand how this works, so
21 the first basis for reimbursement is if there was a negotiated
22 understanding, agreed rate with the beyond the network provider?

23 A Yes, for that service.

24 Q And that -- for example, if there was a perspective
25 negotiation under the shared savings program, would that qualify as a

1 negotiating agreement?

2 A If United was using that, yes.

3 Q If there was a negotiation after the initial reimbursement was
4 made, and a provider agreed to accept some amount, as part of the one-
5 off negotiation, would that be captured within the understanding agreed
6 upon by the non-network provider?

7 A Yes, it would.

8 Q Then if that circumstance doesn't apply, so there's no
9 agreement, what does the plan benefit tell you to do in terms of looking
10 at how to reimburse the plan?

11 A You would determine what the par median is for the
12 negotiated services with other providers in the market, or 125 percent of
13 CMS.

14 Q And once you found those two values what would you do?

15 A You would apply the greater of -- you know, we'll look at
16 either one, and you would apply the greater one.

17 Q So if the par median amount negotiated with network
18 providers for the same service was less than 125 percent of the Medicare
19 rate, which of those two outcomes would you use?

20 A You would use the 125 percent of Medicare.

21 Q The [indiscernible] use in the median amount for negotiating
22 the [indiscernible]?

23 A Yes. The par median amount.

24 Q Now here's what I want to --we looked at two different
25 formulas, and I just want to make sure the jury understands how that

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1 works in daily life in an emergency room. So let me ask a hypothetical
2 this way, sir. Well, let me put it this way. Is it fair to say that each of
3 these two clients, one is Walmart, and one is Roseman University, had
4 chosen different out-of-network benefits for their employees?

5 A Yes.

6 Q So if two patients saw the same doctor, on the same day, for
7 the same emergency services, could that ER physician be reimbursed at
8 different amount, under these two plans that I've just shown you and the
9 jury; if one of those patients worked at Walmart and the patient worked
10 at Roseman University?

11 A Yes, they could.

12 Q And how is that possible? Explain how that could be true.

13 A Let's say in the Roseman University example, the claims we
14 priced in the par median is greater than 120 percent, 25 percent of
15 Medicare, then the par median rate would apply. If it was a Walmart
16 employee and there was no wrap network discount that was accessed,
17 then it could be paid at 125 percent of Medicare.

18 Q So when UnitedHealthcare, working as a TPA in one instance
19 and a fully insured insurance provider in another, adjudicated those
20 claims under the contracts it had with its clients, it would pay one of
21 those claims in the hypothetical you just used, at 125 percent Medicare
22 and the other higher par median rate?

23 A That's correct.

24 Q So the same ER provider gets -- provides the same service,
25 the same day, two people could get paid at a slightly different rate, or at

1 a substantial rate?

2 A That is correct.

3 Q That's a function of the benefit plan?

4 A Yes, it is.

5 MR. ZAVITSANOS: Your Honor, I'm sorry. Constant
6 leading.

7 MR. BLALACK: I'll withdraw.

8 BY MR. BLALACK:

9 Q Now --

10 THE COURT: You will have to refrain, or I'll assist in the
11 objections.

12 MR. BLALACK: I'll withdraw -- I'll rephrase.

13 BY MR. BLALACK:

14 Q Mr. Haben, how does the benefit plan impact the
15 hypotheticals that you just explained?

16 A As I've talked about the benefit plan dictates the
17 reimbursement program applied for that claim. So we will look to the
18 benefit plan. I'll assist and set up for that benefit plan and apply that
19 logic.

20 Q I think you testified earlier that these plan documents are
21 contracts between the employer who sponsors the plan in
22 UnitedHealthcare; is that right?

23 A Yes.

24 Q I think you mentioned to Mr. Zavitsanos yesterday, that the
25 emergency room professionals, or the staffing company, they're not

1 parties to those contracts between UnitedHealthcare and its
2 employer/client?

3 A That is correct.

4 Q Does UnitedHealthcare have a view about whether you can
5 just disregard the language in the benefit plan when determining how to
6 reimburse out of the network plan?

7 MR. ZAVITSANOS: Your Honor, can we approach for one
8 second, I'm sorry.

9 THE COURT: You may.

10 [Sidebar at 1:46:53 p.m., ending at 1:50 p.m. not transcribed]

11 THE COURT: Okay. I've sustained -- I'm sorry. I've overruled
12 an objection. Go ahead.

13 MR. BLALACK: All right. Let's see where we were.

14 BY MR. BLALACK:

15 Q So my question was, sir, in your role as vice president of out-
16 of-network programs, what was your understanding about whether
17 UnitedHealthcare could disregard the terms of the plan documents when
18 reimbursing out-of-network plans?

19 A We cannot.

20 Q Now, we've looked now at a summary plan description and a
21 certificate of coverage. I think you mentioned there is another type of
22 health benefit plan document called an ASA or administrative services
23 agreement?

24 A Correct.

25 Q I'm showing you what's marked, sir, which is Defense Exhibit

1 5499, which is a ASA for Love's Travel Stops & Country Stores, any
2 objection?

3 MR. ZAVITSANOS: I'm sorry, which one is it?

4 MR. BLALACK: It's 5499. It's the one, I think we were alerted
5 to yesterday.

6 MR. ZAVITSANOS: I'm sorry, Counsel. One more time, I'm
7 sorry.

8 MR. BLALACK: 5499.

9 MR. ZAVITSANOS: Okay.

10 MR. BLALACK: It's the Love's Travel Stops & Country Stores.

11 MR. ZAVITSANOS: Let me just confer for a second?

12 MR. BLALACK: Sure.

13 [Counsel confer]

14 MR. ZAVITSANOS: Okay. No objection, Your Honor.

15 MR. BLALACK: Thank you.

16 THE COURT: 54 --

17 MR. BLALACK: Your Honor, we would move it into evidence.

18 THE COURT: 5499 will be admitted.

19 [Defendants' Exhibit 5499 admitted into evidence]

20 BY MR. BLALACK:

21 Q All right. So Mr. Haben, I'm showing you Defense Exhibit
22 5499. This is the third type of plan document that you've discussed with
23 the jury today, administrative service agreement. If you could again
24 remind the jury what an administrative services agreement is?

25 A This is the contract between the employer group and

1 UnitedHealthcare administration to perform services on their behalf
2 including network benefits and out-of-network benefits.

3 Q Okay. And who were the parties to this agreement?

4 A It's UnitedHealthcare Services and the employer group,
5 Love's Travel Stops.

6 Q Okay. Now, the date of this amendment is January 1, 2017.
7 And then -- and I'm going to direct you to a later amendment which is
8 attached, which is at page 18, I believe. Sir, do you see on page 18 that
9 there is a renewal and amendment to the Love's Travel Stops & Country
10 Stores ASA?

11 A Yes, I do.

12 Q And what is the effective date of this amendment?

13 A The financial renewal in terms of the amendment is January
14 1 of 2019.

15 Q Which is within the period of dispute in this case?

16 A Yes, it is.

17 Q Now if you'd turn --

18 MR. BLALACK: Go to the next page, Shane, please, it's page
19 19.

20 BY MR. BLALACK:

21 Q -- you'll see a heading that reads "Administrative service
22 agreement is amended as noted below." And then it says, "The
23 amendment will not affect any of the terms, provisions, or conditions of
24 the agreement except as stated herein." Do you see that?

25 A I do.

1 Q If you go down to the bottom of that page, you'll see a
2 header that reads "Section H, Network Services in Exhibit A is amended
3 to include the following services." Do you see that?

4 A I do.

5 Q If you would look under that chart, and you'll see a -- in the
6 left-hand column, a description of an out-of-network program available
7 to members of the Love's Travel Stops [indiscernible]. Do you see that?

8 A I do.

9 Q What, in that first -- to the top left --

10 MR. BLALACK: Top left, please. There you go.

11 BY MR. BLALACK:

12 Q What is the program that's available under this ASA?

13 A That is the outlier cost management program or OCM.

14 Q Okay. It had been (participant had no choice). Do you see
15 that?

16 A I do see that.

17 Q What does that refer to?

18 A That refers to what we talked about before as the no-choice
19 scenario paid at the in-network benefit level for non-par.

20 Q So for an emergency out-of-network service, would you
21 expect that to be -- this would be supplying the methodology for
22 reimbursement?

23 A Yes, it would.

24 Q All right. It says offers of reimbursement methodology
25 applicable to out-of-network claims includes an advocacy component for

1 participants where the participant can access dedicated resources to
2 explain how the claims were adjudicated and/or the dedicated resources
3 can engage with out-of-network providers to explain the reimbursement
4 methodology applied. Do you know what that advocacy component is
5 referring to?

6 A Yes. I believe it's referring to MultiPlan's engagement on
7 their behalf.

8 Q Now, if you go to the next page, at the top you'll see it
9 continues. And it says, "Any reference to shared savings program,
10 facility agrees to a customary charge determination program and the
11 reasonable and customary charge guidelines. Each as applicable to
12 Section H is replaced in their entirety as follows." And then it has a
13 discussion of the shared savings program. Do you see that?

14 A Yes, I do.

15 Q Okay. My question is this, sir. You have talked about a
16 number of different out-of-network programs.

17 MR. ZAVITSANOS: Your Honor, under optional completion,
18 may we read the portion right above this, please?

19 MR. BLALACK: Which point do you want to -- I'll be glad to --

20 MR. ZAVITSANOS: The head -- the heading right above this
21 box. That's it.

22 MR. BLALACK: Isn't that what I just read? I just read that.

23 MR. ZAVITSANOS: The --

24 MR. BLALACK: I just read that.

25 MR. ZAVITSANOS: The -- yes.

1 MR. BLALACK: I just read that.

2 MR. ZAVITSANOS: Okay. Thank you.

3 BY MR. BLALACK:

4 Q Okay. My question to you, sir, is this. When customers are
5 presented with various out-of-network programs to choose -- well, let me
6 back up. Have you heard the term "opt in" and "opt out"?

7 A Yes, I have.

8 Q What does opt in mean to you?

9 A Opt-in means that you have a choice to be in it or not.

10 Q And what does opt out mean?

11 A You're in it unless you choose to opt out of it.

12 Q Okay. Can you tell the jury for the UnitedHealthcare out-of-
13 network programs, are they opt-in programs or opt-out programs?

14 A You have to opt in. You have to make a conscious choice to
15 adopt it.

16 Q Okay. So if a -- if a customer decides they don't wish to have
17 one program any longer, and they wish to have a new one or they wish
18 to modify the program, is that a -- an option they have to affirmatively
19 exercise?

20 A Yes, they.

21 Q And has the approach to opting in or opting out, has that
22 been the case during the entire period that you were in charge of
23 network programming?

24 A Yes, I believe so.

25 Q Now, sir, you've explained that different clients can select

1 different out-of-network programs. And you've demonstrated how the
2 different programs could result in a different set of payments to the
3 same provider for the same service; is that fair?

4 A That is correct.

5 Q Given that, how do you explain which of those payments
6 UnitedHealth, you, as the vice president of out-of-network programs
7 when you were there, considered to be the reasonable value for those
8 out-of-network services?

9 A I'm sorry, can you ask that again?

10 Q Sure. So you've just explained how different clients can
11 select different out-of-network programs?

12 A Yes.

13 Q You've explained how those different out-of-network
14 programs could result in different payments --

15 A Correct.

16 Q -- for the same out-of-network ER provider for the same
17 service?

18 A Correct.

19 Q So which -- how does that, from your perspective as the vice
20 president of out-of-network programs, what is the reasonable value of
21 the service for purposes of evaluating those different payments?

22 MR. ZAVITSANOS: Objection, Your Honor. Not been
23 designated as a lay expert opinion, also invades the providence of the
24 jury.

25 MR. BLALACK: I'm not asking for an opinion, Your Honor.

1 THE COURT: I know.

2 MR. BLALACK: I'm asking for his view as the head of the
3 development [indiscernible].

4 THE COURT: Overruled.

5 THE WITNESS: One more time, please?

6 BY MR. BLALACK:

7 Q Sorry about that.

8 A Maybe just the last part of it.

9 Q Okay. Let me lay the foundation one more time.

10 A Okay.

11 Q You've explained to the jury, and you've shown different out-
12 of-network programs are selected by different customers, correct?

13 A Yes.

14 Q We've shown that because they select different programs,
15 different payments could result for the same service to the same
16 provider, correct?

17 A Correct.

18 Q So my question to is from the perch as the former vice
19 president of out-of-network programs, how do you assess what the
20 reasonable value of the service was when you're paying different rates?
21 Do you understand my question?

22 A It's dependent upon what the employer group would like to
23 pay and what they want in their benefit plans.

24 Q So in a case, for example, for the -- I think you identified the
25 ENRP program as reimbursing a lower level than, for example, the

1 outlier cost management program; is that correct?

2 A That's correct.

3 Q And I think you identified the outlier cost management
4 program would tend to reimburse at a lower level than, say, a shared
5 savings program?

6 A That's correct.

7 Q Would the EN -- the rate reimbursed under the ENRP
8 program, in your view as the vice president of network programs be
9 reasonable?

10 A Yes, it would be.

11 Q Would the outlier cost management rate, which is higher, be
12 reasonable?

13 A Yes. It's reasonable plus even more premium.

14 Q And the same would be true for shared savings?

15 A Even more premium.

16 Q So it can too, for example, if someone flew on an airplane
17 and there was somebody sitting in first class, someone sitting in
18 business class, someone sitting in economy plus, and someone sitting
19 back in the rear. They're all flying in the same direction?

20 A Yes.

21 Q but receiving --

22 MR. ZAVITSANOS: Objection, Your Honor.

23 Q -- premium services?

24 A Yes.

25 MR. ZAVITSANOS: Constant leading.

1 THE COURT: It's leading. Rephrase.

2 BY MR. BLALACK:

3 Q Let me put it this way, sir. Can you explain -- give the jury a
4 sense of a comparison of how your programs are like other services
5 where there are base services and premium services?

6 A I'm a hockey fan, and I think my Minnesota Wild is coming
7 tomorrow. So I'm excited to watch, I think. Think about it this way. You
8 get the lower bowl, you've got the middle tier, you've got the upper, and
9 you've got the box seats or the suites. They're different prices for each.
10 They're all at the hockey game.

11 Q And from -- as the vice president of out-of-network
12 programs, has -- does UnitedHealthcare consider shared savings-type
13 programs to be more premium programs?

14 A Yes.

15 MR. BLALACK: All right. So before we move on, I want to
16 make sure we're clear with the jury on which of these programs do and
17 do not charge a fee.

18 So if I could, I would ask Ms. White to come and turn on the
19 Elmo, and I'll go through this very quickly. So we've been through this
20 once, but I just want to tie it up before we move on to something else.

21 BY MR. BLALACK:

22 Q So first, does ENRP charge a fee?

23 A No, it does not.

24 Q Does shared savings charge a fee?

25 A Yes, it does.

1 Q Does OCM Data iSight charge a fee?

2 A Yes, it does.

3 Q Does a shared savings program enhanced charge a fee?

4 A Yes, it does.

5 Q Does physician reasonable and customary/FAIR Health
6 charge a fee?

7 A I believe it does not.

8 Q Sir, is there a reason why two of these programs don't
9 charge a fee?

10 A Yes.

11 Q But the other three do?

12 A Yes.

13 Q What is that?

14 A It is the advocacy program. So on both ENRP and the
15 physician R&C program, there's no advocacy that's tied to those
16 programs.

17 Q Whereas the three that do, shared savings, OCM, and shared
18 savings program enhanced do have an advocacy department for the
19 member?

20 A Yes, in -- in one shape or form, yes.

21 Q Okay. Thank you, sir.

22 Okay. All right. Now that you've described the various out-of-
23 network programs for the jury, let's talk about how those programs
24 changed over time. Mr. Zavitsanos focused on 2014 as the first point in
25 his time line; do you recall that?

1 A I do.

2 Q So in 2014, what out-of-network programs were already in
3 place and being used for emergency services?

4 A For emergency services, off the top of my head, would be
5 shared savings with fee negotiation prospectively, and ENRP.

6 Q With no fee, right?

7 A With no fee.

8 Q And I think you've already said that physician R&C -- well, let
9 me ask this. Was physician R&C already in place at that time as well?

10 A Yes, it was.

11 Q But did it apply to emergency room services?

12 A No, it did not.

13 Q Now, does UnitedHealthcare still use shared savings and
14 ENRP today?

15 A Yes, we do -- or they do.

16 Q Has the frequency with which your clients have used those
17 two programs changed over time?

18 A Yes, it has.

19 Q What prompted that?

20 A Clients were demanding better controls on medical costs,
21 and they were looking for better solutions.

22 Q Now, and in response to that market information, what did
23 UnitedHealthcare and your team in out-of-network programs do in
24 response?

25 A We reached out to our vendor, MultiPlan, to see if there was

1 another tool available, and asked for their help.

2 Q Now, I want to talk about that process. And I think it's -- I
3 think it's getting a little confused. We've heard the term outlier cost
4 management and we've also heard the term egregious biller program.
5 Do you remember being questioned about both of those?

6 A Yes.

7 Q Is there is a difference between those two things?

8 A Yes.

9 Q Could you explain what that is?

10 A The egregious biller program was put into place for fully
11 insured business, and that's where there was observation that ER
12 services were being paid at a very high level. There was no program to
13 address it, and those expenses were going up. And so we had to
14 establish a program to address that.

15 Q And what was the threshold that the original egregious biller
16 program targeted for?

17 A I believe we started at 500 percent.

18 Q 500 percent of what?

19 A I'm sorry, 500 percent of Medicare.

20 Q So the only services that would have been targeted by the
21 egregious biller program would have been those out-of-network services
22 being charged at above 500 percent of Medicare?

23 A Yes.

24 Q And then how does the egregious billers program relate, if at
25 all, to what we now know about the outlier cost management program

1 that's been discussed with the jury?

2 A It -- the original egregious biller program did -- does not
3 relate to the MultiPlan OCM Data iSight programs.

4 Q Okay. So what prompted the creation of the OCM or outlier
5 cost management program?

6 A So there were situations where, like, in the wrap network
7 agreements the percentage -- the contractual agreement resulted in a
8 very high reimbursement, typically, like a percentage of billed charges,
9 with no cap on how much they could increase their billed charges. So it
10 was not addressing the escalating costs. The other component is there
11 might not have been an agreement. And so we needed something kind
12 of through the funnel at the end to be able to at least address the billed
13 charges that were being paid.

14 Q Okay. Now, your discussions with MultiPlan, can you tell us
15 who the individuals were at MultiPlan with whom you had the
16 discussions regarding creation of the outlier cost management program
17 and the use of Data iSight. Who were the key people?

18 A It was Jacqueline Kienzle, Dale White, and I believe, Emma
19 Johnson.

20 Q All right. Sir, I am going to now ask you to look at an exhibit
21 which, I believe, is already in evidence. Well, actually, it's not in
22 evidence, but it's not been objected to. It's Defense Exhibit 4569.

23 MR. BLALACK: So I'll ask whether there's any objection to it.

24 MR. ZAVITSANOS: Give me one second, Counsel.

25 MR. BLALACK: Sure.

1 MR. ZAVITSANOS: Sorry. I'm a little technically challenged
2 here. 4569?

3 MR. BLALACK: Yes, sir, 4569.

4 MR. ZAVITSANOS: No objection, Your Honor.

5 MR. BLALACK: Thank you.

6 Your Honor, I move 4569 into evidence.

7 THE COURT: 4569 will be admitted.

8 [Defendants' Exhibit 4569 admitted into evidence]

9 MR. BLALACK: Shane, could you bring that up, please?

10 BY MR. BLALACK:

11 Q And if you just -- you'll see an email, sir, from Dale White to
12 you and Rebecca Paradise dated February 27th, 2016. Do you see that in
13 the middle?

14 A I do.

15 MR. BLALACK: Can you blow that up, please, Shane?

16 Just take a second and review that to yourself, Mr. Haben. And
17 then I'll direct a few questions to you about it.

18 [Witness reviews document]

19 THE WITNESS: Okay. We can get started.

20 BY MR. BLALACK:

21 Q Okay. So sir, you mentioned that sometime in this 2015/2016
22 period, you had communications with the representatives of MultiPlan
23 about trying to improve your out-of-network program offerings; is that
24 right?

25 A That is correct.

1 Q And two of the people you mentioned were Dale White and
2 Jacqueline Kienzle of MultiPlan who were two of the people listed on this
3 email, correct?

4 A That is correct.

5 Q And in the first sentence, it says, "John" and that's addressed
6 to you, correct?

7 A That is correct.

8 Q "John, thanks for taking the time to meet with Jacqueline and
9 me. We appreciated the opportunity to walk through the proposed
10 savings initiatives for your fully insured ASO, et cetera. Do you see that?

11 A I do.

12 Q So when you were thinking a moment ago, and describing to
13 the jury those early conversations with MultiPlan about how to improve
14 your out-of-network program offerings, is this the time period you were
15 thinking of or was it a different time period?

16 A Yes, this was.

17 Q Now, he says in the next sentence, "We believe the
18 implementation of these initiatives in 2016 will go a long way to bringing
19 United back into alignment with its primary competitor group on
20 managing out-of-network program costs; do you see that?

21 A Yes, I do.

22 Q Do you know what Mr. White was referring to there when he
23 told you that these initiatives would go a long way to bringing United
24 back into alignment with its primary competitor groups?

25 MR. ZAVITSANOS: Speculation. Calls for hearsay.

1 THE COURT: Overruled.

2 THE WITNESS: Yes, I do.

3 MR. ZAVITSANOS: I sorry, Your Honor?

4 MR. BLALACK: Okay.

5 THE COURT: Overruled.

6 MR. ZAVITSANOS: I'm sorry. Thank you.

7 BY MR. BLALACK:

8 Q Please explain to the jury.

9 A So we were getting feedback that we were uncompetitive.

10 We approached MultiPlan for solutions. There was a problem out there
11 related to costs that were getting paid at -- or claims getting paid at billed
12 charges not being addressed. And we asked MultiPlan if there were
13 solutions that we could look at together.

14 Q When you referred to the primary competitor group on
15 managing out-of-network claims costs, do you have a general sense of
16 what that refers to?

17 A I don't know who that would be. We lovingly called each
18 other BUCA, Blues, United, Cigna, Aetna.

19 Q What was it called?

20 A BUCA, B-U-C-A.

21 Q Okay.

22 A That -- that's just a -- it could be one of those competitors
23 other than us.

24 Q Now, you've, I think, testified in response to questions from
25 Mr. Zavitsanos over the last week that during this period of 2014, 2015,

1 2016, it was your view that UnitedHealthcare's out-of-network programs
2 were not as competitive as they needed to be. Did you give that
3 testimony?

4 A Yes.

5 Q What was that based on?

6 A That was based on feedback from clients, consultants --

7 MR. ZAVITSANOS: Objection, Your Honor. Again, hearsay,
8 foundation, and speculation.

9 MR. BLALACK: Your Honor, it's not --

10 THE COURT: I think it was foundational.

11 MR. BLALACK: -- offered for the truth of the matter --

12 THE COURT: It was --

13 MR. BLALACK: -- for certain.

14 THE COURT: Yeah. Overruled.

15 MR. BLALACK: It's offered for his state of mind.

16 THE COURT: Overruled.

17 BY MR. BLALACK:

18 Q Now, a little farther down, you'll see a reference to UMR. Do
19 you see that?

20 A Yes, I do.

21 Q And he says, "There's been forward progress", he said, "with
22 UMR's launch."

23 MR. BLALACK: Just pick up with UMR, Shane.

24 BY MR. BLALACK:

25 Q "With UMR's launch later this summer with Data iSight.

1 They have responded to market pressure from the consultant community
2 to bring Data iSight into their standard product offering for out-of-
3 network plan cost management." Do you see that?

4 A Yes, I do.

5 Q So were you involved at all in UMR's decision to utilize Data
6 iSight?

7 A No, I was not.

8 Q So that was a decision made by a separate group of people
9 at UMR, a separate company?

10 A Yes, it was.

11 Q But apparently, you learned about it sometime in 2016?

12 A Yes, I did.

13 Q Do you see his reference there to "They have responded to
14 market pressure from the consultant community"?

15 A I do.

16 Q What is the consultant community?

17 A As we've talked before, it could be Aon, Will -- Towers Willis,
18 consultants network on behalf of clients.

19 Q We haven't really covered this, and I think the jury needs to
20 understand what this is. When you say there is consultants that work on
21 behalf of the clients, what do you mean by that?

22 A So I mean, I think if you go back and look at the Walmart
23 benefit plan, I think that's a really good example because they're a very
24 big and complex company. They don't have the time to go out and kind
25 of shop and look at all the offerings that all the health plans have. So

1 they'll use a consultant that might already have information about what
2 competitors do. And so they use that consultant to determine what
3 would be the best fit for them and for their employees. And they might
4 develop the benefit plans with them.

5 Q Does the consultant community, is that community Aon --
6 what's the other?

7 A Willis Towers Watson.

8 Q Okay. So those consultants you named, is their feedback to
9 TPAs and health insurance companies important?

10 A Yes, it is.

11 Q Why is that?

12 A Sorry. I believe the consultants will provide advice to the
13 employer groups about what they see for the effectiveness of medical
14 cost management and what their employer group may need for their
15 services and what they ask. And that consultant will provide them
16 guidance to say it might be a better fit to go here or a better fit to have
17 multiple options. They're almost like an agent for the client.

18 Q So if UnitedHealthcare or UMR or any other company
19 receives negative feedback during a bidding process from a consultant,
20 is that a challenge for the company?

21 A I view that as an opportunity to get better.

22 Q Okay. Okay. That's another way to look at it.

23 A Yes.

24 Q An opportunity to get better. So in this sentence, what was
25 Mr. White communicating to you about UMR's launch later this summer

1 of Data iSight having responded to market pressure from the consultant
2 community?

3 A My understanding of it would be is that UMR has addressed
4 the feedback that they've gotten from clients and the consultant
5 community and have put things into place to address that business need.
6 And that he is also saying that there's a benefit there, we should move
7 forward.

8 MR. ZAVITSANOS: Objection, Your Honor. Again,
9 speculation. Hearsay.

10 THE COURT: I'm going to ask you to ask follow-up questions
11 rather than having a narrative on this.

12 MR. BLALACK: Okay.

13 THE COURT: And be specific.

14 BY MR. BLALACK:

15 Q When Mr. White told you that UMR's launch later this --
16 referring to UMR's launch later in the summer of Data iSight -- that they
17 have responded to market pressure from the consultant community, with
18 -- specific to that phrase, what did you understand him to be
19 communicating to you in his email to you?

20 A That UMR is moving forward with that change. It would be
21 in support of -- you know, we would be in line if we move forward to.

22 Q And that he -- they were doing so in response to pressure
23 from the consultants?

24 A Yes.

25 MR. ZAVITSANOS: Objection. Leading. Also speculation.

1 THE COURT: It was leading.

2 BY MR. BLALACK:

3 Q Okay. Why was he -- according to Mr. White, why was UMR
4 moving forward?

5 A Because they had pressure from the consultant community.
6 That's what's in the email.

7 Q Now, was it -- and I think Mr. Zavitsanos asked you about this
8 a couple times. Was it unusual in your experience to get feedback from
9 a vendor like Mr. White and MultiPlan about what others in the market
10 were doing? Competitors, whether it's the primary competitor group,
11 BUCA or whatever it's called, or UMR; was that unusual?

12 A No.

13 Q Was that anything inappropriate in your view about that?

14 A No.

15 Q Okay. Did you have a belief and understanding that your
16 consultants shared market intelligence about your operation?

17 A Yes.

18 Q All right. Now, I want to show you another document.

19 MR. BLALACK: And Counsel, this is Defense Exhibit 4570,
20 which according to my records, you all have not objected to.

21 [Counsel confer]

22 MR. ZAVITSANOS: No objection, Your Honor.

23 MR. BLALACK: Thank you.

24 THE COURT: Okay. Did --

25 MR. BLALACK: I move that into evidence, Your Honor.

1 THE COURT: I need the number again.

2 MR. BLALACK: Defense Exhibit 4570.

3 THE COURT: 4570 will be admitted.

4 [Defendants' Exhibit 4570 admitted into evidence]

5 BY MR. BLALACK:

6 Q Now, sir, what I am showing you is an email dated
7 September 8th, 2016, from yourself to a woman by the name of, I
8 believe, Laurie Paidosh?

9 A Yes.

10 Q Is that how to pronounce it?

11 A Yes.

12 Q Who is Ms. Paidosh?

13 A Laurie Paidosh, I believe at that time, was chief of staff for
14 Dan Rosenthal.

15 Q So Mr. Rosenthal, my memory serves, was your boss at that
16 time?

17 A Yes.

18 Q So she was his chief of staff?

19 A Yes.

20 Q Okay. And the subject line of this is "Talking points for OCM
21 DIS". Do you see that?

22 A I do see that.

23 Q Okay. So if you'd look at the email, just take a second and
24 review that to yourself.

25 A Okay.

1 [Witness reviews document]

2 THE WITNESS: Okay.

3 BY MR. BLALACK:

4 Q Now, sir, I am going to just summarize the -- some key
5 language here, and then I am going to ask you a few questions about it
6 for the jury. So in your email to Ms. Paidosh, you write, "Food for
7 thought: MultiPlan's tool, Data iSight, a/k/a DIS, is being proposed for
8 use as part of the shared savings process and outlier cost management.
9 I believe that is a fancy term for egregious for ASO clients." And then it
10 says, DIS is a cost-plus reasonable margin database to determine an
11 initial payment to non-par providers.

12 The amount of reimbursement is primarily impacted by geography
13 and service type (reimbursement amount as a comparison to a
14 percentage of CMS by state, provider type, is available from MultiPlan).
15 Fee negotiation services apply on the back end if the provider does not
16 accept the reimbursement amount and is performed by MultiPlan.
17 Approximately 90 percent to 95 percent of the time, the amount is
18 accepted, according to MultiPlan. MultiPlan said seven of our top ten
19 competitors use the tool today."

20 Now, if you go down a little farther to the last bullet, sir, you'll see
21 it says, "We believe". See that?

22 A Yes.

23 Q We believe BCBS is even more aggressive and is accessing
24 the option of moving DIS up even higher to have IPR/OPR (R&C
25 repricing)(which is option 3 in [indiscernible]). Do you see that, sir?

1 A I do.

2 Q All right. I want to ask you just a few points. But first of all,
3 what was the purpose of this email to Ms. Paidosh?

4 A I don't totally remember. But you know, knowing Laurie's
5 role and my work with Laurie in -- in this role, she's chief of staff for Dan.
6 It's a summary of bullets for Dan to be informed of what's going on.

7 Q Okay. Was this -- was one of the purposes of this email to
8 begin the process of recommending the use of Data iSight as part of
9 your outlier cost management program?

10 A Yes.

11 Q And when you discussed fee negotiation services apply on
12 the back end, that third bullet, is that referring to the retrospective
13 negotiation services you described to the jury earlier?

14 A Yes, it is.

15 Q Now, when you said approximately 90 to 95 percent of the
16 time, the amount of accepted according to MultiPlan, what were you
17 referring to there?

18 A 90 to 95 percent of the time, there are no inquiries coming
19 into United or really, at that point, MultiPlan. But MultiPlan was
20 informing me that they would accept --

21 MR. ZAVITSANOS: Objection, Your Honor. Hearsay.

22 MR. BLALACK: It's being offered not for the truth of the
23 matter asserted but for his state of mind.

24 MR. ZAVITSANOS: Your Honor --

25 THE COURT: No. You're going to have to redirect your

1 questioning. And we can't have the narratives. You have to answer only
2 the question.

3 THE WITNESS: I'm sorry.

4 BY MR. BLALACK:

5 Q My question, sir, is, what did you understand that 90 to 95
6 percent of the time, the amount is accepted according to MultiPlan?

7 That's all I am asking. What did you understand that to refer to?

8 A That MultiPlan did not get inquiries on more than five to ten
9 percent of the time on the payment.

10 Q And by inquiries, you mean inquiries on the rate of
11 reimbursement?

12 MR. ZAVITSANOS: Objection. Leading.

13 THE COURT: Well --

14 MR. BLALACK: Strike that. I'll restate, Your Honor.

15 BY MR. BLALACK:

16 Q What was the inquiry you were referring to there?

17 A Any inquiry on the OCM amount that went out to the
18 provider initially.

19 Q Now, the next bullet refers to MultiPlan. "Seven of our top
20 ten competitors use the tool today." Do you see that?

21 A I do.

22 Q What were you referring to when you wrote that?

23 A Like I said, the BUCAs, so there would be other competitors
24 that are out there.

25 Q Why were you relating those two points that are described in

1 those -- in this email to Ms. Paidosh? Why was that important to you to
2 share with her?

3 A I think it was important to demonstrate that we are behind
4 our competitors. That would be that seven out of ten. And that we
5 should move forward. And that the bullet above is the reimbursement
6 rate that initially goes out to the provider would be accepted.

7 Q Okay. Did the information that MultiPlan shared with you to
8 be passed along to Ms. Paidosh play any role in your views about
9 whether you would be comfortable using this product?

10 A In my role, my goal of informing her, from what I remember,
11 is to inform the organization we are going to move forward with
12 MultiPlan, and just giving them the heads up of our progress.

13 Q Now, why did you refer in the last bullet, specifically, to Blue
14 Cross Blue Shield being even more aggressive?

15 A It was my impression that they were big, you know, what I
16 call the BUCAs, that are moving even further up in the chain. So there
17 were different levels, I think I quoted options. And I got the impression
18 that one of the bigger entities was going to be moving up quicker.

19 Q Okay. And did UnitedHealthcare after this, openly decide --
20 well, strike that. You already said they did. When did UnitedHealthcare -
21 - how long after this did you all decide to implement Data iSight as part
22 of outlier cost management?

23 A I don't remember the specific date, but it was after 2017.

24 Q As was it introduced to both fully insured and ASO at the
25 same time or was that done in phases?

1 A I don't remember exactly off the top of my head, but I think it
2 was more focused on the ASO side.

3 Q Now, I would like to show another document. This is from
4 Plaintiff's Exhibit list. This is Plaintiff's Exhibit 73.

5 THE COURT: Are you transitioning to a new subject?
6 Because this might be a good time.

7 MR. BLALACK: This would -- I'm open whenever you're
8 ready for a break, Your Honor.

9 THE COURT: All right. Let's -- it's 2:25 and we started at
10 1:10. So let's take a recess until 2:40.

11 During the recess, you are instructed do not talk with each
12 other or anyone else on any subject connected with the trial. Don't read,
13 watch or listen to any report of or commentary on the trial. Don't
14 discuss this case with anyone connected to it by any medium of
15 information, including, without limitation newspapers, television, radio,
16 internet, cell phones, or texting.

17 Don't conduct any research on any issue relating to this case.
18 You can't consult dictionaries, use the internet, or use reference
19 materials. You are not to talk, post social media, text, tweet, Google
20 issues, or conduct any other type of book or computer research with
21 regard to any issue, party, witness, or attorney involved in the case.

22 Most importantly, do not form or express any opinion on any
23 subject connected with the trial until the jury deliberates. Thank you for
24 your attention after lunch. See you at 2:40.

25 THE MARSHAL: All rise for the jury.

1 [Jury out at 2:26 p.m.]

2 [Outside the presence of the jury]

3 THE WITNESS: May I step down?

4 THE COURT: Yes, you may.

5 THE WITNESS: Thank you.

6 THE COURT: And as soon as the room is clear, I will ask if
7 you have anything to put on the record.

8 MR. BLALACK: Not from me, Your Honor.

9 MR. LEE: There was one question the Court had that I did get
10 an answer to from my team. Seventeen of the documents posted to the
11 website were marked "attorneys' eyes only". And I don't think it's
12 necessary to give a list right now, but I can give those numbers to the
13 Court if you desire.

14 THE COURT: Can the Plaintiff confirm that they've been
15 taken down?

16 MR. ZAVITSANOS: Yes, Your Honor. They've been taken
17 down, and I was -- I was advised that there was no big deal about these.
18 But they're down.

19 THE COURT: Good enough.

20 All right. Anything to put on the record before we take a
21 break?

22 MR. ZAVITSANOS: Not at this time, Your Honor.

23 THE COURT: Very good. Thanks and have a good recess.

24 MR. BLALACK: Thank you, Your Honor.

25 MR. ZAVITSANOS: Thank you, Your Honor.

1 [Recess from 2:27 p.m. to 2:42 p.m.]

2 THE MARSHAL: Court is back in session.

3 THE COURT: Thanks, everyone. Please remain seated.

4 Are we ready to bring in the jury?

5 MR. BLALACK: We are, Your Honor.

6 MR. ZAVTISANOS: Yes, Your Honor.

7 THE COURT: Thank you.

8 MR. ZAVTISANOS: Oh, Your Honor, one thing. So the Court
9 had suggested maybe some alternatives for the schedule. Can we -- I
10 think I made this clear, but for whatever it's worth. We have no
11 opposition to starting an early day, so. In fact, we prefer it. So whatever
12 the Court's election --

13 MR. BLALACK: Available when you are, Your Honor.

14 THE COURT: Let's start that Monday because I am going to
15 the game tomorrow night.

16 THE MARSHAL: All rise for the jury.

17 [Jury in at 2:43 p.m.]

18 THE COURT: Thank you. Please be seated. Go ahead,
19 please.

20 MR. BLALACK: Thank you, Your Honor.

21 Q Mr. Haben, we were talking about the process during 2016
22 and 2017 when your group was evaluating whether to proceed with a
23 recommendation to utilize outlier cost management. And I said, do you
24 recall that?

25 A Yes, I do.

1 Q I want to show you another document that I understand is in
2 evidence already, Plaintiffs' Exhibit 73. And I believe, actually, it was
3 shown to you by Mr. Zavitsanos earlier this week. This document is
4 entitled, "Customer Impact Advisory Brief." Do you recognize that
5 document, sir?

6 A I do.

7 Q Now, I'm going to show you on page 9 -- if you would go to
8 page 9. And I'm referring to the exhibit number page 9. You'll see a
9 heading that reads, "Outlier Cost Management Optimization". And then
10 on that page, you can read it to yourself, and the jury can read it later,
11 it's got a number of questions. Do you see that?

12 A Yes, I do.

13 Q So it has, how does this -- how will this program impact their
14 net promoter score, and then there's a series of other questions with
15 responses; do you see that?

16 A I do.

17 Q Now, the question that -- well, let me back up. Do you know
18 what the purpose of this document is and how it's used in
19 [indiscernible]?

20 A In general, what I understand this to be is they will go -- the
21 team will go out and talk to sales organizations about customers and the
22 impact, and answer questions. So through the sales organization.

23 Q So would this be part of a due diligence exercise to decide
24 whether --

25 MR. ZAVTISANOS: Objection. Leading.

1 BY MR. BLALACK:

2 Q What would be the purpose of this document?

3 A It would inform them of the potential of the programs that
4 are -- or the program available, in this case, outlier cost management.
5 Try to preaddress any questions they may have such as net promoter
6 score, which is like, is the client going to be happy? Is the member going
7 to be happy about this; yes or no? And they get feedback and answers
8 questions.

9 Q I'm interested in that second question there down. It says,
10 "What is the competitive landscape?" Do you see that?

11 A Yes, I do.

12 Q And it says, "Is UHC the leader? Or are we behind others in
13 our approach? Please include all competitor's information available".

14 Then the response reads, "UHC is utilizing Data iSight, owned by
15 MultiPlan, to administer the FI OCM Program. 90 other payers
16 nationwide use this methodology in a similar manner"; do you see that?

17 A I do.

18 Q What did you understand the question about the competitive
19 landscape [indiscernible]?

20 A It's to anticipate, hey, are we going to be the first ones using
21 this or others using this and we're going to be in line with our
22 competitors.

23 Q For purposes of completing this survey, what was your
24 understanding of the state of Data iSight in the market?

25 A It was well out in the marketplace.

1 Q And did your [indiscernible] Data iSight?

2 A I'm sorry. You -- I couldn't hear you.

3 Q Sorry. Did your self-funded clients ultimately adopt Data
4 iSight to some degree?

5 A Yes.

6 Q Over what period of time would you say that adoption
7 occurred?

8 A Obviously, it's continuing. But it's a -- once it was put into
9 place. So I think as 2017, 2018 to current.

10 Q Now, are there self-funding clients today who do not get
11 [indiscernible]?

12 A I believe they still were when I left.

13 Q Now, during this period 2017 to 2019, was there any other
14 suggestions that you recall MultiPlan making to UnitedHealthcare to
15 improve the competitiveness of its out of network program?

16 MR. ZAVTISANOS: Hearsay, Your Honor.

17 MR. BLALACK: I'm offering it for the truth of the matter
18 asserted, Your Honor.

19 MR. ZAVTISANOS: Then I would ask for limine instruction,
20 Your Honor.

21 THE COURT: I think the question was fine, so objection's
22 overruled.

23 THE WITNESS: Can you ask it again, please?

24 BY MR. BLALACK:

25 Q During this period you were there, 2017 through the period at

680600

680600

1 issue here, January 2020, were there other suggestions that MultiPlan
2 made to UnitedHealthcare's out of network program team to improve the
3 competitiveness of its out of network programs?

4 A Yes.

5 Q Can you give me an example?

6 A It could improvements to Data iSight, the level for
7 benchmarking inside Data iSight. It could be improvements to fee
8 negotiation and other components.

9 Q Do you ever recall an initiative called Benchmark Pricing?

10 A Yes.

11 Q Was that one of the suggestions from MultiPlan?

12 A Yes, it was.

13 Q Now, I'm going to show you a document, sir. Which I believe
14 is in evidence. Plaintiffs' Exhibit 96. I believe Mr. Zavitsanos used this
15 with you this week.

16 MR. BLALACK: Could you please pull that up, Shane?

17 BY MR. BLALACK:

18 Q You'll see it's an email from you, dated April 20th, 2017 to a
19 number of people. Subject of which is "OCM - MultiPlan Benchmark
20 Pricing Overview"; do you see that?

21 A Yes, I do.

22 Q Do you remember being questioned about this document
23 earlier?

24 A Let me just take a peek. Yes, I do.

25 Q Now, if you turn to the attachment. "Overview benchmark

1 pricing April 18, 2017"; do you see that?

2 A Yes, I do.

3 Q And I believe you testified in response to questions from Mr.
4 Zavitsanos that you prepared this presentation?

5 A Yes, I did.

6 Q If you go to the next page, which would be page 3 of the
7 exhibit, you'll see an overview. And it says, "Recommendation:
8 [indiscernible] benchmark pricing over the shared savings program
9 when outlier cost management [indiscernible] Data iSight [indiscernible]
10 July 20, 2017". Do you see that?

11 A Yes, I do.

12 Q Now, could you remind the jury? They have to discuss this.
13 What was benchmark pricing and how did it work?

14 A Think about it as a bar to achieve. So if there's a wrap
15 network discount available -- so if a provider has an agreement with
16 MultiPlan, and that agreement's available for a payer like United or
17 anybody else to use. If United decides to use that -- if they look at that
18 agreement, and the price of that reimbursement rate is at a threshold
19 that, let's say, is above a benchmark. I believe we started at 500 percent
20 of Medicare. I think in this, it says move to 350.

21 But let's just say if it was at 500 percent of Medicare and it was
22 lower than that -- equal to or lower than, we would use that wrap network
23 discount. If that agreement with that provider was above 500 percent of
24 Medicare, we would say that's too expensive, it's not good enough. And
25 then we would move down into the hierarchy.

1 Q So just so that I'm clear about this. If you have a benchmark
2 price, does that mean that an out-of-network claim always must be
3 priced at that selected benchmark price?

4 A No.

5 Q Why not?

6 A If it didn't achieve or didn't meet that threshold of that
7 benchmark, then it would go next into the hierarchy of the out of
8 network program for that benefit plan.

9 Q So it would be fair to say that benchmark pricing ensured
10 that it would be priced above the benchmark?

11 A Yes.

12 Q But it could be priced for lower?

13 A Yes.

14 Q All right. Thank you. You just mentioned something that I
15 wanted to ask about. In fact, you can just see it's on the next page.

16 MR. BLALACK: Let's turn the page, Shane.

17 BY MR. BLALACK:

18 Q Do you see where it says, "competition and [indiscernible]
19 steps"?

20 A Yes.

21 Q I believe, again, Mr. Zavitsanos asked you about this. I want
22 to talk about a couple of points here. First of all, in the first paragraph, it
23 says, "Today, our major competitors have some sort of outlier cost
24 management; they use Data iSight. United will be implementing July 1,
25 2017". Do you see that?

1 A Yes, I do.

2 Q Does that refresh your memory about when Data iSight was
3 implemented?

4 A Yes, it does.

5 Q And this presentation was dated April 2017. So this would
6 have been a presentation about benchmark pricing that predated the
7 actual implementation of Data iSight?

8 A That's correct.

9 Q So why were you reporting to your colleagues that "Today,
10 our major competitors have some sort of outlier cost management; they
11 use Data iSight"?

12 A Because I think it was important for them to understand that
13 if we needed to be in line with our competitors that we need to move
14 forward with this. And it's an offering, right? It's an offering to clients.

15 Q And what do you mean "to be in line with our competitors"?

16 A To be competitive with them.

17 Q So can you -- and when you say, "to be in line with them",
18 are you referring benchmark pricing or Data iSight in that sense?

19 A In that sense, it would be Outlier Cost Management with
20 benchmark pricing.

21 Q Now, then you say, "One major competitor uses benchmark
22 pricing, described in prior slide". And then it says, "By implementing
23 Outlier Cost Management as currently planned, United catches up to the
24 pack, but not leading". Do you see that?

25 A I do see that.

1 Q And then it says, "If we implement benchmark pricing as
2 described, with the intent to reduce the threshold to 350 percent CMS,
3 United would be leading the pack along with a major competitor". Do
4 you see that?

5 A Yes, I do.

6 Q Just a few terms. When we say, "threshold to 350 percent
7 CMS", what does 350 percent stand for?

8 A That would be a recommended benchmark pricing.

9 Q CMS means what?

10 A I'm sorry. Medicare.

11 Q Now, did in fact when United -- well, first of all, did
12 UnitedHealthcare eventually adopt benchmark pricing?

13 A Yes, we did.

14 Q Did you adopt it at the recommended 350 percent?

15 A I don't believe so. I think we initially rolled out with 500
16 percent of Medicare.

17 Q And at some point in time, did you reduce the initial
18 benchmark price of 500 percent to something less?

19 A Yes, we did.

20 Q And what was that?

21 A I believe it was 400 percent.

22 Q So at any point in time, has the benchmark pricing that
23 United had used for its out of network programs been at 350 percent?

24 A I don't believe so.

25 Q Now, when you were referring to "implementing Outlier Cost

1 Management as currently planned, United catches up to the pack, but
2 not leading", what did you mean by that?

3 A What I meant by that is the pack is in terms of our
4 competitors, and that we were more expensive in terms of medical cost
5 reimbursement for employer groups. And that if we implemented
6 Outlier Cost Management, then we would be as competitive as they are,
7 and not behind.

8 Q But if you wanted to be a leader, what was it you were going
9 to need to do?

10 A We would need to be lower for the benchmark pricing.

11 Q So separate and apart from Outlier Cost Management. To be
12 a leader, you would need to adopt benchmark pricing and at that
13 threshold?

14 A Yes.

15 MR. ZAVTISANOS: Objection, Your Honor. Leading
16 constantly.

17 MR. BLALACK: I'll withdraw.

18 BY MR. BLALACK:

19 Q To be a leader, what was necessary for you to do?

20 A Well, it's -- and I'm sorry. I skipped step. You got to have
21 benchmark -- I'm sorry -- outlier cost management available, have
22 benchmark pricing then available, and then present to the clients that
23 that's available to them if they wanted to adopt it.

24 Q That would -- if you did all of those things, would you be a
25 leader then?

1 A We would be in the middle of the pack.

2 Q Did you eventually do all of those? Did you do all of those
3 things that you just described in the middle of 2017?

4 A Yes.

5 Q Did you adopt it at 350?

6 A No.

7 Q So when you -- where you ultimately settled out, was
8 it -- was Outlier Cost Management adopted?

9 A Outlier cost management was now available at that time.

10 Q Benchmark pricing was eventually adopted?

11 A Yes.

12 Q At what threshold?

13 A It started at 500 percent of Medicare.

14 Q So once you did that, where in relative to your competition
15 did you understand you were?

16 A We were with the pack.

17 Q And had you not implemented those plans, where would you
18 understand and expect you to be relative to your competition?

19 A We would be uncompetitive, and they would be
20 disappointed.

21 Q Now, just so that we can unpack this. You've referenced 350
22 percent of CMS here, and we've talked about conducting benchmark
23 pricing at 500 that was reduced to 400. We've separately talked about
24 350 percent of Medicare and 250 percent of Medicare; do you recall?
25 Because you've been testifying about programs that were tied to those

1 thresholds.

2 A Yes.

3 Q What were you referring to when you were describing 350
4 percent of Medicare and 250 percent of Medicare?

5 A So that was the methodology that was in line for the floor
6 related to the ER services.

7 Q Is that the ER [indiscernible]?

8 A Yes, it is.

9 Q Why did you all not follow through and go with the 350
10 percent of CMS benchmark that was originally [indiscernible]?

11 A Just because I think that would be just a very quick move.
12 And we wanted to show our clients the value of the program. At that
13 point -- I mean, clients could decide if they wanted to move that down,
14 but we wanted to get it implemented.

15 Q Okay. And do you remember when UnitedHealthcare
16 implemented benchmark pricing for its out of network program?

17 A I believe it was available in July of 2017.

18 Q All right.

19 MR. BLALACK: Counsel, can we approach the bench?

20 MR. ZAVTISANOS: Yes.

21 MR. BLALACK: Before I move into the next statement.

22 [Sidebar at 2:58 p.m., ending at 3:09 p.m., not transcribed]

23 THE COURT: Thank you, everyone for your courtesy.

24 BY MR. BLALACK:

25 Q Now, Mr. Haben, let's pick up with a different topic. I believe

1 you were asked by Mr. Zavitsanos if you understood that one of the
2 claims in this case was that the Plaintiff had an implied contract with the
3 Defendants in this case. Do you recall that?

4 A Yes.

5 MR. ZAVTISANOS: Counsel, I did not hear your question.

6 MR. BLALACK: I said -- I asked him whether he recalled
7 being asked in your examination that one of the allegations in this case
8 were that the Plaintiffs in this case had an implied contract with the
9 Defendants. That that's one of the issues.

10 THE WITNESS: Yes, I do.

11 BY MR. BLALACK:

12 Q Okay. In your role with UnitedHealthcare, in addition to
13 being a vice president of out-of-network programs, did you have a role
14 for provider contracting?

15 A Yes, I did.

16 Q What was that?

17 A I had a role with -- I'm trying to kind of skinny this down
18 because it was a broad role. I contracted with national hospitals. Am I
19 free to say who they were?

20 Q I think it's just enough to describe generally what your role
21 was without getting into different discussions. With any provider or with
22 the Plaintiffs.

23 A Fair enough. Very large national hospital relationships
24 across the country. So I did provider agreements with them. Very large
25 national -- the largest national labs, I did contracts with them. I did

1 national ancillary. So very large national ancillary, which are like DMA
2 providers. I did contracts with them, as well.

3 Q Now, I want to ask you about UnitedHealthcare's approach to
4 provider contracting with out-of-network providers. Based on your years
5 of experience, as a matter of policy, would UnitedHealthcare ever agree
6 to pay millions of dollars to health benefit claims without recording an
7 agreement in a written contract?

8 MR. ZAVTISANOS: Your Honor, objection. Invades the
9 province of the jury. And also, 403.

10 MR. BLALACK: This is just asking --

11 MR. ZAVTISANOS: And this --

12 MR. BLALACK: This is asking about the foundational
13 element of them proving the claim, Your Honor. That's all. I'm asking
14 about the policy of the company.

15 MR. ZAVTISANOS: And Your Honor, that's a --

16 THE COURT: Rephrase it. Rephrase.

17 MR. ZAVTISANOS: Excuse me. I'm sorry. That's 48.035
18 under the Nevada Statutes. I believe this -- we do not have an expressed
19 contract claim. We have an implied contract claim.

20 MR. BLALACK: And I'm going to ask --

21 MR. ZAVTISANOS: We believe the -- I'm sorry, Counsel.

22 MR. BLALACK: Go on.

23 MR. ZAVTISANOS: We believe the elements are different.
24 And this -- this directly invades the province of the jury. And more
25 importantly, the Court.

1 MR. BLALACK: Your Honor, I am not invading the province
2 of either the Court or the jury. I'm asking about my client's policies and
3 practice with respect to contracting, which is probative of the elements
4 of the claim.

5 THE COURT: Then rephrase with regard to the policies.

6 BY MR. BLALACK:

7 Q Mr. Haben, could you tell me during your time as a leader in
8 provider contracting for UnitedHealthcare, as a matter of the
9 UnitedHealthcare policies -- that's what I'm asking -- were those policy --
10 did those policies contemplate that UnitedHealthcare would agree to a
11 provider contract that was not in writing?

12 MR. ZAVTISANOS: Objection, Your Honor. Again, invades
13 the province of the Court.

14 THE COURT: That's an objectionable question.

15 BY MR. BLALACK:

16 Q Well, let me ask it this way. Mr. Haben, could you explain to
17 the jury what the policies of UnitedHealthcare were with respect to
18 contract? That's all I'm asking.

19 A Yes. Contracting needed to be in writing on contractual
20 paper that was drafted by our attorneys and approved and used and
21 available through a database.

22 Q And was there any policy with respect to the term, like was it
23 permissible to have a contract without an end date?

24 MR. ZAVTISANOS: Your Honor, again, invades the province
25 of the Court. And -- can I approach, Your Honor?

1 THE COURT: Yes.

2 [Sidebar at 3:13 p.m., ending at 3:15 p.m., not transcribed]

3 THE COURT: All right. For the record, I've sustained an
4 objection.

5 BY MR. BLALACK:

6 Q All right. Okay. Now, let's talk about some other topics, Mr.
7 Haben. And I want to talk about specifically now some issues that were
8 discreetly covered with you by Mr. Zavitsanos. And when he questioned
9 you, there were a number of topics. When he would ask you a question
10 and you would say you disagreed or you thought it was a
11 mischaracterization, you would ask to explain, and you did not -- were
12 not given that opportunity.

13 MR. ZAVTISANOS: Excuse me, Your Honor. The rules
14 permit on cross-examination to ask leading questions. And explanations
15 are offered during direct examination, as counsel is doing now.

16 THE COURT: So --

17 MR. ZAVTISANOS: I would object to the -- to the argument
18 and to the -- to the attack on counsel.

19 THE COURT: You'll have to -- you'll have to break it down.

20 MR. BLALACK: Okay. Thank you, Your Honor.

21 BY MR. BLALACK:

22 Q What I'm going to do now, sir, is I'm going to give you the
23 opportunity to explain those answers. And so what I want to do is I'm
24 going to show the jury, and I'm going to ask Ms. White if she could turn
25 on the ELMO for me. And you'll see here, I've written down our

1 summary. And obviously, Mr. Zavitsanos can stand up during this
2 examination to tell me I've got it wrong. But these are our
3 understanding of what the assertions in his examination were to you,
4 Mr. Haben. And I want to go through each of these and start with what
5 you were questioned and the answers that you gave and give you a
6 chance to explain.

7 MR. ZAVTISANOS: Your Honor, I'm sorry. So counsel do
8 not make assertions during examination. They ask questions. And I'm
9 looking at just the first one. I was asking questions about that. Now, if
10 he wants to -- if he wants to ask the witness whether he agrees with this
11 or not. But to represent that these were my assertions of what they are
12 saying, I was asking questions. And in fact, I think this gentleman
13 disagreed with the first one that's up. So I -- this is a mischaracterization.
14 And it's also attempting to inject me into the examination.

15 MR. BLALACK: Your Honor, I am not characterizing this as
16 argument. I am going to go through each of these questions and Mr.
17 Haben's responses and allow him to explain the information he did not
18 provide in cross-examination.

19 THE COURT: You have to present it in a more neutral way.

20 MR. ZAVTISANOS: Your Honor -- I'm sorry.

21 BY MR. BLALACK:

22 Q All right. Now, let me ask you this, Mr. Haben. On the first
23 one, I'm going to show you some testimony -- some questions and
24 answers from your examination with Mr. Zavitsanos. And I want you to
25 kind of start there and go through and discuss those topics, okay?

1 A Yes.

2 MR. BLALACK: All right. So can I have Shane bring up the
3 first of those excerpts, please?

4 MR. GODFREY: Which exhibit are you referring to?

5 MR. BLALACK: This is 11/2/21, the date of the transcript,
6 12475.

7 MR. GODFREY: What page?

8 MR. BLALACK: Page --

9 MR. ZAVTISANOS: Your Honor, I'm sorry. I'm not really
10 sure what we're doing here. I -- there's a process for impeachment. He's
11 putting up -- he's putting up trial testimony when there is not --

12 THE COURT: All right. Meet me in the hall, please.

13 [Sidebar at 3:18 p.m., ending at 3:22 p.m., not transcribed]

14 THE COURT: Thanks, everyone. For the record, I overruled
15 an objection.

16 BY MR. BLALACK:

17 Q All right. So what I'm going to do is quickly show you the
18 sequence from your examination just to orient us on where we are and
19 the topic that we're going to be discussing. So the first one I want to
20 show is page 124, lines 7 to 15 from the transcript of November 2nd.

21 MR. BLALACK: Do you have that, Shane?

22 MR. ZAVTISANOS: November?

23 MR. BLALACK: November 2nd.

24 MR. ZAVTISANOS: Thank you.

25 BY MR. BLALACK:

1 Q All right. So -- "are you telling this jury," let's find that.
2 There you go. "Are you telling this jury that saving someone's life who's
3 been shot, that this amount -- this charge amount is egregious?" Mr.
4 Haben answered, "I'd tell you and I'd tell the jury when the claim is
5 submitted, there's a lot of medical records that are involved that can
6 justify reasonable amount.

7 So the CPT code is typically one line item. I would assume if
8 someone got shot, that that's one line item making up the claim. 1,400
9 to save someone's life? I would think it would be a lot more expensive
10 than just what I see."

11 And then 130, line 20, skipping to the end. Line 20,
12 "Yes, but he says I want to be respectful, yes or no for 99285. The
13 most severe code we have is [indiscernible] egregious. And so I'm trying
14 not to be difficult, so I don't -- yes or no. I'm trying to recall it.

15 Question, "If you want to say I can't answer that, that's fine, too."

16 "I can't answer that."

17 "Okay." "I'd need to reference other items. Thank you."

18 Do you see that, sir?

19 A Yes, I do.

20 Q Okay. So I want to -- that's what I want to talk -- I want to
21 discuss, where I want to pick up. Now, Mr. Haben, have you reviewed
22 that testimony? Do you remember Mr. Zavitsanos asking you if \$1,400
23 was egregiously high to reimburse a CPT code 99285 claim related to a
24 gunshot?

25 A Yes, I do.

1 Q Do you recall him asking you if \$254 was egregiously low to
2 reimburse that same claim for that same kind of code related to a
3 gunshot wound?

4 A Yes, I do.

5 Q Now, you testified, and I just showed it, that a CPT code is
6 typically one line item. So you said, "I would assume if somebody got
7 shot, that's one item of a large claim." What did you mean by that?

8 A I think the way it was represented is it's a gunshot stated
9 here. I think that's a pretty severe wound issue. And -- or a problem. I
10 mean, it's just horrible. And I can't imagine that a claim for one item
11 would be sent in for a patient that had a gunshot wound.

12 Q I'm not sure the jury knows what you mean by one item.
13 What do you mean when you say one item?

14 A So CPT -- as I stated before, CPT codes -- I'm not a coding
15 expert. But claims come in with CPT codes that represent the services
16 that have been performed.

17 MR. ZAVTISANOS: Your Honor, then in that case, we object
18 to everything from this point forward. Speculation.

19 MR. BLALACK: Your Honor, the witness is not testifying as
20 an expert on CPT codes. He knows how the CPT claims come in because
21 they're billed out on a claim form.

22 MR. ZAVTISANOS: He literally just said the opposite.

23 THE COURT: He said, I'm not an expert. But he could
24 explain it. Objection's overruled.

25 BY MR. BLALACK:

1 Q Please continue.

2 A Yes. As I see claims through our out-of-network programs,
3 they come in with multiple claim lines or CPT codes. Those are codes for
4 services that were performed on a patient.

5 Q And so if a claim -- can a claim have more than one CPT code
6 on it?

7 A Yes, it can.

8 Q And what is -- what does each CPT code on a claim line --
9 claim represent?

10 A A service that was performed on that patient.

11 Q So if there were five CPT codes on a claim, how many
12 services would be reported on the claim?

13 A Five services.

14 Q And when United adjudicates those claims to price them or
15 determine if they're covered, does it do so by each claim line or just in
16 the aggregate?

17 MR. ZAVTISANOS: Your Honor, I'm sorry. I think this
18 touches on a limine point. And I'm sorry to interrupt, but I think I
19 understand what counsel's doing.

20 MR. BLALACK: I'm just trying to establish whether they're
21 evaluated individually. That's all.

22 MR. ZAVTISANOS: Well, I --

23 THE COURT: Why don't you approach. Let's see if we can
24 handle it up here.

25 [Sidebar at 3:26 p.m., ending at 3:27 p.m., not transcribed]

1 BY MR. BLALACK:

2 Q Okay. My question was, when a claim comes in with
3 multiple claim lines on them, are they each reviewed and evaluated
4 distinctly?

5 A Yes.

6 Q Now Mr. Zavitsanos I think told you on the first day of your
7 examination that his clients dispute over 11,000 claims in this case. Do
8 you recall something like that?

9 A Yes, I do.

10 Q And when he -- did he show you any of those actual claims?

11 A I don't believe he did.

12 Q And when he wrote up on the white board a number, he
13 wrote a number something like \$1,100 -- let's see whatever the amount
14 was, I think it was \$1,400 and then he wrote 254. Did you -- did you see
15 that?

16 A I believe it was 1,428.

17 Q Do you know what those numbers represent?

18 A I have no idea what he was trying to represent.

19 Q Now I believe you said, and the testimony would show that
20 you could not say if \$254 is a low payment for a CPT code 99285 because
21 you would "need to reference other items." Do you remember that?

22 A Yes, I do.

23 Q What other information would you need to look at to
24 determine if that payment was reasonable?

25 A Usually medical records are needed to be looked at.

1 Q What about other data about the rates for payment?

2 A In terms of geographic location, type of service, what
3 providers accept.

4 Q Was any of that information provided to you in connection
5 with these examples?

6 A No, they were not.

7 Q Now I want to show you a few examples of disputed claims
8 in this case from the disputed claims list. And this is Plaintiffs' Exhibit
9 473, which I believe is stipulated as admissible; is that right?

10 MR. ZAVITSANOS: Yes.

11 THE COURT: 473 is in.

12 BY MR. BLALACK:

13 Q Now, sir, what I want to do is just pull out a couple of the
14 illustrations from their claims list, just to show you and the jury the type
15 of information that we have.

16 A I don't have it. I have 471 and 476.

17 Q Okay. Why don't we -- I'll do it electronically and see if you
18 can follow along.

19 A That would be better. Thank you.

20 Q I'm not sure if you'd be able to make sense of that even if
21 you had a hard copy.

22 A All right.

23 Q I'm going to ask Shane here to bring out the claim line that
24 I've identified -- I've identified by name. First of all I'm going to show
25 you the problems. You'll see there is a reference to -- can you see what

1 those columns say, sir, at the top?

2 A Yes, I can.

3 Q Can you read those out loud?

4 A The first column on the left is entity. Then the next column
5 is facility. The next column is facility -- I'm assuming that's facility
6 county. DOS typically means the date of service. The account number.
7 The billed provider. The billed CPT code (bundled).

8 Q Okay. Now -- and then to the right do you see a column that
9 says charges?

10 A I do.

11 Q And you see the next column says allowed.

12 A Yes, I do.

13 Q And then a little farther there's another row. Do you see one
14 that says employer?

15 A Yes, I do.

16 Q All right. So let's just -- I want -- the one that's highlighted,
17 let's use that one as an illustration. So who is the entity listed for that
18 particular code?

19 A It says Ruby Crest Emergent -- I'm assuming that means
20 Emergency.

21 Q Do you know if that's one of the Plaintiffs in this case, sir?

22 A I believe so.

23 Q And then there's a date of service. Can you tell what that
24 date of service is?

25 A May 29th, 2018.

1 Q And then under the billed CPTs, can you tell what CPT codes
2 are reported on this claim?

3 A I believe it's 99285; 2777 -- I'm sorry, 27788; and 99152.

4 Q Okay. Can you tell me the allowed amount for that claim?

5 A The allowed amount is \$1,781.91.

6 Q Can you tell what the billed charges on the claim?

7 A The billed charges were \$2,477.

8 Q Okay. And can you tell what the employer group was for that
9 particular member?

10 A It's Major Drilling America, Incorporated.

11 Q Now sir, I'm going to ask my colleague Shane to bring up a
12 demonstrative that I prepared based on this claim. And what I'm going
13 to ask you to do is just confirm that the information related to the entity,
14 county, date of service, employer charges allowed, the CPT codes are the
15 same that you just read off on the claim.

16 A It's Ruby Crest, Elko County. Date of service is the same.
17 The company and the employer is the same. And the charges and the
18 allowed look the same.

19 Q Okay. Now, sir, the codes there, can you tell if those are the
20 same codes?

21 A Yes.

22 Q Now what I added in the right hand column is the
23 description. And I'll represent to you that's the description for each of
24 those codes in the CPT manual. That's the manual those codes are
25 generated in. And sir, when you testified -- well, let me back up. Can

1 you tell from looking at the description, the nature of the event that was
2 captured in this billing?

3 A The description's got a detailed information about the code.

4 Q Is there reference to a distal fibula fracture?

5 A Yes, me just take a look at it. Yes, thank you.

6 Q Okay. And that code up at the top, 99285, is that the same
7 highest intensity code that Mr. Zavitsanos continued to call the most
8 severe code?

9 A Yes, I believe so.

10 Q Okay. So and do you see a reference to surgical care?

11 A Yes, down in the middle there.

12 Q So my question to you, sir, when you talked about the kind of
13 -- the kind of claim you would typically associate with [indiscernible].
14 You mentioned you would typically file more than one claim on it; is that
15 right?

16 A That is correct.

17 Q Is this the type of claim that is more consistent with your
18 expectations [indiscernible]?

19 A Yes.

20 MR. ZAVITSANOS: Your Honor, I'm sorry. We're getting
21 into expert issues. This is an undisclosed lay expert. We do have
22 experts that are going to be testifying about these issues. So we object
23 to this line of inquiry, Your Honor.

24 MR. BLALACK: Your Honor, I'm not asking for any expert
25 opinion. I'm trying to show to the jury the basis for the prior testimony

1 he gave in response to questions by Mr. Zavitsanos about why the
2 example he was providing was inconsistent with his own expectations
3 and understanding about how that high intensity [indiscernible].

4 THE COURT: If you get into this in great detail with this
5 witness, I won't allow another witness to go the same place.

6 MR. BLALACK: Okay. That's fine, Your Honor. I'm not -- I'm
7 just not sure I'm following in terms of what specific issue.

8 THE COURT: Well, you can't have two witnesses on the
9 same issue. So if you have expert testimony coming in on this issue,
10 then you need to rely on the expert rather than --

11 MR. BLALACK: Well, we definitely have testimony, Your
12 Honor, on a host of issues, but not on the question of what Mr. Haben's
13 expectations were about what a claim associated with an emergency
14 event would look like associated with that kind of dollar --

15 MR. ZAVITSANOS: Your Honor, I'm sorry --

16 THE COURT: You're getting close to getting cut off now.
17 Getting cut off on that. But I'll overrule the objection for now.

18 BY MR. BLALACK:

19 Q Well, let me go to the top there then Mr. Haben. In this event
20 the total charges for this -- these codes were what?

21 A \$2,477.

22 Q And the total allowed was what?

23 A \$1,781.91.

24 Q And you -- I know your accounting maybe is not what you
25 want it to be. Can you give me a rough sense of what the total percent

1 of the charges were that were allowed on this?

2 A I would need help with a calculator. If somebody could --

3 MR. BLALACK: Mr. Killingsworth [indiscernible] and save me
4 right now.

5 BY MR. BLALACK:

6 Q Let me try and tell me if my math is right. I have 71.9
7 percent. Does that sound right?

8 A I was going to say about 75 percent, yes.

9 Q So sitting here today, sir, do you have enough information to
10 render any kind of informed judgment about whether the amount
11 allowed on the hypothetical Mr. Zavitsanos provided you is reasonable?

12 A I have no ability to do that.

13 Q All right. Now let's look at the next issue that Mr. Zavitsanos
14 raised with you, and that relates to the suggestion that in 2016 the
15 shared savings program was a win, win, win. But United Health moved
16 its clients off of shared savings to drive its own fee revenue. Do you
17 recall the questions and answers around that topic?

18 A Yes, I do.

19 Q Let me show you the exchange that I want to focus on. This
20 is November 3rd, 2021, page 45.

21 MR. ZAVITSANOS: What line?

22 MR. BLALACK: Line 45 -- page 45, line 21.

23 BY MR. BLALACK:

24 Q The question was, "Ninety-five percent of the out-of-network
25 doctors were happy to discount their bill charge. No balance billing.

1 You get a fee. The employer has clarity. It's a win, win, win, win all the
2 way around in 2016, right?"

3 "A Can I clarify what you said?

4 "Q No, sir."

5 Now my question, sir, there was an exhibit referenced in that
6 exchange, which was Plaintiffs' Exhibit 25.

7 MR. BLALACK: So let's bring that up and show that to the
8 jury as well.

9 BY MR. BLALACK:

10 Q Do you remember Mr. Zavitsanos asking you about this
11 document, sir?

12 A Yes, I do.

13 Q If you could go to page 2, this was a chart. And I think in the
14 upper right hand column it says "client eligibility and it had ASO 95
15 percent of membership has SSP." Do you see that?

16 A Yes.

17 Q And just to be clear, this was a little confusing. When you
18 heard the 95 percent of the membership is that referring to human
19 beings or is it referring to customers or clients?

20 A It is not referring to clients. It's referring to the human
21 beings when you add up all of the members underneath those clients.

22 Q All right. Now having looked at this exchange you had with
23 Mr. Haben [sic], you indicated that you could clarify.

24 A I'm sorry with who?

25 Q I mean, excuse me, Mr. Zavitsanos. Do you agree with his

1 framing that it was a win, win, win?

2 A Can you pull up my testimony?

3 Q Sure. Can you go back in?

4 A Can you ask your question again?

5 Q Sure. My question is do you agree that it was a win, win,
6 win, all the way around?

7 A No, I don't. I was trying to clarify I think he misstated the
8 percentage of what it was related to.

9 Q And why didn't shared savings solve all of the problems?
10 What was the problem that needed to be addressed with shared
11 savings?

12 A So our clients, as I stated before, when we looked at all
13 outlier cost management and our work with the vendor, there was a
14 concern that we weren't in the pack, and we were behind.

15 MR. ZAVITSANOS: Objection, Your Honor.

16 THE WITNESS: And so it wasn't a win for our clients.

17 MR. ZAVITSANOS: Excuse me. Hearsay, foundation, and
18 the issues we discussed at the bench. No ability to -- I'm not -- I don't
19 want to make a speaking objection, Your Honor. Foundation and
20 hearsay.

21 THE COURT: All right. Let's take our afternoon recess. I
22 would have taken it at 3:30, but you're afternoon's been a little bit
23 chopped up.

24 So during the recess don't talk with anyone else or each
25 other about any subject connected with the trial. Don't read, watch, or

1 listen to any report of or commentary on the trial. Don't discuss this
2 case with anyone connected to it by any medium of information,
3 including, without limitation, newspapers, television, radio, internet,
4 cellphones or texting.

5 Don't conduct any research on your own relating to the case.
6 Don't consult dictionaries, use the internet or use reference materials.
7 Do not post social media, don't talk, text Tweet, Google issues, or
8 conduct any other type of book or computer research with regard to any
9 issue, party, witness or attorney involved in this case.

10 Most importantly do not form or express any opinion on any
11 subject connected with the trial until the jury deliberates. It is 3:42. Let's
12 be ready at 4:00. We'll go for 45 minutes. And we thank you for your
13 courtesy.

14 THE MARSHAL: All rise for the jury.

15 [Jury out at 3:42 p.m.]

16 [Outside the presence of the jury]

17 THE COURT: Do you guys want to take a break and then put
18 it on the record, or put it on the record now?

19 MR. ZAVITSANOS: Whatever is the Court's pleasure, Your
20 Honor.

21 THE COURT: I'd rather do it while its fresh in everybody's
22 mind.

23 MR. ZAVITSANOS: So Your Honor, here's the issue. So
24 here's the issue. So counsel has selectively chosen a handful of the
25 SPD's that contain varying language. Some of the ones that he showed

1 do not contend reasonable and customary. We don't have all the SPDs
2 for all the clients associated with these claims and the amendments. But
3 the bigger issue now, and really the fundamental issue to me in this
4 case, is whether these changes -- this migration that they've mentioned,
5 whether that was client driven or whether that was United driven.

6 Now I have to say, Your Honor, it defies logic, it absolutely
7 defies logic, that a company as sophisticated as UnitedHealthcare with
8 the kind of infrastructure that they have has been unable to produce one
9 piece of paper from any client indicating that they were the initiating
10 force behind these changes.

11 And for this man, who -- and he did this multiple times
12 during my examination, to suggest that this was client driven, it literally
13 -- there is no way for me to be able to examine him on this point. And so
14 I'm left with -- the only thing that I'm left with is whether the jury finds
15 him palatable or not. Whether they find him credible or not, based on
16 his -- based on his oral word.

17 So I don't think it's appropriate to ask him whether this was
18 driven by the Plaintiff. Certainly if this was recommended -- if this was
19 driven by consultants, there's no consultant that I know and look we
20 work with a lot of clients that work with consultants, none of that's been
21 produced. None of these letters from these clients have been produced.
22 There's nothing. And there are -- there are some documents in evidence
23 where United is saying that the clients want it. He can use those. I mean
24 those are in evidence. That's fine. But to go further with what he's
25 saying here, I just -- it really puts us in a box.

1 MR. BLALACK: Your Honor, I disagree with that
2 characterization. We produced a half a million pieces of paper, which is
3 littered with communications about client pressures, client
4 competitiveness, lack of competitiveness, being behind the pack. I've
5 shown a handful of those today. He showed some of them in his
6 examination. And so I just think it is fundamentally factual and correct
7 that there isn't a substantial record in this massive document collection
8 about the basis for UnitedHealthcare's view that it was behind the pack
9 and that these programs at all were responsive. I've shown three today.

10 Mr. Zavitsanos' passively fair game to teach him and say you
11 know what, that's not true. This is what you're doing. You weren't really
12 behind the pack. In fact, within the last week, he showed him four or five
13 different documents, the purpose was to suggest to the jury that they
14 were leading the market. You may remember there were a couple of
15 them about how you're leading the market, and I forget the phrase,,
16 beating the doors off or something like that.

17 So there's evidence that both sides have available to argue to
18 the jury their respective position [indiscernible] but it's not from lack of
19 documentation.

20 On the claim document issue, they introduced three claim
21 documents in their exhibit. They did the Walmart plan; they did the
22 AT&T plan, and I'm trying to think of what the third one is, but I know at
23 least those two. And so I went and pulled out the Walmart plan myself.
24 So the notion that we're cherry-picking plan documents when they're
25 using plan documents that they want, and we made a production of

1 200,000 administrative records with the relevant plan language in there,
2 it's just baseless.

3 MR. ZAVITSANOS: A brief reply, Your Honor. I'm not taking
4 issue with counsel's right and privilege to select whatever documents
5 they want from the production and try to admit those in evidence. That's
6 not the issue. That's not my complaint. My complaint is there are no
7 documents, zero, zero, produced from third parties outside of United that
8 indicate that this is client driven. Zero. I mean literally zero.

9 And the second complaint that I have, Your Honor, is that not
10 all the plan documents were produced. Now the second concern I've
11 raised with the Court before, that's a little bit -- I'm more concerned
12 about it, but it's the first one that I'm particularly concerned about,
13 because look, that to me just feels a lot weightier in terms of the kind of
14 evidence that a jury would put stock in. Whether this was United being
15 motivated by greed or whether this was United trying to be kind of a
16 good corporate citizen and try to save their clients' money at their
17 request. That's a very material issue on the issue of what a reasonable
18 rate is. And so I'm just -- I've got one arm tied behind my back here.

19 MS. LUNDVALL: And Your Honor, what Mr. Zavitsanos is
20 doing is he's laying the foundation for the request in for the jury
21 instruction dealing with the adverse inference.

22 THE COURT: I understand.

23 MS. LUNDVALL: There was a sanction that was imposed as
24 far -- back in April. The documents that are being referenced fall within
25 the scope of that adverse inference and this witness has indicated

1 repeatedly that in fact there were conversations with clients, and then he
2 pivoted to conversations with consultants. And that there was
3 documentation from these third parties that were driving this. And that
4 is the documentation that we do not have.

5 THE COURT: I'm going to overrule the Plaintiffs' objection.
6 However, after I hear the cross-exam, or the -- when I hear your redirect
7 we'll resolve the issue of jury instructions.

8 MR. ZAVITSANOS: Thank you, Your Honor.

9 MR. BLALACK: Thank you, Your Honor.

10 THE COURT: Thank you both.

11 [Recess taken from 3:49 p.m. to 4:02 p.m.]

12 THE COURT: Ready to bring in the jury?

13 MR. BLALACK: We're ready, Your Honor.

14 THE COURT: The jurors are asking about a schedule for next
15 week. So I will do that -- I'll have it for them Friday. And we'll have
16 letters for their employers on Friday.

17 MR. ZAVITSANOS: And Your Honor, you -- I gather that
18 means Your Honor will make a decision on whether we start earlier or
19 not by Friday?

20 THE COURT: I will. I'm thinking between 8 and 8:30. And --

21 THE MARSHAL: All rise for the jury.

22 THE COURT: -- short lunches.

23 [Jury in at 4:03 p.m.]

24 THE COURT: Thank you. Please be seated. So to the
25 members of the jury, you know that you guys need a schedule for next

1 week. We're off tomorrow for the holiday. And for anyone who's a
veteran, thank you for your service. But Friday, we'll start again. Let's --
start at 9 Friday instead of 9:30. That'll give us a half hour. And more
than likely, next week we'll have longer days. I will also have a schedule
for you Friday and letters for your employers on Friday. Thank you.

Please proceed.

MR. BLALACK: Thank you, Your Honor.

BY MR. BLALACK:

Q Mr. Haben, when we broke, we were discussing the
suggestion that the shared savings program was a win-win. Do you
remember that?

A Yes, I do.

Q I think you had explained why while it offered a lot of good
benefits, it also had some drawbacks. Do you remember that testimony?

A Yes, I do.

Q Typically -- let's just remind the jury. The primary
component of the shared savings program is out-of-network?

A That is correct.

Q Typically, what are the nature of the agreements that the
third-party, like MultiPlan has in an out-of-network with those providers
that participate?

A Typically, they're a percentage off of billed charges. So
whatever the provider bills, it's a percent reduction off of that.

Q And has that methodology contributed in any way to the
shortcomings of the program?

1 A Yes.

2 Q Why?

3 A Because there was no limit to what the provider could do for
4 increasing their billed charges. So if it was a percentage off of that, if -- if
5 those bill charge amounts increase, which is really the chargemaster of
6 that specific provider. If that continues to go up, and goes up at a certain
7 point, the value of what that discount was prior could've been erased.

8 Q Let's just make sure the jury understands what you're talking
9 about there. I'm going to ask Ms. White to turn on her Elmo real quick.
10 So I'm going to just try to illustrate [indiscernible] over time. Sir, I've laid
11 out year one, year two, year three. Okay?

12 A Okay.

13 Q You see that?

14 A Yes.

15 Q Now, let's assume that the wrap agreement between
16 MultiPlan [indiscernible] and an out-of-network provider offered a 20
17 percent discount. Well, actually, something simple. A ten percent
18 discount for bill charges, okay?

19 A That's fine. Can I -- I'm going to be picky on how you put
20 that. It's not of bill charges.

21 Q Yeah.

22 A It's off of.

23 Q I'm sorry.

24 A That's very important.

25 Q Appreciate it. Sorry for that bad grammar. Okay. So in year

1 one, if the RAP agreement had an agreement ten percent off of build
2 charges, and the chargemaster or bill charged for a service under that
3 agreement was \$1,000 --

4 A Okay.

5 Q -- that's the assumption, what would be the rate that
6 UnitedHealthcare could access under the shared savings program for
7 that provider in this program?

8 A So it would be \$900. Ten percent reduction off of 1,000.

9 Q So is that description in year one capture it properly?

10 A Yes.

11 Q Okay. Now, let's assume for a hypothetical that the bill
12 charge for that provider has increased by ten percent in year two.

13 A Okay.

14 Q What would that bill charge be? Would that be \$1,100?

15 A Yes.

16 Q So with that same RAP agreement in place, what would be
17 the rate that UnitedHealthcare could access to reimburse a claim from
18 that same provider in year two?

19 A So it would be a ten percent reduction. So it'd be a \$110
20 reduction.

21 Q So that would be \$990?

22 A \$990. Yes.

23 Q All right. Now, let's assume in year three the provider's
24 charge is increased by \$100. So now that would be \$1,200 for the billed
25 charge in year three. So using the same RAP network agreement that

1 was in place on year one, what would be the rate that the
2 UnitedHealthcare plan could access under the shared savings program?

3 A So that'd be a ten percent reduction. So a reduction of \$120.
4 And that would be 1,080.

5 Q That's what I've got. 1,080 would be the rate under the
6 shared savings program. Does that look right, sir?

7 A Yes.

8 Q The following year, let's assume that the provider this time
9 only increases the charge by \$50. So now it's 1,250 in year four. Okay?

10 A Okay.

11 Q Under that same RAP agreement, with that ten percent
12 discount, what is the amount or the rate that UnitedHealthcare could
13 access for that provider for a member in year four?

14 A So that's a ten percent reduction. So that would be \$125
15 reduction. And I believe the math is 1,125.

16 Q So if I -- does that all apply, sir?

17 A Yes, it does, sir.

18 Q So same rate wrap agreement, same rate, same provider,
19 everything's the same. The only thing that changes is that the charge
20 increases year over year, correct?

21 A The chargemaster for that provider has increased.

22 Q And over that time, the rate the member -- the benefit plan is
23 paying using the shared savings program is increasing from year one at
24 \$900, in year four to 1,125?

25 A That is correct.

1 Q And does that -- like, is that hypothetical I'm describing here
2 typical of the experience that UnitedHealthcare observed in the market
3 during the period that you were questioned about by Mr. Zavitsanos?

4 A Yes.

5 MR. ZAVITSANOS: Excuse me, Your Honor. Objection. Lack
6 of specificity. And also, speaking as a corporate rep. So --

7 THE COURT: Overruled.

8 BY MR. BLALACK:

9 Q So as a result, did the dynamic that's illustrated in the
10 example we just walked through with the jury, was that a factor that
11 contributed to UnitedHealthcare's recommendations to clients about out-
12 of-network programs over the course of the period at issue in this case?

13 A Yes, it was.

14 Q Now, let's move on to a new topic. So I want to talk about
15 the suggestion that UnitedHealthcare's goal was to move clients off of
16 the reasonable and customary FAIR health program to shared savings
17 program enhanced to cut reimbursements and make more money.
18 Okay. That's what I'm going to focus on.

19 A Understand.

20 Q I'm going to show you the exchange that you had on this
21 question with Mr. Zavitsanos. This is page 57 of the transcript from
22 November 3rd. Okay. If you'd look at line 7 through 16, you'll see an
23 exchange that reads,

24 "Q So this document is in 2018. We've got -- it's two years after
25 the one we just looked at. We're getting these -- we're getting these

1 fees, these percentage fees. Now the goal is to get clients off of
2 reasonable and customary care health.

3 Can you underline that, Michelle?

4 "Q United's goal on this internal only document is to get clients
5 off of this so your salesforce can earn a fee, right?"

6 You responded, "That is misrepresented. I can explain."

7 "Q No, sir."

8 And then he proceeds. Is that correct?

9 A That is correct.

10 Q All right. Does that refresh your recollection of the issue I'm
11 going to be talking to you about now?

12 A Yes, it does.

13 Q You were also shown an example --

14 MR. ZAVITSANOS: Your Honor, under optional completion,
15 can we read the rest of the Q and A on that page, please?

16 MR. BLALACK: Sure.

17 THE COURT: You may.

18 MR. ZAVITSANOS: Including the Court's instruction.

19 MR. BLALACK: Sure.

20 THE COURT: You may.

21 BY MR. BLALACK:

22 Q All right. So the document I want to show you is referenced
23 in that exchange, sir. It's Plaintiff's Exhibit 368.

24 MR. BLALACK: So Shane, could you bring that up?

25 BY MR. BLALACK:

1 Q This is the document to which you -- about which you were
2 being questioned. Sir, do you remember being questioned about this
3 document?

4 A Yes, I believe so.

5 Q If you'd go to page 7. The first -- under the first sentence,
6 under the sales strategy of keeping counts it says, "The goal is to provide
7 value and advocacy for consumers and plan sponsors." Do you see that?

8 A Yes, I do.

9 Q Okay. What does that mean?

10 A What that means is clients demand value. And our goal was
11 to make sure that they are satisfied with what we provide.

12 Q Uh-huh.

13 A And that we were doing an advocacy component for the
14 program for the consumer. So that means the employees or the patients
15 and the plan sponsors to take the members out of the middle, if we need
16 to.

17 Q Now, underneath that, the very first bullet says, "Clients are
18 not obligated to change their out-of-network program. But you are
19 obligated to review the options and inform your clients as appropriate."
20 Do you see that?

21 A Yes, I do.

22 Q What was that -- what did that mean?

23 A Just you can't make a client change, but you need to make
24 sure that they understand what's available for them.

25 Q And earlier, we talked about whether United has programs

1 that were opt-in programs or opt-out programs, do you remember that?

2 A That's correct.

3 Q How does United's approach to that question relate to this
4 kind of stuff here?

5 A It's an opt-in concept.

6 Q Now, just to remind the jury, when we're talking about this
7 physician reasonable and customary, does that even apply to
8 [indiscernible], sir?

9 A It does not.

10 Q And with respect to the physician refund customary
11 program, what was United's goal in terms of dealing with its clients on
12 that program?

13 A Our goal was to inform them of the options that they had to
14 help address medical expense and to make sure that they understood
15 that, and what the fees were for that if they wanted to choose it so that
16 they could make a decision.

17 Q Now, you've described earlier with the shared savings
18 program some of its benefits and some of its drawbacks. Do you recall
19 that?

20 A Yes.

21 Q Were there any drawbacks to your -- on your time when you
22 were meeting out on that program with the physician reasonable and
23 customary agreement?

24 A I believe that there was the exposure to balance billing,
25 although fairly rare.

1 Q Okay. And the benchmarks that were used to price claims
2 under that program, what were they based on?

3 A They were based on what should providers submit for billed
4 charges.

5 Q So the same kind of concerns that were presented with the
6 shared savings program, were they present for the reasonable --
7 physician reasonable and customary program?

8 A Yes, they were.

9 Q In what way?

10 A Again, the same issue. There was no control. The providers
11 could do whatever they want for their bill charge amounts. And again, to
12 be very specific, it's their specific chargemaster, what they would submit
13 for a claim.

14 Q We've now covered that topic. Let's go on to the next one,
15 which is the information that was discussed with you, Mr. Haben,
16 regarding UnitedHealthcare allegedly making over \$1 billion in shared
17 savings fees for doing nothing and double dipping by getting PMP and
18 fees. Do you have questions around that topic?

19 A Yes, I do.

20 Q I'd like to show you the exchange just to orient the jury on
21 what we're talking about.

22 MR. BLALACK: Shane, this would be November 3rd
23 transcript, page 65, and line 3, please.

24 BY MR. BLALACK:

25 Q I'll just -- I'm not going to read it all. I'll just let the jury and

1 you, Mr. Haben, scan it. Down to line 25. At the end, you were asked
2 about the Bellagio Hotel and about how it's got bricks and mortar,
3 pictures of the room. And then the question is you were getting a \$1
4 billion every year for doing nothing other than just cutting the rate. You
5 then stated that was incorrect, I can provide context if you want. "No,
6 sir. Let's move on." Do you see that?

7 A Yes, I do.

8 Q Okay. What was the context you wanted to provide and
9 respond to?

10 A There are many things that United does to support the out-
11 of-network programs and shared savings. That includes FTEs that we
12 have to hire to support the program. There is claims administration in
13 terms of sending the claims out to a vendor. Obviously, HIPAA, which is
14 security for medical records is required. There's many other things
15 associated with the program itself.

16 Q And I believe for the shared savings program, that has a
17 member advocacy component, correct?

18 A For shared savings on the fee negotiation component, yes,
19 there is an advocacy piece.

20 Q So in other words, if an out-of-network provider is not a
21 participate in a RAP network, there could be a perspective negotiation as
22 part of that program to try to resolve a dispute, so the member is not
23 balance billed?

24 A That is correct.

25 Q And to the extent shared savings would incorporate shared

1 savings enhanced, which is the OCN program, is there an advocacy
2 component with that program?

3 A Yes, there is.

4 Q Is that a service for which United is seeking to be
5 compensated?

6 A Yes, we are.

7 Q Now, does United seek to be compensated in the form of a
8 fee from programs where it doesn't utilize an advocacy and offer an
9 advocacy component?

10 A No. A program like ENRP, where there's no advocacy, that's
11 free for the client.

12 Q Now, I was going to go through the -- how the shared
13 savings fee is calculated, but I think we've done that. I think the jury fully
14 understands. So I'm not going to go back to it. But I do want to try to
15 address this notion that you're being compensated -- UnitedHealthcare is
16 being compensated for doing nothing. I think you identified that there
17 are different percentages of shared savings fees; is that correct?

18 A Yes, there is.

19 Q Right. And correct me if I'm wrong, I believe you told Mr.
20 Zavitsanos, typically, somewhere in the neighborhood of 30 percent.

21 A Yes, it is.

22 Q So using that just as a guide for this question, if that's the
23 average administrative fee charge for the shared savings program that
24 produced the \$1 million in fees about which you were questioned by Mr.
25 Zavitsanos, can you tell the jury roughly how much that represents in

1 medical costs that health plan clients and their employees did not incur?

2 A What's -- rough math is about \$3 billion.

3 Q So does United Healthcare consider that a value that you
4 provide your clients?

5 A Yes.

6 Q Now Mr. Zavitsanos also asked you about a PMPM fee that
7 United Healthcare from its self-funded clients. So it's different from the
8 shared savings fee. Do you recall this question?

9 A Yes, I do.

10 Q Just to remind the jury, what does PMPM stand for?

11 A Per member per month.

12 Q What is that fee for?

13 A It's the administration of the health plan. Includes benefit or
14 claims administration that's both -- that's in our network. Could be ID
15 card generation. It could be health plan document generation. It could
16 be a number of things.

17 Q Would it include, you know, creating and managing a
18 network?

19 A Yes, it could.

20 Q So are those kinds of services that are typically covered by
21 PMPM fee the kinds of services that are covered by a shared savings fee?

22 A No, they're not.

23 Q So is the shared savings fee different from the PMPM fee?

24 A Yes, it is.

25 Q So for those health plans that have a PMPM fee but who

1 choose an out of network plan like shared savings where United
2 Healthcare charges made as separate against an administrative fee, why
3 does United Healthcare also receive that additional fee on top of the
4 PMPM fee?

5 A In terms of the shared savings fee?

6 Q Yes.

7 A It's for the cost of administrating the service and the value of
8 the program.

9 Q Now Mr. Zavitsanos asked you a lot of questions about the
10 amount of the margins, the revenue you make, whether United
11 generated a lot of revenue over the years. Do you think it was unfair for
12 United Healthcare to be paid these administrative fees for an out of
13 network program?

14 A No, I do not.

15 Q Why not?

16 A The clients were well aware of the value of the programs that
17 could be provided. The percentages and the fees were very clear.
18 There's bills that they get on a regular basis. It's all transparent.

19 Q Are you ashamed of trying to make money with a business
20 [indiscernible]?

21 A No. And I -- you know, I will take -- tell you that the shared
22 savings and what it does for the member and the value that it provides
23 as well as the employer group, it helps them out.

24 Q As the guy who ran the out-of-network program for close to
25 20 years before you retired --

1 A Yes.

2 Q -- how do you feel about the work you did, are you proud of
3 it?

4 A Very proud. And you know, the staff that we have that have
5 been with me for -- some have been there for 20 years. They enjoy the
6 work that they do and the help that they provide people. We get
7 engaged with people. We help employer groups. It's -- I view -- I'm very
8 proud of what we did.

9 Q All right. Now I want to move on to the next document, sir,
10 which is the suggestion that the claim I made in opening statement
11 regarding bill charges realized between -- and I'm talking about in the
12 state between 2019 and 2020 -- is contradicted by a United Healthcare
13 email. Do you remember questions around that topic?

14 A I believe so.

15 Q Okay. Now we're going to offer evidence in this case on
16 what the data shows. So that'll get resolved for the jury one way or the
17 other, and they'll know who was being forthright and who wasn't. But I
18 want to talk about the questioning you received in the cross-examination
19 from Mr. Zavitsanos. So that's --

20 MR. BLALACK: Shane, that's November 3, 2021, page 11 out
21 of 17. I think if you -- yeah.

22 BY MR. BLALACK:

23 Q So this is, I think, quoting from my statements in the opening
24 statement. Yeah. Here we go. We have a transcript of counsel's
25 opening. It says:

1 "Q The evidence is going to show that FAIR health 80th
2 percentile, those charges grew, grew, grew, dropped out a bit, and t hen
3 skyrocketed. Did you hear that?" That's Mr. Zavitsanos asking you that.

4 You then responded, "I did not."

5 "Q In support of that, he put up a statistic showing a graph with
6 the charges going through the roof. Did you see that? "

7 "A I did not.

8 Then he said,

9 "Q "Well, that's my friend, Mr. Leyendecker, back there. He got
10 very excited when he heard that because the reality is you all
11 manipulated these numbers, right?"

12 I object.

13 And then you answer, "I disagree."

14 A little further on page 15, this is where it kind of wraps up. Going
15 on for a while. Page 15, line 17.

16 "Q Well, we got your lawyer telling the jury charges were
17 skyrocketing, but in real time, it says the opposite. Which one should the
18 jury put more stock in?

19 "A I think you're misrepresenting it. So which is

20 "Q Which one should they put more stock in, sir, the document
21 or what your counsel said? That's my question."

22 You answer,

23 "A Bill charges went down because we brought providers into
24 the network. That doesn't reflect what a specific provider would charge.

25 And then Mr. Zavitsanos objected. The answer is

1 nonresponsive.

2 And you said,

3 "A Those are two different statements between --

4 Now here's -- the document he's referring to is an email.

5 Plaintiff's Exhibit 37. And I'll show you that and show the jury that. And

6 this is [indiscernible] -- and you can look at this [indiscernible]. It's an

7 email from Ms. Paradise. I don't think you're copied on this, actually.

8 MR. BLALACK: So we can go on down to the second page.

9 MR. ZAVITSANOS: I'm sorry. What exhibit is this?

10 MR. BLALACK: This is Plaintiff's Exhibit 370.

11 MR. ZAVITSANOS: Thank you.

12 [Counsel confer]

13 MR. BLALACK: 370. There we go.

14 [Counsel confer]

15 BY MR. BLALACK:

16 Q Okay. So let's go over this again. This is Mr. Weinstock

17 [indiscernible]. And I do think there's actually a copy of this

18 [indiscernible] in 26 is that one. But the one that you were questioned

19 about is two days earlier, the middle on the second page. So it should

20 be June 24. Yeah. There we go. Now if you go down, there should be

21 some bullet points.

22 MR. BLALACK: [Indiscernible] keep going. There we go.

23 BY MR. BLALACK:

24 Q And it says in the last paragraph after bullet point listed, it

25 says -- let's see where it says this. I lost the [indiscernible].

1 MR. BLALACK: Is that page 2?

2 MR. GODFREY: That was 3.

3 MR. BLALACK: There we go. Oh, okay.

4 BY MR. BLALACK:

5 Q Okay. So he says as we discussed, even though we are
6 seeing increased savings year over year, we're experiencing continued
7 reduction, non-par charges [indiscernible]. That has been the case since
8 year 2016. Do you see that?

9 A Yes, I do.

10 Q Now when you were questioned about this, the suggestion
11 that this wasn't consistent with my representation to the jury about
12 whether charges were not [indiscernible] initially. You contested that the
13 statement I made was incorrect. And you said that -- you tried to explain
14 what this referred to. Do you remember that?

15 A Yes, I do.

16 Q Would you please explain to the jury what you were saying?

17 A So what I was trying to provide clarification on, this is
18 referring to kind of an overall pooling of all the non-par charges. We
19 brought a provider in, which is a contract that I did, Quest, into the
20 United relationship. And that brings the pool dollars down.

21 The other -- that's completely different than when you think about
22 an individual provider's charge master, like what they submit for a
23 charge. So you could bring the entire -- you could reduce the pool of all
24 the non-par provider billed charges by bringing somebody in. That
25 provider now is considered in network. That pool of dollars drops. But

1 still, the providers in that pool of non-part charges, if you look at them
2 individually, they have their own individual charges, their charge master,
3 what they would submit for a claim.

4 So what I'm clarify is even though maybe you brought somebody
5 in because they came in network, an individual provider's billed charges
6 in that pool still could be going up. That was my point.

7 Q Okay. So let's try to unpack that a little bit. So first of all,
8 what's a charge master?

9 A I viewed it as this is what they submit, kind of the value -- the
10 dollar amounts that they put towards the services of the claims that they
11 would submit. So --

12 Q Is it like a price list?

13 A It's like a price list. Thank you.

14 Q And that's what -- when we think of charges, do you think of
15 what's the price listed on the charge master?

16 A Yes.

17 Q Okay. Now when you refer to removing providers from the
18 pool of charges, the out of network charges, bill charges, and then
19 coming in, what do you mean by coming in? Coming in to what?

20 A So they became a par provider. Quest is a very large
21 national lab. And their dollars came -- became a participating provider,
22 because we have a written agreement with them. And so, they are no
23 longer non-participating provider. So the value of -- or whatever they
24 had for their bill charges in there moved over to an in network bucket.

25 Q So just for example, if Quest had been out of network prior to

1 this email, those dollars would have been reflected in the pool of bill
2 charges being evaluated; is that correct?

3 A Correct.

4 MR. ZAVITSANOS: Objection, Your Honor. Leading.

5 THE COURT: It is leading. Rephrase.

6 MR. BLALACK: I'll withdraw.

7 BY MR. BLALACK:

8 Q So walk me through the -- take the Quest as an example.
9 Walk the jury through how the metric would be evaluated when Quest
10 was out of network and then what would happen to the analysis once
11 they came in.

12 A Let's think about the -- so Quest, very large national lab.
13 Prior to having an agreement, they were being viewed as an out-of-
14 network or non-par provider. They're one of, you know -- I think the
15 example was we had five percent of the claims come in as non-par.
16 They would have been in that consideration of a non-par provider.

17 Once we got a contract with Quest, they're not -- the out of network
18 program is not applicable, because they're part of United's network, and
19 those pool of dollars now is being viewed as in network, and our
20 programs would not apply.

21 Q So if the jury later hears evidence in this case that the bill
22 charges or charge master [indiscernible] went up every year, and if they
23 later hear evidence that the FAIR health data on which they're relying
24 shows that the charges in the state of Nevada went out every year and it
25 showed how much, is there anything inconsistent with that evidence and

1 the statement that's -- was quoted to you from Ms. Paradise in this
2 email?

3 A No.

4 Q Why?

5 A You got to think about the individual charges for that
6 provider. If they continue to go up, they're ones that would contribute to
7 the overall billed charges of an account of an administrator like us. But if
8 you bring somebody in network, those charges go down. So you still
9 could have somebody that has individually high charges but, overall, in
10 aggregate, your overall charges could go down, because you're
11 contracting with somebody and bringing them in network.

12 Q All right. I'm going to move on to one more issue before we
13 break for the day.

14 MR. BLALACK: And, Shane, I'm going to skip ahead to
15 something. One second, Your Honor. Court's indulgence.

16 BY MR. BLALACK:

17 Q All right. Now the thing that I want to talk about is some
18 questioning you received regard the AT&T benefit plan. I think that may
19 have happened yesterday. And the suggestion was that there was an
20 AT&T benefit plan that required United Healthcare to reimburse a claim
21 at the reasonable and customary rate but that United Healthcare ignored
22 that benefit plan and paid the claim at the Data iSight rate instead. Do
23 you remember that question?

24 A Yes, I do so.

25 Q Okay.

1 A I believe so.

2 Q So let me show you the transcript. It's page -- November 9th,
3 transcript page 38, line 17 down at the bottom. You took this claim -- the
4 question was

5 "Q You took this claim, and you applied one of your alleged
6 programs to it when the plan says you're supposed to use reasonable
7 and customary so that you can make a fee, right?

8 "A That's incorrect. I don't know if this plan document goes
9 with this EOB. AT&T has got multiple policy numbers. So if you want to
10 show me the SPD from the group number, I can see if that's the same
11 one."

12 Do you see that, sir?

13 A I do.

14 Q Okay. Now I want to go back over those documents and see
15 if we can figure this out. Now the first point I want to ask, sir, is you
16 remember that you were shown that EOB. And that's Plaintiff's Exhibit
17 444.

18 MR. BLALACK: Bring that up.

19 BY MR. BLALACK:

20 Q Do you recognize this as the document that Mr. Zavitsanos
21 showed you?

22 A Yes. Yes, I do.

23 Q Now do you remember, on the top of page 1, where it says
24 member patient information?

25 A Yes.

1 Q And if one wanted to know what specific plan was connected
2 to this patient and this claim, what information in that box would be
3 helpful to track that down?

4 A The group number would be the most specific.

5 Q Okay. Now the group name there is AT&T Mobility, correct?

6 A That's correct.

7 Q Okay. And I think you testified yesterday that AT&T is a
8 client of United Healthcare?

9 A Yes.

10 Q And do you know if AT&T has more than one plan with
11 United Healthcare?

12 A I believe they do.

13 Q Now are all of those plans exactly the same?

14 A I do not believe they are.

15 Q Now under group number there, you'll see a number. Can
16 you tell the jury what that number is?

17 A 0712670.

18 MR. BLALACK: Now I'm going to ask everyone to remember
19 that, and I will pull it up right now. Group number 0712670.

20 BY MR. BLALACK:

21 Q Now I'm going to ask Shane to pull up Plaintiff's Exhibit 290,
22 which I believe was the certificate of coverage that you were shown for
23 the AT&T client. Do you see that, sir?

24 A Yes, I do.

25 Q So it was offered into evidence yesterday and shown to you

1 [indiscernible]. Do you remember that?

2 A Yes, I do.

3 Q Okay. Now if you look on page 2 of that certificate of
4 coverage, I think you'll see a group number. See a group number?

5 A Yes, I do.

6 Q What's that number?

7 A 730247.

8 Q Okay.

9 MR. BLALACK: I'm going to Ms. White if she can
10 [indiscernible] over to the Elmo real quick.

11 BY MR. BLALACK:

12 Q Sir, I wrote down those two numbers. Would you agree with
13 me that the group number from the EOB that you were shown is
14 different from the group number from the certificate of coverage that
15 you were shown?

16 A Yes, it is.

17 Q What does that tell you?

18 A That EOB is not associated with that certificate of coverage.

19 Q And if you remember, is that certificate of coverage is the
20 coverage that suggested that the reimbursement for a claim for a
21 member under that policy should be in a reasonable and customary
22 range?

23 MR. ZAVITSANOS: Your Honor, may we approach for a
24 second, please?

25 THE COURT: You may.

1 [Sidebar at 4:38 p.m., ending at 4:40 p.m., not transcribed]

2 BY MR. BLALACK:

3 Q All right. So let's wrap this up now sir. Now let's go back to
4 Plaintiffs' Exhibit 444. Now on 444, you'll see a claim number. Do you
5 see that, sir, on page 1?

6 A Yes.

7 Q Okay. And what is that claim number?

8 A That's the unique claim number that is in our unit platform.

9 Q Would it be possible to read that, sir?

10 A I'll try. I believe it says AV6833167501.

11 Q Okay. I've either got AV6833167561 or AV66316751, but we'll
12 keep that [indiscernible].

13 MR. ZAVITSANOS: What exhibit is this, please?

14 MR. BLALACK: This is Plaintiffs'[Exhibit 444. And then I
15 would like to bring up Plaintiffs' Exhibit 470 and also show that to you.

16 MR. ZAVITSANOS: Hold on. Is this the one that was
17 refused?

18 MR. BLALACK: This is -- these are all the ones you've used
19 with him, yeah.

20 MR. ZAVITSANOS: Well, wait a minute. No, I don't think it
21 is.

22 [Counsel confer]

23 MR. ZAVITSANOS: Your Honor, may I just check something
24 real quick, please? Because we had that issue with the --

25 THE COURT: Right.

1 MR. ZAVITSANOS: -- with the wrong claim. Your Honor, I'm
2 sorry for the interruption. May I ask counsel to please -- whatever
3 number he just referenced, the identifier number, can I just have him
4 show me --

5 MR. BLALACK: Is it the claim number you're asking for --

6 MR. ZAVITSANOS: I just need to know what reference
7 number. May I just confer with him, please?

8 THE COURT: Yes.

9 [Counsel confer]

10 MR. ZAVITSANOS: Got it. Thank you.

11 MR. BLALACK: All right. And would you now [indiscernible]
12 Plaintiff's Exhibit 470. All right. This is another document Plaintiffs'
13 counsel showed you, Mr. Haben, called an online reading summary or an
14 online reading history. Do you recall that?

15 A Yes, I do.

16 Q And you see that about four lines down, there's an entry
17 entitled Claim FC Number?

18 A Yes, I do.

19 Q Do you know what a Claim FC Number is?

20 A I believe that's the claim number.

21 Q And can you tell us what that claim number is?

22 A That's more clear, it's AY15596070.

23 Q Okay. So is the claim number in Plaintiffs' Exhibit 470
24 different from the claim number on Plaintiffs' Exhibit 444?

25 A Yes, it is.

1 Q So from your review, is there any reason to believe that the
2 claim that's associated with Plaintiffs' Exhibit 470 relates in any way to
3 the claim described in Plaintiffs' Exhibit 444?

4 A No.

5 Q Do you believe these two documents are discussing different
6 claims?

7 A Yes.

8 Q So when Mr. Zavitsanos suggested yesterday that United
9 Healthcare disregarded the AT&T health claim language, requiring
10 payment using the physician usual and customary program and instead
11 paid the claim using the outline cost management program, do you see
12 anything in these documents that suggest that's true?

13 A No.

14 MR. ZAVITSANOS: Same objection as we discussed at the
15 bench, Your Honor.

16 THE COURT: So noted.

17 MR. BLALACK: Your Honor, at this time, I think I can -- we
18 can call it for the night and let the jury go home.

19 THE COURT: All right. Thanks everyone. So during the
20 recess -- we're in recess until Friday at 9:00 a.m.

21 During the recess, you're instructed not to talk with each
22 other or anyone else on any subject connected with the trial. Don't read,
23 watch, or listen to any report of or commentary on the trial. Don't
24 discuss this case with anyone connected to it by any medium of
25 information, including, without limitation, newspapers, television, radio,

1 internet, cellphones or texting.

2 Don't conduct any research on your own relating to the case.

3 Don't consult dictionaries, use the internet or use reference materials.

4 Do not post social media about the trial. Also do not talk or text with

5 others, Tweet, Google issues, or conduct any other type of book or

6 computer research with regard to any issue, party, witness or attorney

7 involved in this case.

8 Most importantly do not form or express any opinion on any

9 subject until the case is submitted to the jury. Have a great day

10 tomorrow. See you Friday at 9:00.

11 THE MARSHAL: All rise for the jury.

12 [Jury out at 4:45 p.m.]

13 [Outside the presence of the jury]

14 THE COURT: All right. Plaintiff I assume you are going to

15 want to put something on the record.

16 MR. ZAVITSANOS: Your Honor, the only thing I would add,

17 Your Honor --

18 THE COURT: The room is clear.

19 MR. ZAVITSANOS: Your Honor, my short term memory is

20 affecting, and I don't remember whether I put this on the record or not.

21 MR. BLALACK: I'm positive he did, Your Honor.

22 THE COURT: After three weeks of trial, you know, you guys

23 are working your butts off, I can tell.

24 MR. ZAVITSANOS: Yeah.

25 THE COURT: And you're not -- and you're not even rusty, so.

1 MR. ZAVITSANOS: So out of an abundance of caution, Your
2 Honor, if I've already done this, my apologies to the Court and my
3 apologies to counsel. So we just got done with an exchange with Mr.
4 Haben regarding the AT&T summary plan description with the
5 suggestion being that the -- that the claim, the EOB, which I think was
6 Exhibit 444, that it was processed correctly according to the -- to the
7 dictates of the plan. Especially after the witness said they always follow
8 the plan language. Counsel used Exhibit 290 --

9 MR. BLALACK: 290.

10 MR. ZAVITSANOS: -- which counsel represented is a
11 different plan than the plan referenced in the EOB and therefore it
12 doesn't apply. The problem with that is the one that allegedly does
13 apply, has never been produced, and I don't have it. And I have a good
14 faith reason to believe -- I don't want to tip my hand here. I have a good
15 faith reason to believe that that reasonable and customary language is in
16 everything AT&T does. And so, you know, that's -- as we say where I'm
17 from, that's going to kick as hard as it chews, when I get him back on
18 recross.

19 But I'm at a little bit of a disadvantage here because I don't
20 have that -- I don't have the documents in which counsel was suggesting
21 indicates a different methodology.

22 THE COURT: And --

23 MR. BLALACK: I disagree with that factual assertion, and we
24 can certainly litigate that question in due time, when it's appropriate, but
25 I do agree that the benefit plan language that relates to the claims that

1 are in dispute that have not been produced because we produced the
2 administrative records for this. So at an appropriate time, they can move
3 to [indiscernible] it, but we think they're wrong with that.

4 THE COURT: Good enough. All right. And I had indicated at
5 the bench you would have to address it on your redirect.

6 MR. ZAVITSANOS: Yes, Your Honor, yes.

7 THE COURT: All right. Just to give you guys, we only had 41
8 people today on BlueJeans and one was the law clerk. Well, so
9 anyway --

10 MR. BLALACK: I'm much less exciting than Mr. Zavitsanos,
11 Your Honor.

12 THE COURT: You guys are great -- you're all great lawyers.

13 MR. ZAVITSANOS: Well, he's quality, I'm quantity.

14 THE COURT: No, you're all great lawyers. Have a good day
15 off tomorrow. I have a feeling you'll be working all day.

16 MR. ROBERTS: And I do want to request that the Court
17 allocate five or ten minutes before Court on Friday for me to raise an
18 additional issue.

19 THE COURT: Happy to do it.

20 MR. ROBERTS: I did want to thank Mr. Zavitsanos who has
21 confirmed that the materials that we objected to were taken down from
22 the website including some video. But this may cause us to look further
23 into the video issue, because the Court granted a media access request
24 for a communications company, but the video was posted on their
25 website which indicated an investigative company. And it appears that

1 this communication company is actually a licensed private investigator
2 who advertised that he works for lawyers and parties to do publicity in
3 conjunction with trials. And this person who represented he was a news
4 reporter has posted YouTube videos to the website mixing in courtroom
5 video with video taken of a witness on the stand outside the courtroom,
6 and he asked questions with Geppetto heads on counsel for United.
7 Disparaging counsel. And if this is an agent of a party doing this --

8 THE COURT: You better do some research into it and bring it
9 back to my attention in a way that I can act on it.

10 MR. ZAVITSANOS: So let me -- Your Honor, I just thought --
11 if I could briefly address this. This gentleman does not -- I did not hire
12 him. In fact, Your Honor, he is a -- he's actually done investigations on
13 me, Your Honor. If you go on his website he did a whole big piece on
14 me on a case that I was involved with. He is -- he is not someone that I
15 particularly care for. I don't have -- I don't have a relationship with him.

16 THE COURT: It's not that you know he was --

17 MR. ZAVITSANOS: He is -- he is a shock journalist.

18 THE COURT: He was on the escalator ahead of us coming up
19 this morning and tried to talk to me. We had to shut that down. Just so
20 you know.

21 MR. ZAVITSANOS: Yeah.

22 THE COURT: You know, if there are grounds to rescind the
23 media request, I'll consider that. But I want to hear it after you've
24 developed the ideas and talked to each other.

25 MR. ROBERTS: I will, Your Honor.

1 THE COURT: You know.

2 MR. ZAVITSANOS: And I would like an opportunity -- I mean
3 Mr. Roberts and I get along very well. This is the first I'm hearing of this
4 and so I would -- you know.

5 THE COURT: Good enough. Yeah, flush it out. You've got a
6 whole day tomorrow. When you're not doing everything else you're
7 doing.

8 MR. ROBERTS: Thank you. I assume nothing else is going
9 to be posted until we can get this issue --

10 MR. ZAVITSANOS: I can't control what he does, Your Honor.
11 Believe me.

12 MR. ROBERTS: No, no, no, I'm talking about your client on
13 the TeamHealth website.

14 MR. ZAVITSANOS: Oh, yeah, I mean of course, of course.

15 MR. ROBERTS: Okay. Thank you.

16 MR. ZAVITSANOS: Thank you.

17 MR. ROBERTS: I appreciate it. Thank you, so much, Your
18 Honor.

19 THE COURT: Thank you both.

20 MR. MCMANIS: Your Honor, with respect to deposition
21 designations, we did get just a short while ago the objections from the
22 other side to the additional portion of the parts that have been pulled
23 out, because of the possibility they may be played on Friday.

24 THE COURT: Friday.

25 MR. MCMANIS: I don't know if there's a way that we can get

1 that to you tomorrow with everything compiled.

2 THE COURT: You can. I'm not planning on coming to the
3 office tomorrow. But I can. I have appointments I've made, you know,
4 whatever. So I will be home probably by 4:00 p.m. So if you email it to
5 the Law Clerk, I'll ask him to forward it to me, and I can do it for you
6 before Friday morning.

7 MR. MCMANIS: Thank you, Your Honor.

8 THE COURT: Thanks. All right. Everybody, take care.

9 MR. BLALACK: Thank you, Your Honor.

10 [Proceedings adjourned at 4:52 p.m.]

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20 ATTEST: I do hereby certify that I have truly and correctly transcribed the
21 audio-visual recording of the proceeding in the above entitled case to the
22 best of my ability.

23 

24 Maukele Transcribers, LLC

25 Jessica B. Cahill, Transcriber, CER/CET-708

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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

CHAMBERS HEARING REQUESTED

**DEFENDANTS' MOTION FOR LEAVE
TO FILE DEFENDANTS'
PRELIMINARY MOTION TO SEAL
ATTORNEYS' EYES ONLY
DOCUMENTS USED AT TRIAL
UNDER SEAL**



1 UNITED HEALTHCARE INSURANCE
 2 COMPANY, a Connecticut corporation; UNITED
 3 HEALTH CARE SERVICES INC., dba
 4 UNITEDHEALTHCARE, a Minnesota
 5 corporation; UMR, INC., dba UNITED
 6 MEDICAL RESOURCES, a Delaware
 7 corporation; SIERRA HEALTH AND LIFE
 8 INSURANCE COMPANY, INC., a Nevada
 9 corporation; HEALTH PLAN OF NEVADA,
 10 INC., a Nevada corporation,

11 Defendants.

12 Defendants UnitedHealthcare Insurance Company (“UHIC”), United HealthCare
 13 Services, Inc. (“UHS”), UMR, Inc. (“UMR”), Sierra Health and Life Insurance Co., Inc. (“SHL”),
 14 and Health Plan of Nevada, Inc. (“HPN”) (collectively “Defendants”), by and through their
 15 attorneys, hereby move to seal, pursuant to Rule 3(1) of the Nevada Supreme Court Rules
 16 Governing Sealing and Redacting of Court Records (“SRCR”), Defendants’ Preliminary Motion
 17 to Seal Attorneys’ Eyes Only Documents Used at Trial Under Seal (the “Motion”).

18 This Motion is made and based upon the papers and pleadings on file herein, the
 19 Declaration of Colby Balkenbush and the following memorandum of points and authorities.

20 Dated this 12th day of November, 2021.

21 /s/ Colby L. Balkenbush

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 24 Brittany M. Llewellyn, Esq.
 25 Phillip N. Smith, Jr., Esq.
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**DECLARATION OF COLBY BALKENBUSH IN SUPPORT DEFENDANTS' MOTION
FOR LEAVE TO FILE DEFENDANTS' PRELIMINARY MOTION TO SEAL
ATTORNEYS' EYES ONLY DOCUMENTS USED AT TRIAL UNDER SEAL**

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

2. This Declaration is submitted in support of Motion to Seal Defendants' Preliminary Motion to Seal Attorneys' Eyes Only Documents Used at Trial Under Seal ("the Motion").

3. 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.

4. The Motion contains references to and summaries of materials which have been designated Attorneys' Eyes Only under the Stipulated Confidentiality and Protective Order (the "Confidential Material"). The documents were designated as such as they contain highly competitive and/or commercially sensitive proprietary and non-public information that would significantly harm the business advantages of Defendants if made public, including internal strategy discussions and business plans. In addition, some of the exhibits to Defendants' Motion reference or discuss materials which have been designated as "Attorneys' Eyes Only" under the Protective Order.

5. The Protective Order sets forth that documents designated as "Attorneys' Eyes Only" must be filed under seal.

6. Defendants file the instant Motion to Seal in accordance with SRCR 3(1), as there are sufficient grounds to seal the Confidential Material under SRCR 3(4).

7. I declare that the foregoing is true and correct under the penalty of perjury under the laws of the state of Nevada.

DATED: November 12, 2021.

/s/ Colby L. Balkenbush
Colby L. Balkenbush



MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

Defendants move this Court to allow the filing of their Motion under seal, pursuant to Rule 3(1) of the Nevada Supreme Court Rules Governing Sealing and Redacting of Court Records (“SRCR”). The Motion contains information from documents which have been designated as “Attorneys’ Eyes Only” under the parties’ Stipulated Confidentiality and Protective Order (“Protective Order”), and further includes exhibits that are designated the same (collectively, the “Confidential Material”). The documents were designated Attorneys Eyes’ Only as they include highly competitive and/or commercially sensitive proprietary and non-public information that would significantly harm the business advantages of Defendants if made public, including internal strategy discussions and business plans.

There will be no prejudice to Plaintiffs because the parties’ Protective Order mandates that documents designated as “Attorneys’ Eyes Only” or summarizing Attorneys’ Eyes Only information must be filed under seal, and Plaintiffs’ counsel has full access to the Motion and any Confidential Material therein. Defendants respectfully request that the Court permit the filing of the Confidential Material under seal.

II. LEGAL ARGUMENT

Rule 3.4 of the Nevada Rules for Sealing and Redacting Court Records (“SRCR”) provides in pertinent part that:

The court may order the court files and records, or any part thereof, in a civil action to be sealed or redacted, provided the court makes and enters written findings that the specific sealing or redaction is justified by identified compelling privacy or safety interests that outweigh the public interest in access to the court record. The parties’ agreement alone does not constitute a sufficient basis for the court to seal or redact court records. The public interest in privacy or safety interests that outweigh the public interest in open court records include findings that:

- (a) The sealing or redaction is permitted or required by federal or state law;
- (b) The sealing or redaction furthers an order entered under NRCP 12(f) or JCRCP 12(f) or a protective order entered under NRCP 26(c) or JCRCP 26(c);



1 (f) The sealing or redaction includes medical, mental
2 health, or tax records;

3 *****

4 (h) The sealing or redaction is justified or required by another identified
5 compelling circumstance.

6 SRCR 3.4.

7 On June 24, 2020, pursuant to a stipulation by and between the parties, this Court entered
8 the Protective Order. The Protective Order provides that a party may designate a document as
9 “Attorneys’ Eyes Only” if any portion of it contains material, testimony, or information that the
10 party “reasonably and in good faith believes contains trade secrets or is such highly competitive
11 or commercially sensitive proprietary and non-public information that would significantly harm
12 business advantages of [the Party]...and that disclosure of such information could reasonably be
13 expected to be detrimental to the [Party’s] interests.” Prot. Ord. at 2-3.

14 The Protective Order further provides that the parties will file a motion to have
15 confidential / sensitive discovery material filed under seal, including any portion of a court paper
16 that discloses confidential / sensitive discovery material. *Id.* at 20. The Confidential Material at
17 issue here contains highly competitive and/or commercially sensitive proprietary and non-public
18 information that would significantly harm the business advantages of Defendants if made public,
19 including internal strategy discussions and business plans.

20 Consistent with the parties’ agreement contained in the Protective Order, Defendants
21 move to file the Motion under seal. The Motion contains information from documents which
22 have been designated as “Attorneys’ Eyes Only” under the Protective Order, and further includes
23 exhibits attached that are designated the same.

24 Based on the Protective Order and the confidential nature of these documents, SRCR 3(4)
25 provides a sufficient basis to order sealing the Motion and Confidential Exhibits thereto. The
26 Motion has thus been filed temporarily under seal and should remain under seal until such time
27 as this Court has had an opportunity to rule on the instant Motion, and in perpetuity unless this
28 Court finds otherwise.



III. RELIEF REQUESTED

For the foregoing reasons, Defendants respectfully request that the Court enter an Order sealing Defendants' Preliminary Motion to Seal Attorneys' Eyes Only Documents Used at Trial Under Seal and any other Confidential Material. Defendants further request that the Confidential Material remain under seal until such time as this Court has had an opportunity to rule on the instant Motion, and in perpetuity unless this Court finds otherwise.

Dated this 12th day of November, 2021.

/s/ Colby L. Balkenbush

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of November, 2021, a true and correct copy of the foregoing **DEFENDANTS' MOTION FOR LEAVE TO FILE DEFENDANTS' PRELIMINARY MOTION TO SEAL ATTORNEYS' EYES ONLY DOCUMENTS USED AT TRIAL UNDER SEAL** 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.

UNITED HEALTHCARE INSURANCE
COMPANY, a Connecticut corporation; UNITED
HEALTH CARE SERVICES INC., dba
UNITEDHEALTHCARE, a Minnesota corporation;
UMR, INC., dba UNITED MEDICAL
RESOURCES, a Delaware corporation; SIERRA
HEALTH AND LIFE INSURANCE COMPANY,
INC., a Nevada corporation; HEALTH PLAN OF
NEVADA, INC., a Nevada corporation,

Defendants

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

**NOTICE OF ENTRY OF ORDER
GRANTING IN PART AND
DENYING IN PART PLAINTIFFS'
MOTION IN LIMINE TO
EXCLUDE EVIDENCE SUBJECT
TO THE COURT'S DISCOVERY
ORDERS**

Please take notice than an Order Granting In Part And Denying In Part Plaintiffs' Motion In
Limine To Exclude Evidence Subject To The Court's Discovery Orders was entered on November

1 12, 2021, a copy of which is attached hereto.

2 DATED this 12th day of November, 2021.

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and Jones, Ltd. dba Ruby Crest Emergency Medicine

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on this 12th day of November, 2021, I caused a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION IN LIMINE TO EXCLUDE EVIDENCE SUBJECT TO THE COURT'S DISCOVERY ORDERS** to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

UNITED HEALTHCARE INSURANCE
COMPANY, a Connecticut corporation;
UNITED HEALTH CARE SERVICES INC.,
dba UNITEDHEALTHCARE, a Minnesota
corporation; UMR, INC., dba UNITED
MEDICAL RESOURCES, a Delaware
corporation; SIERRA HEALTH AND LIFE
INSURANCE COMPANY, INC., a Nevada
corporation; HEALTH PLAN OF NEVADA,
INC., a Nevada corporation,

Defendants.

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

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS'
MOTION IN LIMINE TO EXCLUDE
EVIDENCE SUBJECT TO THE
COURT'S DISCOVERY ORDERS**

Hearing Date: October 19–20, 2021

1 This matter came before the Court on October 19–20, 2021 on plaintiffs Fremont
2 Emergency Services (Mandavia), Ltd. (“Fremont”); Team Physicians of Nevada-Mandavia,
3 P.C. (“Team Physicians”); Crum, Stefanko and Jones, Ltd. dba Ruby Crest Emergency
4 Medicine’s (“Ruby Crest” and collectively the “Health Care Providers”) Motion in Limine to
5 Exclude Evidence Subject to the Court’s Discovery Orders (the “Motion”). Pat Lundvall,
6 Kristen T. Gallagher and Amanda M. Perach, McDonald Carano LLP; and John Zavitsanos,
7 Joe Ahmad, Kevin Leyendecker, Jane Robinson, and Jason McManis, Ahmad, Zavitsanos,
8 Anaipakos, Alavi & Mensing, P.C., appeared on behalf of the Health Care Providers. D. Lee
9 Roberts and Colby Balkenbush, Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC; Lee Blalack
10 and Dmitri Portnoi, O’Melveny & Myers LLP; and Dan Polsenberg, Lewis Roca Rothgerber
11 Christie LLP appeared on behalf of UnitedHealthcare Insurance Company; United HealthCare
12 Services, Inc.; UMR, Inc.; Sierra Health and Life Insurance Co., Inc.; and Health Plan of
13 Nevada, Inc.’s (collectively, “United”).

14 The Court, having considered the Motion and United’s opposition and the argument of
15 counsel at the hearing on this matter, and good cause appearing, finds and orders as follows:

16 **Clinical Records & Proper Coding**

17 IT IS HEREBY ORDERED that the Motion is GRANTED with respect to the issue of
18 clinical records and proper coding, for the reasons stated on the record. If Defendants believe
19 evidence, argument, or testimony subject to this ruling is relevant and should be admitted, they
20 shall make an offer of proof outside the presence of the jury.

21 **Medicare or Non-Commercial Reimbursement Rates**

22 IT IS HEREBY ORDERED that the Motion is GRANTED with respect to the issue of
23 Medicare rates. Any evidence, argument, or testimony that Medicare or non-commercial
24 reimbursement rates are the reasonable rate, that providers accept it most of the time, or
25 arguing reasonableness based on a percentage of Medicare or non-commercial reimbursement
26 rates is hereby EXCLUDED in limine. If Defendants believe evidence, argument, or testimony
27 subject to this ruling is relevant and should be admitted, they shall make an offer of proof
28 outside the presence of the jury.

The Health Care Providers' In-Network Rates

IT IS HEREBY ORDERED that the Motion is DEFERRED to trial with respect to the issue of the Health Care Providers' in-network rates for the reasons stated on the record. If Defendants believe evidence, argument, or testimony subject to this ruling is relevant and should be admitted, they shall make an offer of proof outside the presence of the jury.

The Health Care Providers' In-Network Negotiations/Prior Contracts with United

IT IS HEREBY ORDERED that the Motion is GRANTED with respect to the issue of the Health Care Providers' In-Network Negotiations/Prior Contracts with United for the reasons stated on the record. If Defendants believe evidence, argument, or testimony subject to this ruling is relevant and should be admitted, they shall make an offer of proof outside the presence of the jury

The Health Care Providers' Out-Of-Network Reimbursement Rates & Data

The Health Care Providers' Motion with respect to the issue of the Health Care Providers' out-of-network reimbursement rates and data was withdrawn on the record at the hearing on October 20, 2021.

The Health Care Providers' Costs of Service

IT IS HEREBY ORDERED that the Motion is GRANTED with respect to the issue of the Health Care Providers' costs of service for the reasons stated on the record. If Defendants believe evidence, argument, or testimony subject to this ruling is relevant and should be admitted, they shall make an offer of proof outside the presence of the jury.

How the Health Care Providers Charges Are Set

IT IS HEREBY ORDERED that the Motion is GRANTED with respect to the issue of how the Health Care Providers' charges are set. Any evidence, argument, or testimony relating to how the Health Care Providers' charges are set is hereby EXCLUDED in limine. This shall not preclude the introduction of evidence regarding FAIR Health or percentiles of FAIR Health, nor shall it preclude the introduction of evidence regarding increase in prices set by the Health Care Providers. If Defendants believe evidence, argument, or testimony subject to this

1 ruling is relevant and should be admitted, they shall make an offer of proof outside the
2 presence of the jury.

3 **The Health Care Providers' Hospital Contracts/Credentials**

4 IT IS HEREBY ORDERED that the Motion is GRANTED with respect to the issue of
5 the Health Care Providers' hospital contracts and credentials for the reasons stated on the
6 record. If Defendants believe evidence, argument, or testimony subject to this ruling is
7 relevant and should be admitted, they shall make an offer of proof outside the presence of the
8 jury.

9 **Corporate Ownership, Acquisition and Due Diligence, Corporate Structure**

10 IT IS HEREBY ORDERED that the Motion is GRANTED IN PART and DENIED IN
11 PART with respect to the issue of the corporate ownership, acquisition and due diligence, and
12 corporate structure. The Court finds that the flow of funds within the Plaintiffs' or
13 TeamHealth's corporate structure is irrelevant and inadmissible.

14 The Motion is DENIED with respect to evidence, argument, or testimony regarding the
15 relationship between (1) Plaintiffs and TeamHealth, Inc.; and (2) the basic relationship
16 between TeamHealth, Inc. and Blackstone Inc. (formerly known as The Blackstone Group,
17 Inc.).

18 If the Defendants believe evidence, argument, or testimony subject to the ruling on this
19 Motion is relevant and should be admitted, they shall make an offer of proof outside the
20 presence of the jury.

21 **Sub-TIN**

22 IT IS HEREBY ORDERED that the Motion is DENIED with respect to the sub-TIN
23 issue, for the reasons stated on the record.

24 **Collections and CollectRX**

25 IT IS HEREBY ORDERED that the Motion is DEFERRED until trial for the reasons
26 stated on the record. If Defendants believe evidence, argument, or testimony subject to this
27 ruling is relevant and should be admitted, they shall make an offer of proof outside the
28 presence of the jury.

November 12, 2021

Dated this 12th day of November, 2021

Nancy L Allf

TW

Respectfully submitted by:

C9A 4A3 F9E9 D54D
Nancy Allf
District Court JudgeAHMAD, ZAVITSANOS, ANAIPAKOS, ALAVI
& MENSING, P.C/s/ Jason S. McManis

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2 DISTRICT COURT
3 CLARK COUNTY, NEVADA

4
5
6 Fremont Emergency Services
(Mandavia) Ltd, Plaintiff(s)

CASE NO: A-19-792978-B

7 vs.

DEPT. NO. Department 27

8
9 United Healthcare Insurance
Company, Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

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

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Defendants.

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

**PLAINTIFFS' TRIAL BRIEF
REGARDING DEFENDANTS'
PROMPT PAYMENT ACT JURY
INSTRUCTION RE:
FAILURE TO EXHAUST
ADMINISTRATIVE REMEDIES**

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Fremont Emergency Services (Mandavia), Ltd.; Team Physicians of Nevada-Mandavia, P.C.; Crum, Stefanko and Jones, Ltd. dba Ruby Crest Emergency Medicine (collectively the “Health Care Providers”) submit this trial brief Regarding Defendants’ Prompt Payment Act Jury Instruction Re: Failure To Exhaust Administrative Remedies. This trial brief is based upon the record in this matter, the points and authorities that follow, the pleadings and papers on file in this action, and any argument of counsel entertained by the Court.

POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants UnitedHealthcare Insurance Company; United HealthCare Services, Inc.; UMR, Inc.; Sierra Health and Life Insurance Co., Inc.; and Health Plan of Nevada, Inc.’s (collectively, “United”) have proposed a jury instruction that manufactures an obligation for the Health Care Providers’ to have exhausted administrative remedies under the Nevada Prompt Pay Statutes applicable to health care matters under NRS 683A.0879 (third party administrator), NRS 689A.410 (Individual Health Insurance), NRS 689B.255 (Group and Blanket Health Insurance), NRS 689C.485 (Health Insurance for Small Employers), NRS 695C.185 (HMO) (collectively the “NV Healthcare Prompt Pay Statutes”). **Exhibit 1**, proposed jury instruction titled “Nevada Prompt Payment Act: Plaintiffs’ Failure To Exhaust Administrative Remedies” (excerpt). As explained below, there is a private right of action embodied in the NV Healthcare Prompt Pay Statutes. United’s reliance on *Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 568, 571-72 (2007) concerns NRS 690B.012, a prompt pay statute applicable to casualty insurance is markedly different. Presentation of a jury instruction as United proposes is not supported and should not be made.

II. LEGAL ARGUMENT

A. Legal Standard

The Health Care Providers’ trial brief is brought pursuant to EDCR 7.27 which provides:

Unless otherwise ordered by the court, an attorney may elect to submit to the court in any civil case, a trial memoranda of points and authorities at any time prior to the close of trial. The original trial memoranda of points and authorities must be filed and a copy of the

memoranda must be served upon opposing counsel at the time of or before submission of the memoranda to the court.

B. The NV Healthcare Prompt Pay Statutes Provide A Private Right of Action

The Health Care Providers' fourth claim for relief is premised on United's violation of the NV Healthcare Prompt Pay Statutes set forth in NRS 683A.0879 (third party administrator), NRS 689A.410 (Individual Health Insurance), NRS 689B.255 (Group and Blanket Health Insurance), NRS 689C.485 (Health Insurance for Small Employers), NRS 695C.185 (HMO). Each statute provides as follows:

NRS 683A.0879 Approval or denial of claims; payment of claims and interest; requests for additional information; award of costs and attorney's fees; compliance with requirements. [Effective through December 31, 2019.]

1. Except as otherwise provided in subsection 2, an administrator shall approve or deny a claim relating to health insurance coverage within 30 days after the administrator receives the claim. If the claim is approved, the administrator shall pay the claim within 30 days after it is approved. Except as otherwise provided in this section, if the approved claim is not paid within that period, the administrator shall pay interest on the claim at a rate of interest equal to the prime rate at the largest bank in Nevada, as ascertained by the Commissioner of Financial Institutions, on January 1 or July 1, as the case may be, immediately preceding the date on which the payment was due, plus 6 percent. The interest must be calculated from 30 days after the date on which the claim is approved until the date on which the claim is paid.

4. An administrator shall not pay only part of a claim that has been approved and is fully payable.

5. A court shall award costs and reasonable attorney's fees to the prevailing party in an action brought pursuant to this section.

Subsection 5 appears in each NV Healthcare Prompt Pay Statute.¹

¹ NRS 689A.410 Approval or denial of claims; payment of claims and interest; requests for additional information; award of costs and attorney's fees; compliance with requirements; imposition of administrative fine or suspension or revocation of certificate of authority for failure to comply. [Effective January 1, 2020.]

4. An insurer shall not pay only part of a claim that has been approved and is fully payable.

5. A court shall award costs and reasonable attorney's fees to the prevailing party in an action brought pursuant to this section.

(continued)

Despite this clear statutory language that allows an action to be brought pursuant to each of the NV Healthcare Prompt Pay Statutes, United proposes a jury instruction that is premised on an entirely different prompt pay statute applicable to casualty insurance. United cites *Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 571, 170 P.3d 989, 993 (2007) in an effort to support the proposed, unfounded instruction. *Allstate* concerned NRS 690B.012 (the “Casualty Prompt Pay Statute”), which provides in full:

NRS 690B.012 Claims: Approval or denial; request for additional information; payment; interest on unpaid claim.

1. Except as otherwise provided in subsections 2, 3 and 4, an insurer shall approve or deny a claim of its insured relating to a contract of casualty insurance within 30 days after the insurer receives the claim. If the claim is approved, the insurer shall pay the claim within 30 days after it is approved. If the approved claim is not paid within that period, the insurer shall pay interest on the claim at the rate of interest established pursuant to NRS 99.040. The interest must be calculated from the date the payment is due until the claim is paid.

2. If the insurer requires additional information or time to determine whether to approve or deny a claim, it shall notify the policyholder of its request for the additional information or time within 20 days after it receives the policyholder’s claim, and at least

NRS 689B.255 Approval or denial of claims; payment of claims and interest; requests for additional information; award of costs and attorney’s fees; compliance with requirements. [Effective through December 31, 2019.]

4. An insurer shall not pay only part of a claim that has been approved and is fully payable.
5. A court shall award costs and reasonable attorney’s fees to the prevailing party in an action brought pursuant to this section.

NRS 689C.485 Approval or denial of claims; payment of claims and interest; requests for additional information; award of costs and attorney’s fees; compliance with requirements. [Effective through December 31, 2019.]

4. A carrier shall not pay only part of a claim that has been approved and is fully payable.
5. A court shall award costs and reasonable attorney’s fees to the prevailing party in an action brought pursuant to this section.

NRS 695C.185 Approval or denial of claims; payment of claims and interest; requests for additional information; award of costs and attorney’s fees; compliance with requirements. [Effective through December 31, 2019.]

4. A health maintenance organization shall not pay only part of a claim that has been approved and is fully payable.
5. A court shall award costs and reasonable attorney’s fees to the prevailing party in an action brought pursuant to this section.

once every 30 days thereafter, until the claim is approved or denied. The notice must set forth the reason why the additional information or time is required.

3. The insurer shall approve or deny the claim within:
 (a) Thirty days after it receives the additional information; or
 (b) Thirty-one days after the last timely notice was provided pursuant to subsection 2,
 ↪ whichever is later.

4. If the claim is approved, the insurer shall pay the claim within 30 days after it is approved. If the approved claim is not paid within that period, the insurer shall pay interest on the claim in the manner prescribed in subsection 1.

Based on the statutory language at issue there, *Allstate* held that the Division of Insurance had exclusive jurisdiction over claims brought pursuant to NRS 690B.012. *Allstate's* ruling is limited to NRS 690B.012 and is wholly inapplicable to the Health Care Providers' claims. The Casualty Prompt Pay Statute is categorically different than the NV Health Care Prompt Pay Statutes which provide: "**A court** shall award costs and reasonable attorney's fees to the prevailing party *in an action brought pursuant to this section.*"²

United also points to statutes of general applicability³; however, NRS 679A.170 provides that specific provisions relative to a particular type of insurance prevails over generalized provisions.⁴ Under the instruction of NRS 679A.170, the Court can decline to apply generalized statutes about administrative procedures when the NV Health Care Prompt Pay Statutes expressly contemplate court action for violation of their provisions.

² *Arora v. Eldorado Resorts Corp.*, No. 2:15-cv-00751-RFB-PAL, 2016 WL 5867415, at *8 (D. Nev. Oct. 5, 2016) ("the provision within the [wage] statute for the payment of 'attorney fee[s]' further supports an implied private right of action. There would be no need for such allowance within the language of the statute if a private right of action were not implied."); see *Neville v. Eighth Judicial District Court*, 133 Nev. 777, 783 (2017) (stating it would be absurd to think that the Legislature intended a private cause of action to obtain attorney fees for an unpaid wages suit but no private cause of action to bring the suit itself);

³ NRS 679B.310 (administrative procedures; hearings in general); NRS 679B.370 (appeal from Commissioner); NRS 233B.130 (judicial review); NRS 233B.133 (deadlines in petition for judicial review).

⁴ **Particular provisions prevail.** Provisions of this Code relative to a particular kind of insurance or type of insurer or particular matter shall prevail over provisions relating to insurance in general or insurers in general or to such matter in general.

III. CONCLUSION

For the foregoing reasons, the Health Care Providers respectfully request that the Court reject United's proposed instruction titled "Nevada Prompt Payment Act: Plaintiffs' Failure To Exhaust Administrative Remedies" as contrary to Nevada law.

DATED this 12th day of November, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and on this 12th day of November, 2021, I caused a true and correct copy of the foregoing **PLAINTIFFS' TRIAL BRIEF REGARDING DEFENDANTS' PROMPT PAYMENT ACT JURY INSTRUCTION REGARDING FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES** to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

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DISTRICT COURT**CLARK COUNTY, NEVADA**

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

Plaintiffs,

vs.

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

**DEFENDANTS' PROPOSED JURY
INSTRUCTIONS**

1 UNITED HEALTHCARE INSURANCE
 2 COMPANY, a Connecticut corporation; UNITED
 3 HEALTH CARE SERVICES INC., dba
 4 UNITEDHEALTHCARE, a Minnesota
 5 corporation; UMR, INC., dba UNITED MEDICAL
 6 RESOURCES, a Delaware corporation; SIERRA
 7 HEALTH AND LIFE INSURANCE COMPANY,
 8 INC., a Nevada corporation; HEALTH PLAN OF
 9 NEVADA, INC., a Nevada corporation,

10 Defendants.

11 Defendants UnitedHealthcare Insurance Company (“UHIC”), United HealthCare Services,
 12 Inc. (“UHS”), UMR, Inc. (“UMR”), Sierra Health and Life Insurance Co., Inc. (“SHL”), and Health
 13 Plan of Nevada, Inc. (“HPN”) (collectively “Defendants”), by and through their attorneys, submit
 14 the following Proposed Jury Instructions. Defendants reserve the right to amend their proposed jury
 15 instructions based on, among other things, the evidence admitted at the trial.

16 Dated this 1st day of November, 2021.

17 /s/

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 19 Colby L. Balkenbush, Esq.
 20 Brittany M. Llewellyn, Esq.
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JURY INSTRUCTION NO. D____



JURY INSTRUCTION NO. D____

NEVADA PROMPT PAYMENT ACT: PLAINTIFFS' FAILURE TO EXHAUST
ADMINISTRATIVE REMEDIES

To proceed with Plaintiffs' fourth cause of action, Plaintiffs must prove the following elements for each individual At-Issue Claim:

1. Defendants deemed a particular claim submitted by Plaintiffs approved and fully payable;
2. Plaintiffs are entitled to their full billed charges;
3. Defendants did not remit timely reimbursement to Plaintiffs, meaning payment to Plaintiffs within 30 days of receipt of the individual claim;
4. Plaintiffs filed an action against Defendants with the Nevada Department of Insurance within 60 days the alleged failure to provide timely reimbursement;
5. A hearing was held by the Nevada Insurance Commissioner to assess the alleged failure to provide timely reimbursement;
6. Plaintiffs were identified as a party of record by the Nevada Insurance Commissioner;
7. The Nevada Insurance Commissioner rendered a Final Ruling;
8. The Final Ruling was not in Plaintiffs' favor;
9. Plaintiffs sought judicial review within 30 days of those Final Rulings being rendered;
10. The Nevada Insurance Commissioner provided the records of the hearings to the Court; and
11. Within 40 days of the Court receiving each record, Plaintiffs filed a memoranda supporting their position that the Final Rulings should be reversed.

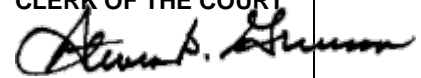
SOURCE/AUTHORITY:

Allstate Ins. Co. v. Thorpe, 123 Nev. 565, 568, 571-72 (2007); NRS 679B.310; NRS 679B.370; NRS 233B.130; NRS 233B.133.



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DISTRICT COURT
CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES
(MANDAVIS) LTD., ET AL.,

Plaintiffs,

vs.

UNITED HEALTHCARE
INSURANCE COMPANY, ET AL.,

Defendants.

CASE#: A-19-792978-B

DEPT. XXVII

BEFORE THE HONORABLE NANCY ALLF
DISTRICT COURT JUDGE
FRIDAY, NOVEMBER 12, 2021

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 11

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JOHN ZAVITSANOS, ESQ.
JASON S. MCMANIS, ESQ.
JOSEPH Y. AHMAD, ESQ.
KEVIN LEYENDECKER, ESQ.

For the Defendants:

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K. LEE BLALACK, ESQ.
JEFFREY E. GORDON, ESQ.
DANIEL F. POLSENBERG, ESQ.

RECORDED BY: BRYNN WHITE, COURT RECORDER

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1 Las Vegas, Nevada, Friday, November 12, 2021

2
3 [Case called at 8:50 a.m.]

4 [Outside the presence of the jury]

5 THE COURT: Good morning, everyone.

6 IN UNISON: Good morning, Your Honor.

7 THE COURT: We're on the case of Fremont v. United. Let's
8 take appearances, please. Joining us with the Plaintiff.

9 MR. ZAVITSANOS: Good morning, Your Honor. John
10 Zavitsanos for the healthcare providers.

11 MR. AHMAD: Joe Ahmad, also on behalf of the healthcare
12 providers.

13 MR. LEYENDECKER: Kevin Leyendecker on behalf of the
14 healthcare providers.

15 MR. MCMANIS: Good morning, Your Honor. Jason
16 McManis for the healthcare providers.

17 THE COURT: Thank you. And for the Defense, please.

18 MR. BLALACK: Yes, Your Honor. Good morning. Lee
19 Blalack on behalf of the Defendants.

20 MR. ROBERTS: Good morning, Your Honor. Lee Roberts,
21 also on behalf of Defendants.

22 MR. GORDON: Good morning, Your Honor. Jeff Gordon on
23 behalf of the Defendants.

24 MR. POLSENBERG: And Dan Polsenberg. Good morning,
25 Your Honor.

1 THE COURT: Thank you, all. All right. So you guys asked to
2 start a little early this morning.

3 MR. BLALACK: Correct. We're ready when you are, Your
4 Honor. Mr. Roberts has one housekeeping issue, and then Mr. Haben, I
5 can go get him and have him ready to go at the top of the hour.

6 THE COURT: Very good.

7 MR. ROBERTS: And this follows up, Your Honor, on the
8 discussion we had at the end of the day on Wednesday, and just, I
9 wanted to confirm that last night we did file a preliminary motion to seal
10 with regard to AEO documents. And at -- I doubt the Court has had time
11 to review it --

12 THE COURT: I have not.

13 MR. ROBERTS: -- but we do suggest in here, and cite some
14 authority from other jurisdictions that, in order not to delay jury time and
15 get the case done, that this matter be deferred until the end of trial. And
16 in the meantime, we simply follow the precautions that we have been
17 following today to try to keep attorneys as only documents from being
18 displayed to the public.

19 And the only thing that we have in addition to what we
20 discussed last week is that to the extent the cameras do come back in the
21 courtroom, we would just ask that they be instructed not to focus on the
22 attorneys as only documents that are displayed on the screen.

23 THE COURT: Thank you.

24 MR. ROBERTS: Thank you, Your Honor.

25 MR. ZAVITSANOS: Just brief response, Your Honor. So I

1 thank counsel for giving us the opportunity to respond in writing and
2 will. The only -- the only issue is that before we began the evidence, we
3 were given a list of the documents that they considered AEO, and we
4 obviously relied on that. None of those materials, I believe -- none of
5 those materials were ever put up. That list has now grown during the
6 course of trial. So rather than argue about it, we agree with Mr. Roberts
7 that we would follow that protocol, and you can sort this out at the --

8 THE COURT: I got it.

9 MR. ZAVITSANOS: Okay.

10 THE COURT: Thank you, both.

11 MR. ROBERTS: Thanks very much. And just to confirm,
12 Your Honor, I think that the admitted exhibits were the only ones that
13 really there was a question about, and that the Court said that until
14 documents are admitted, they're still protected under the previous
15 protective order, correct?

16 THE COURT: I assume you agree with that?

17 MR. ZAVITSANOS: Yes, Your Honor. The only issue is,
18 again, if -- they've been very -- kind of charitable here -- they've been
19 very generous in what they designate as AEO. And so --

20 THE COURT: If issues arise, we'll deal with it.

21 MR. ZAVITSANOS: Yes.

22 THE COURT: All right. And then to let you guys know, the --
23 by the time the deposition transcripts got to me, I was already at the
24 game, so I didn't get to that, but I'll do it this morning on our break.

25 MR. ZAVITSANOS: So Your Honor, on that point --

1 THE COURT: Yeah.

2 MR. ZAVITSANOS: -- just before the jury gets here, I visited
3 with Mr. Blalack, and I'm not going to hold him to this by any means, he
4 guestimates that he will have Mr. Haben until the mid-morning break.
5 My guestimate is I have about an hour or less. That would take us to the
6 lunch break. We would then, right after the lunch break, play the
7 deposition of Mr. Rosenthal. If Your Honor needs more time than that,
8 we can start with -- we can start with the next live witness. But that was
9 going to be -- that was our preference, but if Your Honor needs more
10 time, we can defer that until Monday.

11 THE COURT: Well, I'll do my best.

12 MR. ZAVITSANOS: Yeah.

13 THE COURT: All right.

14 MR. MCMANIS: Your Honor, would you like a hardcopy of
15 what was sent in yesterday?

16 THE COURT: I think my law clerk was already doing that, but
17 if you have an extra, I can --

18 MR. MCMANIS: I do. I do.

19 THE COURT: Yeah, let me -- let me call him off then. So --

20 MR. ROBERTS: And as long as we're distributing hardcopies,
21 Your Honor, we do have a hardcopy of what we filed last night if that
22 would be -- if you think it's useful.

23 THE COURT: That would be great. Thank you. Thank you,
24 both.

25 MR. ROBERTS: Thank you, Your Honor.

1 THE COURT: You know, I usually don't like courtesy copies
2 because we don't shred paper here. I mean, we don't -- we waste paper,
3 and I can read it on the computer.

4 MR. ROBERTS: Oh, I can take it back. I don't mean to burden
5 the Court.

6 THE COURT: Well, don't take it back. No.

7 MR. ROBERTS: But thank you, I'll remember that.

8 THE COURT: Thank you.

9 MR. ZAVITSANOS: Yeah. And Your Honor, our preference is
10 to do Mr. Rosenthal first for reasons that will become evident. But
11 anyway --

12 THE COURT: Do you guys need a quick break before the jury
13 comes in?

14 MR. BLALACK: Mr. Haben's ready, Your Honor.

15 MR. ZAVITSANOS: We do not, Your Honor. We're ready to
16 go.

17 THE COURT: Good enough. So come on in, Mr. Haben.

18 MR. AHMAD: Your Honor, I'm not -- I'm not sure -- I'm not
19 sure what the interaction was, but I think one of our legal assistants got
20 stuck in the elevator and --

21 THE COURT: Stuck in the elevator?

22 MR. AHMAD: Yes. Yes. I think the marshals eventually
23 helped her out and got her out, but apparently a juror tried to help. I
24 don't know what was said or communicated at all, but I just want to raise
25 that. I wasn't --

1 THE COURT: Were you aware?

2 MR. BLALACK: No, I was not. Unless there's something
3 more, it doesn't concern me.

4 MR. AHMAD: No, that's it.

5 THE COURT: Good enough.

6 MR. POLSENBERG: And I was down there, although I didn't
7 notice the juror. Michelle was there.

8 MR. BLALACK: Michelle's getting a lot of air time in this
9 process.

10 MR. POLSENBERG: Michelle, we're talking about --

11 MR. AHMAD: Myrna [phonetic].

12 MR. POLSENBERG: -- Myrna getting stuck in the elevator.

13 MS. RIVERS: Oh, yeah.

14 MR. POLSENBERG: And any interaction with the juror.

15 MS. RIVERS: Oh, no, she just tried to push it.

16 MR. POLSENBERG: Okay. I'm sorry, it was just a --

17 MR. ZAVITSANOS: I appreciate it.

18 THE COURT: Good enough. You know, the -- you guys have
19 it tough out there; we only have one elevator back here, and it's the
20 same -- the same issue, so take --

21 MR. BLALACK: All right. We'll bring Mr. Haben in.

22 THE COURT: And I'll try to be polite about winning the game
23 over his team. They played a beautiful game. Did you get to go, Mr.
24 Haben, last night?

25 MR. HABEN: Yes, I did.

1 THE COURT: You guys came back so strong.

2 MR. HABEN: That was a really fun game. I couldn't believe
3 the stadium was --

4 THE COURT: And our young kids really stepped up last
5 night.

6 MR. HABEN: Yes.

7 THE COURT: It was a great game.

8 MR. HABEN: I read an article today, and I was really
9 disappointed that half your team, all your veterans were not playing, and
10 I'm like, oh, my God, I enjoy it.

11 THE COURT: Well, it was -- it was fun to give them a chance.

12 MR. HABEN: Yes, it was a good game. Thank you.

13 THE COURT: Okay.

14 MR. BLALACK: It comes to Vegas, Your Honor. All right.
15 We're ready when you are, Your Honor.

16 MR. ZAVITSANOS: Oh, Judge, before we get started, happy
17 Veteran's day to Mr. Blalack and any other veterans that we have, so --

18 MR. BLALACK: Thank you very much.

19 MR. ZAVITSANOS: I appreciate everything they do. Sorry.

20 MR. BLALACK: That's very, very gracious.

21 THE MARSHAL: All rise for the jury.

22 [Jury in at 8:59 a.m.]

23 THE COURT: Thank you. Please be seated. Good morning,
24 everyone.

25 IN UNISON: Good morning.

1 THE COURT: Welcome to Friday, and thanks for being on
2 time.

3 Mr. Blalack, please continue.

4 MR. BLALACK: Thank you, Your Honor.

5 CROSS-EXAMINATION CONTINUED

6 Q Good morning, Mr. Haben.

7 A Good morning.

8 THE WITNESS: Good morning, Your Honor.

9 BY MR. BLALACK:

10 Q Okay. Mr. Haben, I'd like to pick up where we left off on, I
11 guess it was Wednesday.

12 THE COURT RECORDER: Mr. Blalack, are you [indiscernible]?

13 MR. BLALACK: I am now on. Is that coming through? I have
14 been told that it's hard to hear me on the system, so I will speak up and
15 do my best to be heard. That is not normally a complaint I get, so I'm
16 going to do my best to vocalize to you and the jury and the court
17 reporter can hear us.

18 BY MR. BLALACK:

19 Q Let me start with, do you recall on Wednesday we were
20 talking about a number of profits that you were questioned by Mr.
21 Zavitsanos during his examination where you were questioned
22 regarding various documents and assertions that Plaintiffs make in this
23 case? Do you recall that questioning?

24 A Yes, I do.

25 Q I'm going to pick it up where I left off and go to the next of

1 those topics. And sir, do you remember the questioning and discussion
2 regarding the allegations of MultiPlan is like a paid-off umpire, and
3 incentivized to generate a lower reimbursement rate because he gets
4 paid a percentage of the amount accepted; do you remember that?

5 A Yes, I do.

6 Q And I'd like to, as we did on Wednesday, bring up a portion
7 of your testimony and your Q and A with Mr. Zavitsanos just to orient
8 you and the jury on this topic. This is November 3rd. It's 31, line 1
9 through 25. All right. So let's just start at the top there, and you can just
10 read along. And he's asking about MultiPlan and FAIR Health. And you
11 can see about halfway down, he says:

12 "Q Yeah, and MultiPlan is supposed to be an objective third
13 party, right?"

14 "Yes," is the answer.

15 "Q Okay. Are you a baseball fan?"

16 "A I am.

17 "Q If the umpire calling balls and strikes was being paid by one
18 of the teams, would the umpire be neutral?"

19 "A MultiPlan is an umpire for multiple payers.

20 "Q That's not my question, sir. We're talking baseball. If the
21 umpire had been paid by one of their teams, would the umpire be
22 neutral?"

23 "A Umpire's getting paid already.

24 And the question,

25 "Q Do you not understand my question?"

1 "A Yeah, I understand what you're saying.

2 "Q If the umpire was being paid?

3 "A I think it's a misrepresentation."

4 Do you recall that exchange, sir?

5 A I do.

6 Q Now, Mr. Zavitsanos suggests that MultiPlan is bias because
7 bias is paid a fee for access to its data, but that FAIR Health is not bias.
8 Do you think MultiPlan is bias because United Healthcare pays a fee for
9 its service?

10 A No.

11 Q Okay. And I want to look at the comparison between
12 MultiPlan and FAIR Health and try to understand a little bit more about
13 how these two organizations operate. And I'd like to talk a little bit to
14 you -- the Elmo, and she'll use that to walk the jury through this
15 document. So sir, what I've done is I've written MultiPlan on one
16 column, FAIR Health on the other, and then there's a number of other
17 questions on the left-hand side; do you see that?

18 A Yes, I do.

19 Q I'd like to just run through these real quick and show how the
20 two organizations compare and don't compare. So let me start with
21 MultiPlan. Does UnitedHealthcare own MultiPlan?

22 A No, they do not.

23 Q Does UnitedHealthcare own FAIR Health?

24 A No, they do not.

25 Q Is MultiPlan a third-party vendor of UnitedHealthcare?

1 A Yes, they are.

2 Q Is FAIR Health a third-party vendor of UnitedHealthcare?

3 A Yes, they are.

4 Q Based on your understanding, sir, do United Healthcare's
5 competitors use MultiPlan as a third-party vendor?

6 A Yes, they do.

7 Q Are MultiPlan services widely used in the industry?

8 A Yes, they are.

9 Q Do you know, sir, if UnitedHealthcare's competitors are use
10 FAIR Health as a third party?

11 A Yes, they do.

12 Q Are FAIR Health services widely used in the industry?

13 A Yes, they are.

14 Q Does United Healthcare pay MultiPlan a fee for services?

15 A Yes, they do.

16 Q What kind of fee does United Healthcare pay MultiPlan?

17 A It's based on a percentage of savings, typically.

18 Q That's the fee you've explained to the jury before and walked
19 through various calculations?

20 A Yes.

21 Q Does UnitedHealthcare pay a fee to FAIR Health for its
22 services?

23 A Yes, they do.

24 Q What kind of fee does UnitedHealthcare pay FAIR Health?

25 A That's a subscription fee annually.

1 Q Does MultiPlan use data to support pricing for out-of-network
2 programs?

3 A Yes, they do.

4 Q Does FAIR Health use data to support pricing for out-of-
5 network programs?

6 A Yes, they do.

7 Q What is the data source used by MultiPlan?

8 A It's --

9 MR. ZAVITSANOS: Objection, Your Honor. Speculation.
10 Foundation.

11 MR. BLALACK: Mr. -- I'll lay the foundation, just so it's clear.

12 BY MR. BLALACK:

13 Q Mr. Haben, during the course of your engagement in
14 MultiPlan, have you been informed and briefed on the way the MultiPlan
15 data --

16 MR. BLALACK: Strike that.

17 BY MR. BLALACK:

18 Q Have you been informed about the data sources that are
19 used by MultiPlan for its various pricing services?

20 A Yes, and it's on their websites as well.

21 Q What is the data source used by MultiPlan for its out-of-
22 network pricing through the Data iSight service?

23 A It's paid claims data, allow charges for allowed amounts.

24 Q And just so the jury is clear, that's paid claims for all payers,
25 not just UnitedHealthcare, correct?

1 A Yeah. I can't read what you have. Can you raise that up?
2 Thank you.

3 Q Does that help?

4 A Yeah. I'll -- yes.

5 Q So the paid claims, allowed amounts are for multiple payers
6 in the market, not just UnitedHealthcare?

7 A Yes, it is.

8 Q What is the data source used by FAIR Health?

9 A Billed charges.

10 Q Sir, is that comparison that I have put there on page -- on the
11 Elmo that the jury is looking at, is that an accurate comparison in your
12 view of the relationship, the comparison between the services and
13 relationship with UnitedHealthcare and FAIR Health?

14 A Just one clarification. Where it says independent third party
15 and you have no, I think you were asking are they owned. They're not
16 owned, but they are both independent third parties.

17 Q So I'll put yes. Thank you for that clarification.

18 A Yes.

19 Q So they're not -- just to clarify to the jury. That's a very good
20 point, Mr. Haben. Both MultiPlan and FAIR Health, neither of them are
21 owned by UnitedHealthcare?

22 A They are not.

23 Q Okay. Does UnitedHealthcare consider FAIR Health and
24 MultiPlan both independent of United Health?

25 A Yes, they do.

1 Q Now, you testified that UnitedHealthcare pays fees to both
2 FAIR Health and MultiPlan. Does United Healthcare consider MultiPlan
3 or FAIR Health bias because of the fees it pays for those two vendor
4 services?

5 A No.

6 Q Why not?

7 A MultiPlan and FAIR Health are used by many payers in the
8 industry, and it's the reimbursement methodologies that they have for
9 both are accepted by many payers other than United in the industry.

10 Q Thank you, sir. Now, let's move onto the next topic. Mr.
11 Zavitsanos' question to you was suggested that usual and customary
12 and reasonable reimbursement, with a traditional program, that most
13 self-funded clients used, and as it -- its name indicates based on the FAIR
14 Health benchmarks was used by everybody and defines what is
15 reasonable. Do you recall questions on that nature?

16 A Yes, I do.

17 Q Let me show you your testimony from late last week on this
18 topic.

19 MR. BLALACK: And can you put that up for the jurors, 20 to
20 21 for all testimony of Mr. Haben, page 46.

21 BY MR. BLALACK:

22 Q Line 22, at the bottom, and then it will bleed over to the next page.
23 Okay. Now, there's the term again, UCR, except now it says receivable
24 instead of reasonable. And over here it says:

25 "R&C, reasonable and customary, right?

1 And you say, "Yes."

2 I think he's referring to a diagram, which we'll talk about in a
3 minute. And then the question below that:

4 "Q Percentile values are provided by FAIR Health. This is a
5 charged base methodology approach for professional services, right?

6 "A Correct.

7 "Q Okay. That's what we do. That's what our doctors do,
8 provide professional services, right?

9 "A Yes, they do.

10 "Q All right. Now, this is the traditional out-of-network
11 reimbursement program, generally bias to out-of-network benefit claims,
12 right?

13 "A That's what it says.

14 "Q Right. That means that what everybody is doing in 2016,
15 right?

16 "A No, it does not.

17 "Q It -- so when it says this is the traditional, then you -- are you
18 a college football fan?

19 "A Not really."

20 Q All right. Now, let me --

21 MR. BLALACK: You can pull that down, Shane.

22 BY MR. BLALACK:

23 Q So let me try to orient you around that testimony, sir and
24 pick up where Mr. Zavitsanos left off, okay?

25 A Yes.

1 MR. BLALACK: Now, Shane, can you pull up Plaintiffs'
2 Exhibit 25, which is the -- which is in evidence, and which is the
3 document about which Mr. Zavitsanos was questioning you.

4 BY MR. BLALACK:

5 Q Do you have that in your binder, sir?

6 A I'll take a look here. Yes, I do.

7 Q Okay. When you've got it, you can go to page 2, which
8 Shane has helpfully brought up on the screen. We're looking at that
9 third row usual and customary and reasonable, although that says
10 receivable. I think that's a typo. Let me ask you this. Let's just get some
11 terminology straight, sir. Does UnitedHealthcare have out-of-network
12 program that's called the UCR program?

13 A No. It's either a physician or a facility R&C.

14 Q So what do you understand this reference to UCR to mean?

15 A I believe it's reference to the facility and physician R&C
16 program.

17 Q And R&C is an acronym for what?

18 A Reasonable and customary.

19 Q Now, just to remind the jury, what is the physician R&C
20 program? Just remind the jury with a brief description.

21 A I think we went through some of the terms, reasonable,
22 customary, usual customary. It's tied to fair health, related to physician
23 claims that are paid at the out-of-network benefit level. If you remember,
24 we talked -- we had the -- my left-hand side, the highest benefit level in
25 the benefit plan in-network and then you have the out-of-network benefit

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1 level. Physician R&C is on this. ER service sit over here on the in-
2 network benefit level.

3 Q Okay. So just to kind of touch base on that point, because
4 physician usual and customary is utilized on the out-of-network benefit
5 level instead of the in-network benefit level, is that program utilized to
6 reimburse out-of-network emergency room professional services?

7 A It is not.

8 Q Now, was the physician's reasonable and customary
9 program active and in place before July 1, 2017, which is the beginning
10 of the period at issue in this case?

11 A Yes, it was.

12 Q Does UnitedHealthcare still use that program, or did it still
13 use that program when you left the company earlier this year?

14 A Yes, they still had it available.

15 Q How frequently did your clients use that program when you
16 left, as compared to the earlier years when it was first introduced?

17 A It became less frequent.

18 Q Why was that?

19 A The clients in the --

20 MR. ZAVITSANOS: Objection, Your Honor. Hearsay.

21 THE COURT: Overruled.

22 BY MR. BLALACK:

23 Q Please proceed.

24 A The clients and consultants, as we indicated before --

25 MR. ZAVISTANOS: Hearsay again on this part.

1 THE WITNESS: -- were letting us know --

2 THE COURT: It -- yeah. I have to sustain it.

3 BY MR. BLALACK:

4 Q Just describe the reasons for why the program is less -- used
5 less frequently.

6 A The program is used less frequently because the bill charges
7 or the physician R&C program is based on billed charges. Those billed
8 charges are uncontrolled, and they continue to go up, so there's value.

9 Q Also, is this a program that offers customer advocacy and
10 balance billing protection to the members who participate in the
11 program?

12 A No, it does not. They can be balance billed.

13 Q Now, in his questions, Mr. Zavitsanos suggested that the
14 name of the program suggests that UnitedHealthcare believes the
15 program itself defines what is reasonable value for physician services.
16 Do you agree with that suggestion?

17 A No. It's just a term used for the program, and it was
18 developed probably in the early 2000s.

19 Q Now, just to remind the jury of something you talked about
20 on -- well, let me skip that and move down a different topic. The
21 document here states that usual, customary and reasonable is, quote, a
22 traditional OON reimbursement program. Do you see that reference
23 there?

24 A Yes, I do.

25 Q What does it mean that the program was a traditional

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1 program?

2 A Like indicated before, it started in the early 2000s, so it
3 started out probably when I started in the out-of-network programs.

4 Q Have you ever heard the term, legacy program, sir?

5 A Yes.

6 Q Would you consider physician R&C a legacy program?

7 A Yes.

8 Q Why is that?

9 A It's been in place for a very long time.

10 Q Now, I'd like to show you another document Mr. Zavitsanos
11 showed you earlier this week.

12 MR. BLALACK: Shane, would you please pull up Plaintiff's
13 Exhibit 175, which has already been admitted into evidence?

14 BY MR. BLALACK:

15 Q Do you remember seeing this document earlier in your
16 examination, sir?

17 A Yes. Is it in my binder?

18 Q It should be and if it's not, it's in one of those binders.

19 A Yes. I think I have it.

20 Q Okay.

21 MR. ZAVITSANOS: Hang on. Give me one second.

22 MR. BLALACK: Sure. 175.

23 MR. ZAVITSANOS: Thank you.

24 MR. BLALACK: Uh-huh.

25 BY MR. BLALACK:

1 Q Just a take a second. Refamiliarize yourself with that
2 document, Mr. Haben.

3 [Witness reviews document]

4 THE WITNESS: Okay.

5 BY MR. BLALACK:

6 Q Now, can you tell what the date of this document is, sir?

7 A May 26th, 2018.

8 Q Is it May or March?

9 A I'm sorry. March.

10 Q Okay. Now, I'm now showing you --

11 MR. BLALACK: If you could, Shane, go to page 2, page 2 of
12 that document.

13 BY MR. BLALACK:

14 Q Do you recall Mr. Zavitsanos asking about this page of the
15 document during his examination?

16 A I believe so.

17 Q Now, my recollection is he only asked you about that first
18 paragraph up above and that he did not show you or the jury that next
19 paragraph, that's 7 and that's the one we want to focus on. Would you
20 please read that next paragraph to the 3 please?

21 A "UHC has a variety of programs to work to manage no-par
22 spends, however there is still opportunity to do more, particular with
23 respect to these UCR-type claims. Market intel indicates that our
24 competitors have tighter cost controls to help manage this spend."

25 Q So what did that last sentence mean, "Market intel indicates

1 that our competitors have tighter cost controls to help manage this
2 spend?"

3 A We're behind our competitors. They're doing a better job on
4 behalf of our clients.

5 Q Now, there's been a lot of questioning in the trial about
6 whether you understood as the head of out-of-network programs that
7 the programs you managed were competitive, behind the competition or
8 ahead of the competition. Do you remember all those questions?

9 A Yes.

10 Q The statement that's in this document from 2018, how does
11 that compare with your recollection, what you thought and understood,
12 based on market intelligence of your competitive position for out-of-
13 network programs?

14 A That's in line with what I understood.

15 Q Now, I want to direct you to page 6 of this document. So this
16 was the chart that Mr. Zavitsanos walked through, and you had a
17 number of different scenarios.

18 MR. BLALACK: And Shane, could you pull up -- yeah, and
19 blow up the chart and then we'll probably have to blow up the individual
20 pieces of it.

21 BY MR. BLALACK:

22 Q And sir, if you can tell, looks like there's -- in the blue box, it
23 says permit. Do you see that?

24 A Yes, I do.

25 MR. BLALACK: Bring that down, Shane.

1 BY MR. BLALACK:

2 Q And then in the next blue box, it says proposed scenario A.
3 Do you see that, sir?

4 A Yes, I do.

5 Q And then in the next box below that, it says, proposed
6 scenario B, correct?

7 A Correct.

8 Q Okay. And so just to refresh the jury's memory, this is a
9 document that walked through and described two different scenarios
10 compared to what was then a current scenario using a specific program
11 to evaluate how changes might result from migrating to a different
12 program. Is that a fair summary?

13 A Yes.

14 Q Okay. Now, if you could, having read -- refreshed your
15 memory on this slide, just generally describe what's being compared on
16 this slide. Explain that, if you could.

17 A So what's being compared is the R&C plans that are in the --
18 in their benefit plan. That's the current bucket to the proposed, where
19 we're looking at implementing Data iSight and then there's two
20 scenarios related to that program.

21 Q Now, by the way, can you tell what benefit level this is
22 focused on? Is it in-network or out-of-network?

23 A No. I understand your question. I believe we were talking
24 about the out-of-network benefit level.

25 Q Now, my recollection is that Mr. Zavitsanos walked you

1 through the current assumption compared to the two proposals to show
2 the way in which the employer could be impacted from a cost
3 perspective of moving from the physician reasonable and customary
4 program in its benefit plan to the outlier cost management program in its
5 benefit plan; is that correct?

6 A Correct.

7 Q Okay. Now, for the current scenario, can you tell -- remind
8 the jury what the document said the cost to the employer would be
9 under the physician R&C for this hypothetical?

10 A Cost for the employer did you say?

11 Q The employer.

12 A So in that current amount or the current blue box, you have
13 the allowed amount of \$600. Their share is 60 percent, so \$360 is the
14 client responsibility.

15 Q Now, go down to scenario A, okay. And first of all, describe,
16 before we talk about the impact to the employer, describe what scenario
17 is being evaluated in that blue box.

18 A So this is where we put Data iSight into the -- in the benefit
19 plan and apply that program with the assumption that the provider
20 would accept the Data iSight rate on what we call the first pass, so the
21 additional rate that goes out. And there would be no additional
22 negotiation needed, because the provider accepted it.

23 Q And --

24 A So we're trying to paint that scenario.

25 Q And under that scenario, the assumptions, what was the

1 potential cost or the likely cost to the employer, having compared to the
2 then existing scenario under physician reasonable and customary?

3 A So that first pass of that rate that went out to the provider as
4 the allowed amount of \$300 and then the same coinsurance of 60
5 percent calculated off of that allowed amount would be \$180.

6 Q Okay. And then on top of that, would there have been a fee
7 paid to UnitedHealthcare under the program?

8 A Yes, there would be.

9 MR. BLALACK: And so Shane, if you go to the right hand
10 under the white circle.

11 BY MR. BLALACK:

12 Q Can you see what the total cost to the employer was?

13 A Yes. It would be \$425.

14 Q And so under Proposed Scenario A, that would have been a
15 higher cost for the employer then under the scenario for physician
16 reasonable and customary?

17 A I believe so. Yes.

18 Q Now do the same analysis, sir, and again, as to the employer
19 cost on Proposed Scenario B, starting with explaining what the
20 assumption was for that scenario.

21 A So on Scenario B, what's trying to be modeled here is the
22 provider would reject the initial allowed amount. They would contact
23 MultiPlan. They would negotiate and it would be an amount that would
24 be greater than the original allowed amount that was paid of Data iSight,
25 but it would be less than the reasonable and customary amount, just for

1 perspective. And so the allowed amount in this scenario is \$400.

2 Q Okay.

3 A And then the client share is 60 percent of that, so 240.

4 Q And then when you add the fee the client would pay United
5 Healthcare for those savings, what would be the total impact for the
6 employer?

7 A The total impact would be \$450.

8 Q So again, how did this scenario as to the employer compare
9 to the scenario of reasonable physician R&C?

10 A It would still be higher.

11 Q Okay. Now, my recollection is that analysis that we just
12 walked through is the analysis that Mr. Zavitsanos walked through with
13 you. But there's another -- there's some other information on this slide
14 that he did ask you about and you didn't ask you about and you didn't
15 discuss, and I want you to explain that to the jury. On this slide, does it
16 explain the impact to the member in each of those scenarios?

17 A Yes, it does.

18 Q All right. Let's start with the current one. And if you could,
19 explain in that physician reasonable and customary scenario what the
20 impact to the member would be.

21 A So I'll just start from the top again. So the allowed amount
22 underneath that scenario, which was the R&C program, the allowed
23 amount was \$600. The percentages that we had is that the members'
24 coinsurance would be 40 percent, so it would be \$240 as their
25 coinsurance. But as you remember, the usual and customary does not

1 have protection for balance billing, so the provider could balance bill the
2 member up to another 400.

3 Q So under scenario -- the current physician reasonable and
4 customary scenario, what was the potential exposure to the member in
5 that encounter?

6 A \$640.

7 Q Okay. Now, let's go to Scenario A. And again, remind the
8 jury what was Scenario A?

9 A So this is where Data iSight was put into place, and it models
10 out that the provider would accept the initial first pass rate that was paid
11 out to the provider. No additional negotiation would be needed.

12 Q What would be the impact to the member under Scenario A?

13 A So in this situation, because the allowed amount is now 8 --
14 I'm sorry -- \$300, the member's cost share is 40 percent, if you
15 remember, that would be \$120. And then because this was accepted by
16 the provider, there would be no balance billing.

17 Q So what was, under Scenario A, using the outlier cost
18 management program instead of the physician reasonable and
19 customary program, what was the total potential exposure to the
20 member in that scenario?

21 A In scenario A, I believe it was \$640.

22 Q No. I'm talking about Scenario A, not the current scenario.

23 A I'm sorry. The current?

24 Q You already --

25 A So the --

1 Q -- told me the current.

2 A Sorry.

3 Q Sorry. I'm asking about proposed Scenario A.

4 A Proposed Scenario A, because the provider accepted the
5 allowed amount, that went out the door, the member's coinsurance
6 would be \$120 and that would be all that they would be liable for.

7 Q And is that less than the proposed potential exposure to the
8 member under the physician reasonable and customary program?

9 A Yes. Compared to the current, yes.

10 Q Now, let's go to the final scenario. That's Scenario B. Same
11 analysis. Remind the jury what the scenario was and then explain what
12 the impact to the member would be under that scenario.

13 A So proposed Scenario B is that the provider rejects the initial
14 allowed amount that went out the door. The provider contacts MultiPlan
15 to negotiate a rate. That rate gets negotiated to an allowed amount of
16 \$400. That would be the new allowed amount.

17 Q And what is the impact on the member there?

18 A So the member would have a coinsurance of 40 percent,
19 based on that \$400 and that would be \$160 and there would be no
20 balance billing.

21 Q And why would there be no balance billing in that scenario?

22 A Because the provider and MultiPlan had negotiated, so that
23 was one of the program -- or the components of Data iSight is that
24 MultiPlan would engage with the provider and negotiate, if needed.

25 Q Okay. So in that scenario, what's the total exposure to the

1 member in Scenario B?

2 A It'd be \$160.

3 Q So comparing the -- and just focusing on the impact to the
4 member, which is not something Mr. Zavitsanos asked you about. What
5 is the comparison from the member's perspective of the benefit of being
6 in the physician reasonable and customary program as opposed to cost
7 management?

8 A The perspective is that they could be exposed to a higher
9 amount in this scenario with \$640 as the current versus the proposed A
10 scenario of 120 or the proposed B of 160, so much less.

11 Q So under both Scenarios A and B with the outlier cost
12 management, would the member be subject to balance billing?

13 A No.

14 Q Would the member be subject to balance billing under the
15 existing current scenario using the physician reasonable and customary
16 program?

17 A Yes, they would.

18 Q So from the perspective of the member, what was United
19 Healthcare's view about which scenario was the least favorable for the
20 member?

21 A The least favorable would have been the current scenario,
22 the reasonable and customary.

23 Q All right, sir. Thank you. Change the focus. Let's move on to
24 the next topic, which was the assertion that United had a five-year
25 scheme to manipulate public opinion against healthcare providers to

1 fake news and influencers. Do you remember questions around that
2 subject, sir?

3 A Yes, I do.

4 Q All right. Let's show you the trial transcript, where you were
5 questioned on this subject.

6 MR. BLALACK: Shane, this is from November 2nd, so this
7 would have been last week. Page 157, line 9 through 17.

8 BY MR. BLALACK:

9 Q "Q Okay. No doubt about it. In 2014, United set out on a
10 path to change the public narrative, socialization, presentation, so that
11 people start buying the message, right?"

12 "A We were educating on provider reimbursements, yes.

13 "Q Yeah. Because you knew if you did this, you knew this day
14 was coming, and you knew that people would end up in a jury and if you
15 got to them five years before, and you blitzed enough media, the
16 narrative would be viewed through your lens, rather than the cathedral
17 of truth, right?"

18 And then if you go on down a little farther to page 157, line
19 25, which carries on -- 20 to 25 on 157.

20 "Right, sir?", he asked.

21 "A I try --

22 "Q That's what that is."

23 "A Can I answer?"

24 "Q No. Is that what that is?"

25 All right. And it goes to the next page.

1 "A No. I trust people are smart and they can understand what
2 they're being told."

3 All right. Now sir, do you recall this exchange with Mr. Zavitsanos
4 that you just read?

5 A I do.

6 Q All right.

7 MR. BLALACK: Now Shane, could you please pull up
8 Plaintiff's Exhibit 12, which is the document Mr. Zavitsanos was
9 discussing with Mr. Haben and I believe is already admitted into
10 evidence? Blow the top of that up, Shane, so the jury can see what we're
11 talking about, although you probably will remember this.

12 BY MR. BLALACK:

13 Q Sir, this is a document labeled out-of-network billing
14 initiative media statement talking point Qs and As, Tuesday, June 3rd,
15 2014 update. Do you see that?

16 A I do.

17 Q Do you recall that this is the document about which Mr.
18 Zavitsanos was questioning you?

19 A I do.

20 Q Now, Mr. Zavitsanos pointed you to only a small portion of
21 this initiative, so let's make sure the jury can see what was left out. And
22 let's start with the initiative overview. You see the quote there, sir, at the
23 top, UnitedHealthcare's individual members. You see that?

24 A I do.

25 Q All right. I want to kind of walk the jury and you through this

1 real quick and have some follow up questions. So it says,

2 "United Healthcare's individual members, member businesses and
3 providers who agree to engage with us to provide in-network access to
4 quality care, that they harm their physicians and other healthcare
5 professionals who choose not to participate in our network.
6 Subsequently charge exorbitant and often ever-increasing fees."

7 Do you see that, sir?

8 A I do.

9 Q Does that statement that I just read and is highlighted
10 accurately describe the impetus for the June, 2014 out-of-network billing
11 initiative described on this page?

12 A It does.

13 Q Now, in the next sentence, it says, again, under the initial
14 overview, it says, "And typically, these providers fall into these
15 categories," and then it lists several categories. Do you see that?

16 A Yes, I do.

17 Q And was this initiative designed to target just out-of-network
18 ER providers or staffing companies?

19 A No, it was not.

20 Q What other provider groups were identified as engaging in
21 these abusive billing practices?

22 A Well, as it said -- it says here, ER providers, ER facilities,
23 assistant surgeons, radiology, anesthesiology. Those are the wrap holes
24 that we talked about the other day. Lab, pathology. Those that treat
25 individuals at a network facility.

1 Q Okay. And what do they have, from your perspective as the
2 head of out-of-network programs, what do those groups have in
3 common?

4 A So those groups typically sit inside a facility. So you can see,
5 you know, like if you go into the ER and you go into maybe a facility that
6 you know is participating, these entities sit inside of those, provide
7 services, but they may not be part of that facility. They might be a part
8 of the staffing company that's inside that facility.

9 Q Well, still in the overview section, a little farther down, it
10 says -- we'll start at that next paragraph that starts with "because".
11 "Because these providers have lied to the insurers who often want to
12 protect their members from being balance billed, and some states are
13 required to hold the member harmless, they often act with impunity."
14 Do you see that?

15 A I do.

16 Q What are you referring to when you say the word "hold the
17 member harmless"?

18 A So there are some -- there are some state laws that require
19 the member to --

20 MR. ZAVITSANOS: Objection, Your Honor. Foundation and
21 calling for legal conclusion. And also, relevance for the time period
22 we're talking about here.

23 MR. BLALACK: Your Honor, this is a document he presented
24 to the witness. I'm just following up.

25 MR. ZAVITSANOS: I did not question on this -- on the -- what

1 it means legally to hold a member harmless.

2 MR. BLALACK: I'm not asking for a legal interpretation, Your
3 Honor.

4 THE COURT: Overruled.

5 BY MR. BLALACK:

6 Q You may proceed.

7 A Yeah. So there are requirements to hold the member
8 harmless. And so what that means is if they get balance billed by the
9 staffing company and they want us to engage, we will engage and try to
10 address that balance bill amount, or if we need to, very rarely, we may
11 have to pay billed charges.

12 Q Now, let's go to the media plan. And it says -- and first off,
13 let me ask this question. Why was there a media plan for this initiative,
14 just generally, why?

15 A So I think about it this way: when I drive to the airport, right
16 by the airport, there's always a sign that says if you see something, you
17 need to say something. Right? So in this situation, we were
18 getting -- we were getting feedback from clients, consultants. We were --

19 MR. ZAVITSANOS: Objection, Your Honor. Hearsay. And
20 also foundation, and also the issue we've talked about at the bench
21 several times.

22 THE COURT: Sustained.

23 MR. BLALACK: The witness is not -- it's not being offered for
24 the truth of the matter asserted, Your Honor. He's speaking to his state
25 of mind.

1 THE COURT: Rephrase.

2 MR. ZAVITSANOS: Well --

3 THE COURT: You can at least rephrase based upon what --
4 the impressions he made are.

5 BY MR. BLALACK:

6 Q Okay. Sir, my question I'm asking you is what was your
7 understanding based on your state of mind at the time? What was your
8 understanding of why a media plan was useful and needed for this
9 issue?

10 MR. ZAVITSANOS: Your Honor, same objections. But in
11 addition to that, he is not the author of this document, and therefore, his
12 state of mind is irrelevant.

13 THE COURT: Overruled because he acted based upon it.

14 MR. ZAVITSANOS: Okay.

15 BY MR. BLALACK:

16 Q You can proceed, sir.

17 A We needed to educate our clients and our employer groups
18 about what we were seeing in the market.

19 Q Now, moving down to the next subheading under the media
20 plan, do you see a heading that says "objectives"?

21 A Yeah.

22 Q It states that one of the objectives was "to increase
23 understanding of the problems around out-of-network billing and its
24 impact on individuals and the overall healthcare system". Do you see
25 that?

1 A Yes.

2 Q What does that mean?

3 A Well, I don't think that it was very transparent to individuals
4 about exactly what was happening inside facilities and the staffing
5 companies there coming in to supply or provide services, they were
6 unaffiliated with the facilities that they were giving services with.

7 Q Okay. Let's turn to page three. There's a heading that reads
8 "About Initiative". Do you see that?

9 A I do.

10 Q And under bullet two, it says, "This out-of-network payment
11 initiative takes our members out of the middle as physicians will need to
12 work with us to resolve any payment issues." Do you see that?

13 A I do.

14 Q What does it mean when that statement refers to taking
15 members out of the middle?

16 A So what that means is that the members are getting surprise
17 billed or balance billed. They weren't aware of that, maybe that that
18 provider was non-participating. We're taking them out of the middle. So
19 we're going to engage with that provider in this -- or some situations
20 using MultiPlan to try to resolve the dispute.

21 Q Okay. Bullet three right next to it starts with
22 "UnitedHealthcare". It reads, "UnitedHealthcare is reviewing all the
23 claims of non-participating providers, but currently, ones deemed
24 excessive or worse, egregious, will be part of this process." Do you see
25 that?

1 A I do.

2 Q To what is that referring?

3 A That's referring to providers that bill, I believe it's even in
4 here, anything above 500 percent of Medicare.

5 Q As the former head of out-of-network programs for
6 UnitedHealthcare, do you consider a charge above 500 percent of
7 Medicare ever reasonable?

8 A No.

9 Q Okay. Go on page -- do you see the statement "Questions
10 and Answers"? And there's a heading that reads "General"?

11 A I do.

12 Q Okay. Now, under that heading, there is a question that
13 reads, "Why is UnitedHealthcare undertaking this initiative?" And then in
14 the second paragraph under that, it states, "Reforming how we work
15 with non-network physicians will provide our members greater
16 protection from surprise bills while addressing excessive, often
17 egregious billing practices by some medical professionals." Do you see
18 that?

19 A I do.

20 Q What is surprise billing?

21 A As we talked about before, I'll give you an example, if that's
22 all right, sir. So if you go into the emergency room and let's just say it's
23 some facility down the road you're very familiar with. You know that
24 that facility is in your network. You feel very comfortable that you're
25 going there, or even if you're taken by ambulance. You get treated. The

1 ER physician in that facility may not be participating. You wouldn't have
2 known that. They're often supplied by a staffing company. The facility is
3 under contract with that staffing company to perform ER services.

4 You get a surprise bill from them. In other words, you could get a
5 very high bill from that staffing company saying you owe a lot of money.
6 Or it could be anesthesiologist, lab, et cetera.

7 Q Well, how is addressing surprise billing important to you and
8 UnitedHealthcare?

9 A Because member complaints and the exposure to members
10 and the dissatisfaction.

11 Q Let's turn to the top of page five. There's a subheading with
12 a question. It starts with "is this initiative". Yeah. "Is this initiative
13 designed to force patients to seek in-network care?" Do you see that?

14 A I do see that.

15 Q And then the answer below that reads, "No. Employers pay a
16 premium to enable their employees to be able to access out-of-network
17 care. But members need to be aware of what 'going out-of-network'
18 entails and how much they must -- they may have to pay on top of their
19 coinsurances and deductibles for that care." Do you see that, sir?

20 A I do.

21 Q Let's break that down. When it says, "Employers pay a
22 premium to enable their employees to be able to access out-of-network
23 care," what does that mean?

24 A So a premium means more. Employers are paying more for
25 that type of benefit plan where you have both in-network coverage and

1 out-of-network coverage.

2 Q So if you're a member of -- if you're an employee of a
3 company and you have a benefit plan that also offers out-of-network
4 benefits in addition to in-network benefits, is one of those more
5 expensive than the other?

6 A Yes.

7 Q Which one?

8 A Out-of-network is typically more expensive than in-network.

9 Q Okay. Now, when it says, "Members need to be aware of
10 what," and it says, "going out-of-network" in quotes, "entails and how
11 much they may have to pay on top of the coinsurance and deductibles
12 for that care." What does that mean?

13 A So think about the scenario that we talked about before. You
14 have your in-network benefit level and your out-of-network benefit level.
15 If you banged up your knee and you said, I'm going to go get scoped or
16 whatever in a couple of weeks, you make a decision to go out-of-
17 network, you're going to know that, and you know that you have a
18 higher coinsurance. In the situation here where you're talking about ER
19 physicians, you're just -- you're not making that choice. So it's choice on
20 the in-network benefit level -- or no choice on the in-network benefit
21 level, choice on the out-of-network benefit level. You need to
22 understand that cost share.

23 Q Do you believe there was anything improper about
24 UnitedHealthcare wanting to alert its members, its clients, the public, to
25 what United considered was a serious problem of surprise medical

1 billing by out-of-network providers and staffing companies?

2 A Not at all.

3 Q Is that sort of communication part of what United Healthcare
4 considers its job?

5 A It is our obligation to do that.

6 Q All right. Now, I want to talk about the next topic, which is
7 the contention about the Yale study. Do you recall -- and bring that
8 down. Do you recall being questioned and where the suggestion by Mr.
9 Zavitsanos was that UnitedHealthcare paid for the Yale study and
10 controlled its content?

11 A Yes, I do.

12 Q I want to show you some Q&A, sir. This is from November 8,
13 so this is earlier in the week.

14 MR. BLALACK: If you bring that up, Shane. This is at page
15 77, line 8.

16 BY MR. BLALACK:

17 Q "Q Now, with the umpire -- we got a lot of umpires.
18 There's another umpire. Now, the umpire calls a strike. That's
19 unreachable, right, because he's neutral, right? But what if -- again, back
20 to my question, what if the umpire was secretly, without anybody in the
21 world knowing, on the payroll with the pitcher. Would you have
22 reasonable to be skeptical of the umpire?

23 "A Yeah.

24 "Q Okay. And that's what you all did with the Yale study.

25 "A I disagree."

1 Do you see that, sir?

2 A I do.

3 Q Do you consider that a serious allegation?

4 A Very serious.

5 Q Now, do you recall that you were shown a number of emails
6 regarding the so-called Yale study?

7 A Yes, I do.

8 Q First of all, were you an author or recipient of any of those
9 emails that you were shown?

10 A No.

11 Q So of all those questions he asked related to those
12 documents, were you on any of them?

13 A I was not.

14 Q Do you have any personal knowledge of any of those
15 documents or emails?

16 A Any of those documents what?

17 Q Or emails. Do you have any personal knowledge of any of
18 those documents or emails?

19 A No.

20 Q All right. So leaving those -- set those aside, that you weren't
21 on them, and you didn't participate in them. Leaving those aside, do you
22 have any -- you're under oath. Do you have any knowledge of
23 UnitedHealthcare paying any money to Dr. Cooper at Yale or anyone
24 else involved with the Yale study?

25 A No.

1 Q Did Mr. Zavitsanos show you any document which said in
2 the document that UnitedHealthcare paid any money to support the Yale
3 study?

4 A No.

5 Q During the time that you were at UnitedHealthcare, did you
6 ever see any document, or did anyone ever tell you that
7 UnitedHealthcare had paid any money to Dr. Cooper or anyone else
8 involved in the study?

9 A No.

10 Q Did Mr. Zavitsanos show you any documents which said that
11 UnitedHealthcare had editorial control over the contents of the Yale
12 study?

13 A No.

14 Q When you were at UnitedHealthcare, did you ever see any
15 documents or did anyone that you ever spoke to ever tell you that
16 UnitedHealthcare exercised editorial control of the content of the Yale
17 study?

18 A No.

19 Q Now, I want to show you one of the documents that Mr.
20 Zavitsanos showed you, but I also want to show you an email that
21 transmitted the document, which he did not show you or the jury. So
22 first, let me mark for identification Plaintiff's Exhibit 31, which is not in
23 evidence.

24 [Plaintiffs' Exhibit 31 marked for identification]

25 MR. ZAVITSANOS: Hold on a minute.

1 MR. BLALACK: I'm going to ask my colleague here whether
2 they stipulate to its admission. Plaintiffs' Exhibit 31.

3 MR. ZAVITSANOS: No objection, Your Honor.

4 MR. BLALACK: Shane, if you could bring that up. I'll move
5 that into evidence now.

6 THE COURT: Give me the number again.

7 MR. ZAVITSANOS: Your Honor, can we approach for one
8 second, please?

9 THE COURT: You may. I need the number first.

10 MR. BLALACK: Plaintiffs' Exhibit 31, Your Honor.

11 THE COURT: All right, 31 will be admitted.

12 [Plaintiffs' Exhibit 31 admitted into evidence]

13 [Sidebar at 9:46 a.m., ending at 9:47 a.m., not transcribed]

14 THE COURT: Okay. Objection was overruled. Please
15 proceed.

16 BY MR. BLALACK:

17 Q All right. Now, sir, let's show the jury Plaintiffs' Exhibit 31.
18 And bring up the top so we can see it. So sir, just again, the date of this,
19 Plaintiffs' Exhibit 31, is what?

20 A I'm sorry. The date?

21 Q The date of Plaintiffs' Exhibit 31, which is on the screen right
22 now, is what?

23 A February 10th of 2016.

24 Q And again, as with the other documents, if you see it, can
25 you tell me, do you see your name anywhere?

1 A I do not.

2 Q Can you tell the jury what the subject of the document is?

3 A "Out-of-network proposal."

4 Q All right. Now, I'm going to show you the next document,
5 which is Plaintiff's Exhibit 32, so the next one in sequence, which was
6 shown to you and is admitted into evidence already.

7 MR. BLALACK: Now, you can just pull up the top of that,
8 Shane. There you go.

9 BY MR. BLALACK:

10 Q Now, sir, you'll see at the top, what does the top of the page
11 say?

12 A "Out-of-network providers at in-network hospitals: theory and
13 evidence."

14 Q Okay. And there's listed underneath that the names of three
15 persons. Who are they?

16 A Zach Cooper from Yale, Vivian Ho from Rice, and Fiona Scott
17 Morton from Yale University NBER.

18 Q And what's the date of the --

19 A February 2016.

20 Q Do you recognize this document from your examination
21 earlier today, or earlier in this trial?

22 A I do.

23 Q And can you tell that this document is the attachment to
24 Plaintiff's Exhibit 31 that I just showed you?

25 A I believe it is.

1 Q Prior to this trial, had you ever seen this document before?

2 A I don't believe so.

3 Q Okay. What does this document, from your -- take a second
4 to skim it, sir. And then I want to ask you what does this document
5 appear to be?

6 A I'm sorry. Which -- the one on the screen?

7 Q Plaintiffs' Exhibit 32.

8 A Okay.

9 Q Take a second to skim it to yourself. And then just tell me
10 once you're done what it appears to be.

11 [Witness reviews document]

12 A It looks like a plan to write two papers identifying the scale of
13 out-of-network billing.

14 Q Would it be fair to call this a research proposal?

15 A Yes.

16 Q Could you tell from this document and the email whether
17 UnitedHealthcare intended or planned to supply data for the study?

18 A You said either this document or the email?

19 Q Or the email.

20 A I think the email, most likely.

21 Q Okay. Now, sir, when the Yale study, so the actual Yale
22 study, was published, did you review it?

23 A When it was finalized?

24 Q Yes.

25 A Yes.

1 Q Did you ever see the Yale study in draft form before it was
2 finalized?

3 A No.

4 MR. BLALACK: All right. I want to -- this is not in evidence,
5 so I'm going to ask Shane to pull this up just for the Judge and counsel.

6 MR. ZAVITSANOS: I'm sorry. What is this?

7 MR. BLALACK: This is Defendants' Exhibit 5497, and you can
8 find that in your binder.

9 MR. ZAVITSANOS: Your Honor, may I confer with counsel
10 for one second?

11 MR. BLALACK: Sure. Can we approach?

12 MR. ZAVITSANOS: Yeah.

13 [Sidebar at 9:51 a.m., ending at 9:53 a.m., not transcribed]

14 MR. ZAVITSANOS: I apologize for the interruption.

15 THE COURT: We just needed -- the lawyers some direction.
16 There was nothing that I ruled on.

17 BY MR. BLALACK:

18 Q All right, sir. Let's just recap and make sure the jury is with
19 us. I think you said that when the Yale study was published, you did
20 review it?

21 A When it was finalized and out in the public, I did see it.

22 Q But you did not see it in draft form before?

23 A I did not.

24 Q Okay. So if you would find in your binder Defense Exhibit
25 5497 and review that real quickly. So is that document the Yale study

1 you reviewed when it was published?

2 A I believe so.

3 Q Can you just quickly -- I don't need down to the exact
4 number -- give the jury an estimate of the number of pages in that study?

5 A There's 80 pages.

6 Q What's the date on the Yale study?

7 A June of 2017.

8 Q Let's now turn to -- sit that side. Let's turn back to Plaintiff's
9 Exhibit 32. And if you'd bring that back up, please. Again, this is the
10 document you -- that was described as a research proposal that was
11 marked up in redline. Do you see that, sir?

12 A I do.

13 Q What's the date of that document?

14 A That's February of 2016.

15 Q So a year prior; is that correct?

16 A Over a year ago -- a year prior.

17 Q Okay. Can you quickly tell the jury how long that document
18 is?

19 A Can you scroll? It's three pages.

20 Q Can you tell, sir, from comparing these two documents,
21 Defense Exhibit 5497, Plaintiffs' Exhibit 32, whether Plaintiffs' Exhibit 32
22 is a draft of the Yale study?

23 A It is not.

24 Q So based on the redline here that's reflected in Plaintiffs'
25 Exhibit 32, is there anything you see in this document which states that

1 UnitedHealthcare exercised editorial control over the Yale study?

2 A I do not believe so.

3 Q Is there anything you see here in Plaintiffs' Exhibit 32, which
4 states that UnitedHealthcare paid or would pay Dr. Cooper or any other
5 researcher in connection with the Yale study?

6 A No.

7 MR. BLALACK: If you can bring that down, Shane.

8 BY MR. BLALACK:

9 Q Let's go to the next section, sir. Do you remember being
10 questioned about an entity called Naviguard, sir?

11 A Yes.

12 Q And do you remember the suggestion that UnitedHealthcare
13 created Naviguard to replace MultiPlan so that United could conquer -- I
14 think was the term -- 300 million dollars or more for itself?

15 A Yes.

16 Q Okay. Let's look at the Q and A on that from your transcript,
17 sir. And this was November 8th. So that was earlier this week.

18 MR. BLALACK: It's page 33, Shane, line 6 to 16.

19 BY MR. BLALACK:

20 Q Starting at the top, you were asked a question.

21 "Q Well, it looks like after you got this, the program was up and
22 running. The plan by 2023 was to terminate the MultiPlan vendor
23 contract to save the 380 dollars and put that in your pocket, as well,
24 right?

25 "A The contract is not terminated yet. If I want to still use

1 MultiPlan, I can."

2 And that was as of the question.

3 "Q My question, sir, was by 2023 -- it's kind of hard to read here
4 -- the plan was to terminate the MultiPlan contract, right?

5 "A That was an option, yes.

6 "Q That was an option? That wasn't the plan?

7 "A Well, as I was trying to explain -- can I explain it?

8 "Q No. Was that -- was -- was that the roadmap, the critical map
9 to execution, that you all were planning to terminate the MultiPlan
10 contract by 2023?

11 "A Clients stayed on MultiPlan, and we had to keep it."

12 Do you see that?

13 A I do.

14 Q Okay. Now, do you -- do you recall this exchange during
15 your examination?

16 A I do.

17 Q I'm going to give you the opportunity to explain the
18 information that you tried to explain earlier. What is Naviguard?

19 A Naviguard was -- or is a customer advocacy tool that assists
20 in deciding on a health group.

21 Q When you say, UnitedHealth Group insurance, what does
22 that mean?

23 A That's a separate entity inside UnitedHealth Group.

24 Q Did you ever have any responsibility for the initial
25 development of Naviguard?

1 A I was an advisor to Naviguard.

2 Q Were you ever an officer or director of Naviguard?

3 A No.

4 Q Have you ever worked for Naviguard?

5 A No. I have not.

6 Q What services, sir, does Naviguard provide?

7 A As I talked about, it's a member advocacy service. So what
8 that is is they help members who has any balance billing or out-of-
9 pocket or what we call member cost share, the coinsurance, co-
10 deductible. They help negotiate on their behalf.

11 Q Does Naviguard making pricing recommendations for out-of-
12 network services to UnitedHealthcare or other health insurers?

13 A No, they do not.

14 Q Does Naviguard process and pay out-of-network claims
15 themselves?

16 A No, they do not.

17 Q Do Naviguard and MultiPlan provide the exact same services
18 to the market?

19 A No, they do not.

20 Q If you would, please explain to the jury what services each of
21 those two entities provide and how they differ?

22 A So as I talked about, Naviguard is a customer advocacy tool,
23 sits inside UnitedHealth Group ventures. It helps the member address
24 any out-of-pocket copay coinsurance deductible negotiations, in addition
25 to any balance billing negotiations, if they need help. Naviguard, as

1 well, will help the member understand the value of their benefits. It's
2 very -- obviously, because it sits inside UnitedHealth Group. It's very
3 well -- it knows the benefit plans extremely well. And also, you know,
4 one of the components that Naviguard can do is to help steer members
5 in the future to in-network providers. So that's Naviguard. MultiPlan --
6 sorry, I've been talking a lot, so my voice is going. Plus, the game was
7 really good last night, so.

8 MultiPlan is a third-party entity used by many in the industry. Not
9 only United, but our competitors. They provide, as we've kind of talked
10 about, multiple services. They provide rep network agreements,
11 prospective and retrospective fee negotiation. They provide outlier cost
12 management, Data iSight. They also provide other programs such as
13 fraud waste and abuse editing and other functions.

14 Q Now, when you referred to Naviguard providing member
15 advocacy services, does that term only mean negotiation services with
16 an out-of-network provider, or does it -- is it broader than that?

17 A It's broader than that.

18 Q In what way?

19 A If I can, the -- Naviguard, the genesis of it was United had an
20 entity called the special needs program. And it was developed off of that
21 program. So if you think about members, employees of employer
22 groups that have children with special needs, autism, ADD, et cetera, you
23 can enroll into that program and you can help navigate through the
24 complexities of the healthcare system. Very specialized, very controlled,
25 very hands-on. Naviguard was built with that in mind to go even further

1 to kind of address non-par services. So not only negotiations on what
2 the member's share is, but also, in the future, hey, are you aware you
3 could have a par alternative, let me help you find that in the future.

4 Q Now, does MultiPlan -- or at least when you were there, at
5 UnitedHealthcare, did MultiPlan provide member advocacy services of
6 the type you just described beyond negotiating without a member
7 provider?

8 A No. They did not.

9 Q But are there things that MultiPlan does that Naviguard does
10 not?

11 A Yes.

12 Q And are there things that Naviguard does that MultiPlan does
13 not?

14 A Yes.

15 Q Was Naviguard created to replace MultiPlan?

16 A It was not.

17 Q When you left UnitedHealthcare in August, did it still use
18 MultiPlan's services, including Data iSight?

19 A Yes.

20 Q When you left UnitedHealthcare in August, did it still pay for
21 MultiPlan's services, including the Data iSight tool?

22 A Yes.

23 Q Now, I want to show you -- well, actually, I don't think we
24 need to waste time showing you. Do you remember being shown a
25 document from 2018, that Mr. Zavitsanos noted -- suggested that

1 MultiPlan's contract would be terminated by 2023?

2 A Yes, I do.

3 Q And do you -- did you prepare that document?

4 A I believe I did.

5 Q Why was that statement in the 2018 document?

6 A So you've got to realize that there's a great dependency on
7 vendor and there's vendor fees that are out there that are being paid.
8 And so the intent is to address that. We're always challenged on
9 expenses.

10 Q If you had an offering that could provide all of the same
11 services that MultiPlan did and not have to pay any fee for it, would there
12 be a reason to keep using the vendor?

13 A No.

14 Q Now, at the time you left UnitedHealthcare in August 2020 --
15 2021, was there at that time a plan in place to terminate MultiPlan's
16 contract?

17 A No.

18 Q And why not, given the statements in the prior document?

19 A It just -- it wasn't plausible. There was --

20 Q Why wasn't it plausible?

21 A There was -- clients still wanted to use the RAP networks and
22 the prospective fee negotiations that MultiPlan provides. And we were
23 willing to accommodate that. We're not going to force a client to move.

24 Q Now, let's move on to the next and final or next to final
25 document, sir. That is the language in UnitedHealthcare's administrative

1 service agreement. I think you were shown such an agreement. And the
2 suggestion was it proved that UnitedHealthcare knows and knew that the
3 provider's full bill charges are what's owed if there's not a discount on
4 one of their programs. Do you remember the question about that topic?

5 A Yes.

6 MR. BLALACK: And Shane, if you could bring up the
7 testimony from November 3rd of last week, page 161, line 6, down to the
8 60 -- we'll go to the next page. We'll start at line 6.

9 BY MR. BLALACK:

10 Q So --

11 "Q Savings obtained -- this is quoted from the administrative
12 service agreement -- means the amount -- and here's the part I want to
13 ask you about -- that would have been payable to a healthcare provider,
14 including amounts payable by both the member and the plan if no
15 discount were available, minus the amount that is payable to the
16 healthcare provider. Identically, amounts payable to both the member
17 and the plan after this account was paid. Do you see that?

18 "A I do.

19 "Q Okay. So in other words, the billed charge would have been
20 owed. But if you use one of these RAP agreements where you're able to
21 negotiate the providers down, the difference between the billed charge
22 and what the plan actually paid, you take that percentage, right?

23 "A Can you -- that's a very long question. I think you have --

24 "Q You don't understand that question?

25 "A No.

1 "Q You don't? Okay.

2 "A You said owed. That's not what you owe to the provider."

3 Do you see that, sir?

4 A I do see that.

5 Q Okay. Let me bring that down. Now, the document that you
6 all were discussing in your questioning was Plaintiffs' Exhibit 10. And it
7 has been admitted into evidence.

8 MR. BLALACK: And I'll ask Shane to bring that up again. All
9 right. Go to the top, Shane. Let's just reorient the jury at what we're
10 looking at.

11 THE WITNESS: Is that in my binder?

12 BY MR. BLALACK:

13 Q It should be. Plaintiffs' Exhibit 10.

14 A I might be on the wrong --

15 Q If it's not in that one, look at the other one.

16 A All right. Thank you. I think I got it.

17 Q Okay. Just looking at the first page of the document, sir.

18 A Okay.

19 Q All right. Looking at that first paragraph, can you describe to
20 the jury what Plaintiffs' Exhibit 10 is?

21 A That is an administrative service agreement between
22 UnitedHealthcare Services and Walmart.

23 Q Now, you explained this earlier, but just so that we're all
24 working off the same sheet of music here, what is the administrative
25 services agreement?

1 A It's a -- sorry. It's a contract between UnitedHealthcare and
2 the employee group to perform administrative services as defined in the
3 agreement.

4 Q And in this agreement, is UnitedHealthcare an insurer or a
5 third-party administrator?

6 A They're a third-party administrator.

7 Q So does that mean this Walmart plan is a fully insured plan
8 or self-funded?

9 A Self-funded.

10 Q Now, in the questioning I showed you earlier, the suggestion
11 was that the language about how to determine the shared savings fee
12 showed that UnitedHealthcare knew it owed billed charges in the
13 absence of a discount. And then you seemed to disagree with that. Is
14 that fair? Is that right?

15 A Understood. Yes.

16 Q All right. Let's look at that language again, which is at I
17 believe page 60.

18 MR. BLALACK: So Shane, could we find that in Mr. --

19 THE WITNESS: 6-0?

20 BY MR. BLALACK:

21 Q 6-0. And we're talking about the E010.660. I believe you're
22 looking for the fourth row of the chart, second column, under the section
23 with the table shown in the shared savings program. You see that?

24 A I do.

25 Q Okay. Now, first of all, just to remind the jury, what do you

1 understand this section to describe?

2 A This is the fee that is paid for using the shared savings
3 program.

4 Q Okay. And I want to show you the same language that Mr.
5 Zavitsanos showed you. I believe it starts with the phrase, "savings
6 obtained" down to the bottom. Do you see that?

7 A Yes.

8 Q Now, focused on the language that he was questioning you
9 about, which I believe was, "would have been pay" -- do you see that?
10 "Would have been payable to the healthcare provider."

11 A Yes, I do see that.

12 Q Do you understand that -- well, let me put it this way. What
13 do you understand that phrase, "would have been payable" to mean?

14 A That's just the methodology that we calculated, which is the
15 billed charges to the allowed. It is not what is owed to the provider.

16 Q And what is your understanding of what the phrase would
17 have been payable from -- by the member and plan? What is that
18 referring to?

19 A That's just referring to the method of calculation of the --

20 Q And is that an amount that the provider could pursue against
21 the member?

22 A Yes. The staffing company could go and try to collect from
23 the employer group and the employee.

24 Q But does that language indicate that the member is obligated
25 to pay it?

1 A No, it does not.

2 Q Now, what is your basis for saying that's the proper way to
3 read that language?

4 A Well, I mean, 30 years in the industry, 20 years in running the
5 out-of-network programs. It was never understood that that is what is
6 owed to the provider.

7 Q And in your view, is there anything in that language which
8 indicates to you that there was an obligation to pay the provider's bill
9 charge no matter what that bill charge was?

10 A No.

11 Q Why do you say that?

12 A That would just be implausible. I mean, that -- if that was the
13 case, that would mean that the provider or the staffing company could
14 bill whatever they wanted, let's say \$10,000 for a strep test, and the
15 employer group would have to pay it.

16 Q Now, basing your years of experience in your own time at
17 UnitedHealthcare, what is the proper way to read that language?

18 A That's what the staffing company could pursue the employee
19 group and the member for collections. But it is not what is owed.

20 Q Does it mean that -- does the provider have the option of
21 contesting that charge?

22 A Yes. That's what I was saying. The provider has the right to
23 balance bill.

24 Q And the member, what is his right?

25 A They have the right to -- and the employee group, to

1 challenge what is owed and then contest what that amount is of what's
2 owed.

3 MR. ZAVITSANOS: Excuse me. Counsel, can I -- I'm sorry.
4 May I ask what exhibit and page number that is?

5 MR. BLALACK: I believe that is --

6 MR. ZAVITSANOS: My apologies for the interruption.

7 MR. BLALACK: No worries. I believe that's Plaintiffs' Exhibit
8 10, and that was page 60.

9 MR. ZAVITSANOS: Thank you. Thank you very much.

10 MR. BLALACK: And at this time, Your Honor, I'll pass the
11 witness back to Mr. Zavitsanos.

12 THE COURT: Okay.

13 MR. BLALACK: Thank you for your time, sir. I know it's been
14 a long day. We're almost done.

15 THE COURT: This is a good time for our morning recess.
16 During the recess, do not talk with each other or anyone else on any
17 subject connected with the trial. Don't read, watch, or listen to any
18 report of or commentary on the trial. Don't discuss this case with
19 anyone connected to it by any medium of information, including without
20 limitation newspapers, television, radio, internet, cell phone, or texting.

21 Don't conduct any research on your own relating to the case.
22 Don't consult dictionaries, use the internet, or use reference materials.
23 Don't use social media about the trial. Don't talk, text, Tweet, Google
24 issues, or conduct any other type of book or computer research with
25 regard to any issue, party, witness, or attorney involved in the case.

1 Most importantly, do not form or express any opinion on any
2 subject connected with the trial until the jury deliberates. It's 10:11.
3 Please come back at 10:25, please.

4 THE MARSHAL: All rise for the jury.

5 [Jury out at 10:12 a.m.]

6 [Outside the presence of the jury]

7 THE COURT: Plaintiff, do you have anything for the record?

8 MR. ZAVITSANOS: Yes, Your Honor. We have a couple of
9 issues on which I believe the door has been opened. And I don't know if
10 the Court would like a -- my preference, Your Honor, would be to do this
11 outside the presence of the jury. So I don't know if Your Honor would
12 like to take it up now.

13 THE COURT: We can do it now or when you come back. It's
14 up to you.

15 MR. ZAVITSANOS: I could use a comfort break. May I --

16 THE COURT: I could use a comfort break.

17 MR. ZAVITSANOS: Okay.

18 THE COURT: So let's come back about 10:25.

19 MR. ZAVITSANOS: Yes, Your Honor.

20 THE COURT: Thanks, guys. And I'm going to ask lead
21 counsel to step forward for a second.

22 MR. ZAVITSANOS: Yes, Your Honor.

23 [Recess taken from 10:13 a.m. to 10:25 a.m.]

24 [Outside the presence of the jury]

25 THE MARSHAL: Back on the record.

1 THE COURT: All right. Please remain seated. Okay. Mr.
2 Zavitsanos.

3 MR. ZAVITSANOS: Yes, Your Honor. With the Court's
4 permission, may I have Mr. McManis address the point I wanted --

5 THE COURT: He may.

6 MR. ZAVITSANOS: -- to raise.

7 MR. MCMANIS: Thank you, Your Honor.

8 So in Mr. Haben's last three minutes or so of testimony,
9 there's testimony about UCR, and how that is no longer reasonable, how
10 -- that had been the plan in the early 2000s, and then they had to shift
11 away from it, and the jury is left with the impression that they had to
12 shift away from that solely because of these provider increases and
13 charges.

14 Your Honor, the only way for us to rebut that testimony is to
15 introduce the evidence about Ingenix, and why UCR was, in United's
16 view, reasonable in the early 2000s, when they had control over that
17 data. And then when the Ingenix lawsuit happened the settlement
18 required them to start using FAIR Health. I believe FAIR Health was fully
19 operational and ready for use by 2011. They were required to use it for
20 five years, and just coincidentally, that's 2016, when this five-year plan
21 ends.

22 And so I think what we have right now, Your Honor, is, you
23 know, a one-sided story of -- UCR was fine until the providers got out of
24 control, but in order to respond to that we need to be able to explain the
25 real reason United thought UCR was reasonable then and is

1 unreasonable now. So we think they fully opened the door to this
2 Ingenix information, and that we need to be able to get into that.

3 MR. ZAVITSANOS: And to release a couple of references
4 that -- I think the Court initially sustained my objection, and counsel
5 rephrased the question to suggest that this was client and consultant
6 driven. And so that's the only -- that's the only thing I have to add, Your
7 Honor.

8 MR. BLALACK: Your Honor, I'll try to spell it out. One, on
9 Ingenix. I don't think it's at all plausible to suggest that anything that I
10 would ask, or that Mr. Haben said in any rebuttal role, had touched on or
11 opened the door to the Ingenix settlement that was entered in 2009, for
12 a couple of reasons.

13 One, even if -- even if this interpretation was true, even under
14 the Plaintiffs own theory, the whole use of Ingenix was as a result of a
15 mandate under a settlement agreement, and their theory is that once the
16 mandate went away United stopped using reasonable and customary
17 and FAIR Health, because it was no longer under a mandate or under a
18 settlement.

19 So there's nothing about that theory of that case, that in any
20 way corroborates the notion that United believed that the reasonable
21 and customary methodology and FAIR Health was reasonable back in
22 2008 versus 2010. In fact, it's quite the opposite, it would support the
23 inference that it didn't believe it, but was forced to do it by an external
24 party.

25 In this case the evidence that Mr. Haben made, I don't believe

1 he ever testified that -- about the feasibility of the FAIR Health or R&C
2 value. What he said was that clients and customers don't select it
3 anymore, and with the same degree of frequency, as they did before,
4 because charges had gone up, up, up. It was causing charges with no
5 control in there, and it has no balance billing protection, unlike other
6 alternative programs, therefore it's just less attractive.

7 On that point, they are more willing and capable of using the
8 documents that got in the record, and some of which has been used in
9 the prior examination, before I got up, to attack both of those premises,
10 even if there was balance billing protection or were to arguing that there
11 was no evidence that charges went up during this period, which has
12 been one of the key arguments on the other side.

13 So it's not like they are somehow disarmed from attacking
14 the bulk of those arguments, and there's absolutely nothing that Mr.
15 Haben said, they got near the Ingenix settlement, got near the meat of
16 the reasons why it was adopted, but in fact he was just noting that
17 physician reasonable and customary, that program that's been around
18 forever, and it's still in place today, it's still used just by a fewer number
19 of clients.

20 MR. ZAVITSANOS: A brief rebuttal, Your Honor.

21 So one of the things that counsel did very, very skillfully,
22 very skillful, I'm not being facetious, I really admire the way he did this,
23 was to fuse together this reasonable and customary program, with the
24 obligation independent of the program, to process claims, at a
25 reasonable and customary rate; those are different. Okay. You can be

1 obligated to process things at a reasonable and customary rate without
2 being a subscriber to this program and that distinction is going to be
3 elaborated considerably during the recross.

4 Now the problem is not on the program itself, it is on this
5 side, this side obligates them to process them to the reasonable and
6 customary rate. The problem is that what counsel did, and he kind of
7 bounced back and forth between both, the suggestion is that they moved
8 away from processing claims unreasonable and customary because of
9 escalating charges, and pressure from clients and consultants.

10 And the reality is, they moved away from then for one
11 reason, and one reason only, and that is the term of the obligation
12 expiry. And they were doing it, initially, because they were kind of
13 cooking the books on this Ingenix deal, which is essentially the
14 predecessor for what they were doing with Naviguard, and so that's the
15 real reason, and the problem that's left now is exactly what Mr. McManis
16 said, this impression is created, but this fell out of favor, and that we
17 were the problem.

18 MR. MCMANIS: The only thing that I would add to that, Your
19 Honor, is there -- what Mr. Haben testified to is this program was created
20 in the early 2000s, and that's the time frame they had to control over
21 that, and then he testified that usual, customary and reasonable doesn't
22 actually mean "reasonable" because now here we are in 2021 and all the
23 providers are discretionary.

24 And so I do think there's sort of a fundamental imbalance in
25 the way the information has been presented, because this key piece of