

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.

Electronically Filed
Apr 18 2023 08:17 PM
Elizabeth A. Brown
Clerk of Supreme Court

Case No. 85525

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

Petitioners,

vs.

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

Respondents,

vs.

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

Real Parties in Interest.

Case No. 85656

**APPELLANTS'
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441	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 3 of 18 (Filed Under Seal)	12/24/21	115 116	28,485–28,643 28,644–28,742
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455	Supplemental Appendix of Exhibits to Motion to Seal Certain Confidential Trial Exhibits – Volume 17 of 18 (Filed Under Seal)	12/24/21	125	30,953–31,122
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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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1 information about how UCR was -- originally felt, and why they were
2 okay with then, and here they are saying something different now, and
3 more to the jury I think has to be explained.

4 THE COURT: All right. I just don't think the door has been
5 opened. I think that the 2009 Ingenix settlement would be so prejudicial
6 to the Defendant they couldn't get a fair trial, so --

7 MR. BLALACK: Yes, Your Honor.

8 MR. ZAVITSANOS: But just to be clear, Your Honor, so I
9 don't run afoul of the Court's ruling, it is -- and I think I did this on the
10 initial part of it, it is okay to say that you are obligated to use FAIR Health
11 for a period of time in the expiry.

12 MR. BLALACK: I have no problem with that, Your Honor.

13 THE COURT: I think that came up in your direct --

14 MR. ZAVITSANOS: Yes.

15 THE COURT: So good enough. Let's --

16 MR. ZAVITSANOS: Yes, Your Honor. Yes.

17 MR. BLALACK: If that's all that's done, I'm good.

18 THE COURT: Thanks. Let's bring the jury in.

19 THE BLALAK: Should I get Mr. Haben and put him in his
20 seat, Your Honor?

21 THE COURT: Yes, please.

22 MR. ZAVITSANOS: Well, Your Honor, we're having
23 technical issues.

24 THE COURT: Okay. Let's go ahead and bring -- you can go
25 ahead and have them ready.

1 [Pause]

2 MR. ZAVITSANOS: Your Honor, while we're waiting on the
3 jury, may I ask counsel, if he has -- I have three exhibits --

4 THE COURT: Sure.

5 MR. ZAVITSANOS: -- I need to admit?

6 THE COURT: Why don't you do that right now?

7 MR. ZAVITSANOS: So let me give him the numbers, Your
8 Honor. It is Exhibit 5.

9 MR. BLALACK: One second, Your Honor.

10 MR. ZAVITSANOS: And Lee, these are the ones we sent you
11 last night. Exhibit 5.

12 MR. BLALACK: No objection.

13 MR. ZAVITSANOS: Is that admitted, Your Honor. We move
14 for admission --

15 THE COURT: I'll do it in front of the jury.

16 MR. ZAVITSANOS: Oh, okay. Exhibit 14, it's another copy
17 around the same time.

18 MR. BLALACK: No objection.

19 MR. ZAVITSANOS: And finally, Your Honor, Exhibit 255.

20 MR. BLALACK: One second, Your Honor. I have no
21 objection.

22 THE COURT: All right. So when the jury comes in I'll admit
23 514 and 255. And how are you guys --

24 MR. ZAVITSANOS: It's 5 --

25 THE COURT: -- 14.

1 MR. ZAVITSANOS: 14, I'm sorry, I thought --

2 THE MARSHAL: Are we ready?

3 THE COURT: One sec.

4 MR. ZAVITSANOS: It's 5, 1-4, 14, and 255.

5 THE COURT: All right. I think that's what -- I guess what I
6 meant to say. That's what I wrote down.

7 MR. ZAVITSANOS: Yeah. I misheard you, Your Honor. My
8 apologies. Oh, I'm sorry, but I'm reminded as well, Your Honor, my
9 apologies, 403.

10 MR. BLALACK: 403?

11 MR. ZAVITSANOS: Yes.

12 THE COURT: 403. Thank you. So give me an update on
13 your tech issue?

14 MR. ZAVITSANOS: What's going on Michelle? What's the
15 problem? I think we're having an interface issue with the court system.

16 THE COURT: Okay. Wes, will you let them know it's a
17 technical issue, and it'll just be a couple of minutes.

18 THE MARSHAL: Yes, ma'am.

19 MR. BLALACK: You Honor, I will indicate that we stipulate to
20 admissibility, but with one wrinkle. Is this is one of those highly
21 sensitive AEO documents.

22 MR. ZAVITSANOS: Yeah. Just let me know.

23 MR. BLALACK: So we just need to --

24 [Counsel confer]

25 MR. ZAVITSANOS: So other than that, good?

1 MR. BLALACK: Yeah. It's admissible, we have no objection
2 to admissibility.

3 THE COURT: Okay. Wes, we're good.

4 THE MARSHAL: Okay.

5 [Pause]

6 THE COURT: And so that you all know, the Marshal -- they're
7 ready for when Andrea gets back. The schedules and letters for
8 employers are ready for them today for next week.

9 MR. ZAVITSANOS: Thank you, Your Honor.

10 MR. BLALACK: Thank you, Your Honor.

11 [Pause]

12 THE MARSHAL: All rise for the jury.

13 [Jury in at 10:41 a.m.]

14 THE MARSHAL: All the jurors are present.

15 THE COURT: Thank you. Please be seated.

16 Mr. Zavitsanos, redirect, please.

17 MR. ZAVITSANOS: Thank you, Your Honor, may it please
18 the Court.

19 REDIRECT EXAMINATION

20 BY MR. ZAVITSANOS:

21 Q Mr. Haben, good morning.

22 A Good morning.

23 Q Okay. Just like your lawyer did, instead -- we're not going to
24 cover the waterfront by any means. I have a few questions about
25 various topics, and I'm going to give you the topic, and ask you a few

1 questions, then move on to another topic, okay?

2 A Okay.

3 Q We're going to try to get you out of here, obviously, as soon
4 as possible, and certainly before the afternoon, okay?

5 A Understood.

6 Q Okay. So let me start by asking you, do you know what a
7 political action committee is?

8 A I believe so.

9 Q And the acronym for that PAC?

10 A Yes.

11 Q Generally, what is a PAC?

12 A I don't know, I don't really participate in one, but it's, I guess
13 what the acronym say it stands for a political action committee.

14 Q Okay. So sometimes people of a like political mind will get
15 together, form a PAC and then that PAC will support a particular
16 candidate, or a particular referendum, or something like that, right?

17 A Okay.

18 Q Okay. I want to start with the Yale study, okay, and with Dr.
19 Zack Cooper; are you with me?

20 A Yeah.

21 Q Okay. Now the question was put to you whether there's any
22 evidence United paid to fund the Yale study. Do you remember that?

23 A Yes.

24 Q Do you know of an organization called the National Institute
25 of Healthcare Management, NIHCM?

1 A I don't know.

2 Q Do you know whether United funds that organization, and if
3 that organization funded the Yale study --

4 A I don't.

5 Q -- kind of how PAC works in politics?

6 A I don't know.

7 Q Okay. Did United arrange for one of the researchers that
8 works with Dr. Cooper, to get a job with a consulting firm that United is
9 using in this case, to testify over a \$1,000 an hour?

10 A I don't know.

11 Q Okay. We should ask that gentleman, I guess, right?

12 A I don't know who does.

13 Q Okay. Do you know who Gail Boudreaux, it's a good Cajun
14 name, Gail Boudreaux and David Anderson are, former employees with
15 United?

16 A I don't know David, although that's a common name, but I do
17 know Gail.

18 Q Okay. Do you know whether they were board members with
19 the National Institute of Healthcare Management at the time that this
20 organization funded part of the Yale study?

21 A I do not know.

22 Q Okay. Fair enough. And I think what you were trying to -- do
23 you know whether Dr. Cooper, Zack Cooper, the primary author of the
24 Yale study, has been blasted by other academics for a gross research
25 conflict?

1 A I don't know.

2 Q Well, your opinion -- as far as you know, he's objective,
3 right?

4 A Yes.

5 Q Okay. And so I'm not going to go through these documents
6 in great detail, I just want a reference point, so we can re-orient
7 ourselves.

8 MR. ZAVITSANOS: Michelle, please pull up Exhibit 509, and
9 we're going to go to page 6. Michelle, pull up the whole thing, please.

10 BY MR. ZAVITSANOS:

11 Q Okay. So this is -- we talked about this during the front part
12 of your examination, but this is something called UnitedHealthcare
13 contract negotiations. I'm not going to show the first page, because the
14 jury saw it already, I just want to go right to the key part, and this is on
15 page 6.

16 MR. ZAVITSANOS: And this is right here Michelle, the
17 second bullet from the bottom.

18 BY MR. ZAVITSANOS:

19 Q Just so -- I think we got it the first time, but that is the same
20 Zack Cooper who is being used by United, to bring our story to life, to
21 publicly speak on the agenda that United is setting forth, right?

22 A Zack Cooper's name is on that, yes.

23 Q Okay. All right. Now, okay. We're done with the Yale study.
24 Now we're going to move on to another topic.

25 MR. ZAVITSANOS: Your Honor, I move for the admission of

1 Plaintiffs' Exhibits 5, 14, 255 and 403. And with regards to 403, Your
2 Honor, we ask that that be admitted, subject to the understanding that
3 we had with Defense, counsel, prior to the jury arriving here this
4 morning.

5 MR. BLALACK: No objection, Your Honor, that's correct.

6 THE COURT: Exhibits 5, 14, 255 and 403 will be admitted,
7 subject to the agreement of counsel, made previously.

8 [Plaintiffs' Exhibit 5, 14, 255 and 403 admitted into evidence]

9 BY MR. ZAVITSANOS:

10 Q Okay. Now, Mr. Haben, I was a little confused by your
11 testimony, and I want to give you a full opportunity, I'm not going to cut
12 you off, I'm going to let you explain. Processing claims using a
13 reasonable and customary methodology in the ASO context, are you
14 saying -- are you telling this jury that never applies for out-of-network
15 emergency room doctors?

16 A I don't believe that it did for out-of-network ER services.

17 Q Okay. What's the date today, Mr. Haben?

18 A I've lost track. I think it's the 12th.

19 Q Okay. So I'm going to put reasonable and customary does
20 not apply to OON emergency room doctors, right?

21 A Physicians, yes.

22 Q I'm going to give you an opportunity, Mr. Haben, to retract
23 this and admit that you made a mistake on that. Would you like to do
24 that?

25 A I don't believe I've made a mistake on that.

1 Q Okay. Does UnitedHealthcare have lawyers, internal
2 lawyers?

3 A Yes.

4 Q Do the lawyers often review the materials that
5 UnitedHealthcare puts out?

6 A Not all materials, no.

7 Q Not all materials. Some materials. Some materials. Do they
8 do that?

9 A Some materials, yes.

10 Q So I'm going to abbreviate UnitedHealthcare UHC. Okay?

11 A That's fine.

12 Q Okay. As between what the UnitedHealthcare lawyers within
13 the company say before trial and what you're telling the jury during trial
14 on this issue, who do you believe the jury should believe?

15 A Well, they should believe me. I'm here, and I'm under oath.

16 Q Exhibit 472. Let's start up here.

17 MR. ZAVITSANOS: No. Michelle, close that up. Just here.

18 Just this. "Privileged and confidential." Just the privileged and
19 confidential.

20 BY MR. ZAVITSANOS:

21 Q All right. So privileged and confidential typically is
22 something that lawyers put on not to be shared with members outside of
23 the intended audience, right?

24 A I don't know. But if that's what you're saying, I understand.

25 Q Okay. Do you know whether this document was prepared by

1 United's in-house lawyers at the highest level?

2 A I don't know who prepared it.

3 Q Okay. Close it up, and let's see what is on this privileged and
4 confidential document.

5 MR. ZAVITSANOS: Right here, Michelle. "Findings and
6 recommendations," the four bullets, please, with the heading. And,
7 Michelle, will you please highlight the second -- all the way across.

8 BY MR. ZAVITSANOS:

9 Q "ASO plans with reasonable and customary language will
10 generally be tied to 80 percent of FAIR Health for the payment of out-of-
11 network ER services." Do you see that?

12 A I do.

13 Q And this is a strategy on how to move away from that, right,
14 that the lawyers are advising the company?

15 A I disagree. I don't believe the lawyers wrote this. I don't
16 know who wrote it.

17 Q You don't know if privileged and confidential -- well, do you
18 know whether -- do you know whether privileged and confidential
19 generally means prepared by lawyers?

20 A It does not.

21 Q It does not.

22 MR. ZAVITSANOS: Close it up.

23 BY MR. ZAVITSANOS:

24 Q Well, this was prepared before trial because it's an exhibit,
25 right? And do you see --

1 MR. ZAVITSANOS: Michelle, pull this down at the bottom
2 here. Just of the DEF.

3 BY MR. ZAVITSANOS:

4 Q That's something called a Bates number. And DEF means it
5 was produced by the Defendants. Do you see that?

6 A I do.

7 Q Would you agree with me, Mr. Haben --

8 MR. ZAVITSANOS: Pull that -- pull out back the four bullets,
9 Michelle.

10 BY MR. ZAVITSANOS:

11 Q Would you agree that while your lawyer --

12 MR. ZAVITSANOS: Second bullet, please highlight it.

13 BY MR. ZAVITSANOS:

14 Q -- while your lawyer was questioning you, that essentially, I
15 guess, a couple of hours of your testimony was just flat wrong?

16 A That's incorrect. And I can explain why.

17 Q Go ahead, sir.

18 A So my testimony was, and I think it's very clear in the benefit
19 plans that we looked at, when you looked at them, it said that these are
20 for out-of-network services and that benefit level only. ER physician
21 services are typically paid at the network benefit level, and the
22 reasonable and customary programs do not apply.

23 Q Mr. Haben, where is that on this document?

24 A It is not on this document.

25 Q Okay.

1 A We referred to the benefit plans when we adjudicate claims.

2 Q Okay. So we need to look at the benefit plans, right?

3 A That would be where I would guide you.

4 Q Okay. So let's look at exhibit -- oh, hold on. So it looks like
5 whoever wrote this, lawyers or not, say, "Suggest ASO reasonable and
6 customary customers be offered a mid-year material modification
7 opportunity, which would lower FAIR Health to 50 percent up or cap all
8 reasonable, customary charges at 300 percent of CMS or some other
9 similar variant." Do you see that?

10 A I do.

11 Q Okay. And no doubt about it, what Dr. Scherr here does is
12 provide out-of-network emergency room service, right?

13 MR. BLALACK: Object to the foundation of that question.

14 THE COURT: Overruled.

15 BY MR. ZAVITSANOS:

16 Q That's what he does? He provides out-of-network emergency
17 room service, right?

18 A I don't know what he does.

19 Q Well, he's an emergency room doctor?

20 A Okay.

21 Q Emergency room doctors perform out-of-network emergency
22 room services, right?

23 A I don't know if he's a network or out-of-network. I'm not
24 trying to be difficult. I don't know this --

25 Q You don't know --

1 A -- individual.

2 Q -- whether the man sitting over here seeking out-of-network
3 benefits is in-network or out-of-network? Is that what you're telling the
4 jury?

5 A I think your wording is very confusing. The -- you're asking
6 does he seek out-of-network benefits. I don't know what that means.

7 Q It seems like as soon as I started asking the questions, you
8 started becoming confused again.

9 A Well, you're asking it in a confusing way.

10 Q Okay. All right. Do you know whether the Plaintiffs in this
11 case are seeking reimbursement for out-of-network emergency room
12 services? Mr. Haben?

13 A They are seeking reimbursement for emergency room
14 services, and I believe they are out-of-network.

15 Q Thank you, sir.

16 A Yes.

17 MR. ZAVITSANOS: All right. Michelle, you can take that
18 down.

19 BY MR. ZAVITSANOS:

20 Q Now, Exhibit 363, that's the website. And I thought we went
21 through this, but --

22 A Can I get to that?

23 Q Sure.

24 MR. ZAVITSANOS: Michelle, pull up the comp -- pull up
25 everything from information on payment down to the first paragraph

1 under, "What do these terms mean"? Perfect. Okay. Now, Michelle, will
2 you do me a favor, please, will you -- please pass that over to her.
3 Highlight and underline the parts that I have there, Michelle.

4 BY MR. ZAVITSANOS:

5 Q Okay. Mr. Haben, will you agree with me there is not one
6 word on this website that talks about reasonable and customary that
7 says it does not apply to emergency room doctors performing out-of-
8 network emergency room services? Not one word, right?

9 A I disagree with you.

10 Q Show me.

11 A I can't pull up the website. We have just a snippet of --

12 Q No. Show me in the exhibit that you went through with your
13 lawyer where you were telling the jury that this supports your view that
14 out-of-network emergency room services are not to be applied using the
15 reasonable and customary standard. Please show us what words
16 support that.

17 A It's supposed to be based -- it says here, "Based on the terms
18 of the member healthcare benefit plan," and you would have to go look
19 at that benefit plan.

20 Q Ah. Okay. Now we're getting somewhere. So --

21 MR. ZAVITSANOS: Michelle, you know what I forgot to write
22 down, would you -- what was the last exhibit number?

23 UNIDENTIFIED SPEAKER: 472.

24 MR. ZAVITSANOS: Would you please pull up 472, please,
25 Michelle?

1 THE WITNESS: Is that the one we just looked at?

2 MR. ZAVITSANOS: Keep that open, yeah. We're -- I'm just
3 going to write that down. Pull out the four bullets, please. Okay. So --

4 THE WITNESS: Sorry.

5 [Pause]

6 BY MR. ZAVITSANOS:

7 Q Okay. See, now you've got me doing it too. I'm using all
8 these acronyms. Okay?

9 A Uh-huh.

10 Q All right.

11 MR. ZAVITSANOS: Okay. Michelle, let's go back to where
12 we were on the website.

13 BY MR. ZAVITSANOS:

14 Q So my question was, Mr. Haben, please show us exactly
15 where on this website it says that the out-of-network emergency room
16 services are not to be applied at the reasonable and customary amount
17 when the plan says reasonable and customary amount.

18 A You have -- as I said before, you have to look at the
19 individual benefit plan.

20 Q Okay. So then I guess we need to correct this and say, "R&C
21 does not apply to out-of-network ER doctors if the plan uses other
22 language"? That's what you meant to say, right?

23 A No. That's incorrect.

24 Q Okay.

25 MR. ZAVITSANOS: May I have that back, please? Thank

1 you.

2 BY MR. ZAVITSANOS:

3 Q All right. Now, let's -- a few more questions on this
4 reasonable and customary. Up until 2014, United was required to
5 process claims using the reasonable and customary standard for out-of-
6 network emergency room services, correct, sir?

7 A I don't believe that's correct.

8 Q So what year was it, sir --

9 A I --

10 Q -- where they were required to use that --

11 A The --

12 Q -- standard?

13 A The requirement was based on what's here. I don't know
14 what you're referring to.

15 Q The requirement that you process out-of-network claims at
16 the usual, customary, and reasonable rate. That obligation, when did
17 that expire? Remember, we recovered this on day one of my
18 questioning of you.

19 A That was almost two weeks ago. I don't remember what
20 obligation --

21 Q Fair enough.

22 A -- you're talking about.

23 MR. BLALACK: Your Honor, can we approach, because I
24 think maybe --

25 THE COURT: You may.

1 MR. BLALACK: -- we can --

2 THE COURT: You may.

3 MR. BLALACK: -- work together to --

4 THE COURT: Please.

5 MR. ZAVITSANOS: I'm going to move on, Your Honor. No
6 need.

7 MR. BLALACK: Okay. Because I could help you. I think I
8 know what you want to do.

9 MR. ZAVITSANOS: He's a very generous soul, and I
10 appreciate it, but I'm going to move on.

11 MR. BLALACK: Okay. Fair enough.

12 MR. ZAVITSANOS: Thank you.

13 BY MR. ZAVITSANOS:

14 Q Okay. We're going to move on, Mr. Haben. The jury's been
15 taking notes, so we're going to move on.

16 Okay. So -- okay. Let's go to Exhibit 25, because I -- again, I
17 know we've talked about this document a lot --

18 A I need to go get that one.

19 Q Sure. And I got a little confused. Go to page 2, please.

20 MR. ZAVITSANOS: And, Michelle, would you please pull out
21 this usual and customary and reasonable? Okay.

22 BY MR. ZAVITSANOS:

23 Q Now, this is in 2016. And, Mr. Haben, just so we can orient
24 ourselves, you understand that what we are saying on this side of the
25 room is that United began engaging in what we deem to be wrong

1 behavior after 2016? Do you understand that's our position?

2 A I don't agree with your position, but I understand that's --

3 Q Yeah. I --

4 A -- your position.

5 Q -- understand you don't agree with me.

6 A Yes.

7 Q Okay. So as of 2016, I thought we agreed this was the state
8 of the world --

9 MR. ZAVITSANOS: Right here, Michelle. Can you make that
10 a little bit bigger, that right part, because that's -- we're cutting it off a
11 little bit when it's shown. Go all the way across so it's not cut off. Great.
12 Okay. So, Michelle, will you please -- will you please highlight the
13 second bullet point?

14 BY MR. ZAVITSANOS:

15 Q Okay. Now, an ASO client is a client that has a plan
16 document, right? An SPD?

17 A That's correct.

18 Q That's the only way you can service an ASO client? You have
19 to have an SPD, right?

20 A You have to have an SPD --

21 Q Okay.

22 A -- a summary plan description.

23 Q Now, according to the world, in 2016, the majority of the
24 ASO clients had language in their plans that used usual, customary, and
25 reasonable, right, sir?

1 A What that says is, "The majority of ASO clients still use this
2 out-of-network reimbursement methodology."

3 Q Yes, sir. Okay.

4 MR. ZAVITSANOS: All right. Now, take that down, Michelle.
5 BY MR. ZAVITSANOS:

6 Q Back to 363.

7 A Sorry.

8 Q If I understood --

9 A I've got to go get that again, sir.

10 Q Sure. 363. And --

11 MR. ZAVITSANOS: Michelle, will you please highlight -- and
12 follow me here, please -- here, the second bullet? And last sentence,
13 Michelle, the resource. The whole thing.

14 BY MR. ZAVITSANOS:

15 Q Okay. Here's my question, Mr. Haben, this jury is going to be
16 asked to evaluate a reasonable rate for the out-of-network emergency
17 room services that Team Physicians, Ruby Crest, and Freemont
18 performed on your members. You understand that?

19 A I understand that.

20 Q Is it fair when the jury is trying to determine what is
21 reasonable to use United's definition of what is reasonable? Is that fair?

22 A It is -- to determine what is reasonable, you have to look at
23 what is in the benefit plan for those employer groups that have coverage
24 for out-of-network services.

25 Q Yes, sir. And this is about benefit claims. And what I'm

1 asking is, if we're trying to put a bookmark in the year 2016 as the
2 beginning of what we contend is the bad behavior, is it reasonable for
3 the jury in trying to determine what is reasonable to use United's
4 definition of what is the reasonable? Is that reasonable?

5 A I've lost track of all the reasonables you've talked about,
6 but --

7 Q Yeah. Is it okay for the jury to base what is reasonable
8 beginning in 2016 on what United said was reasonable?

9 A I think of it this way -- can I --

10 Q Well, give me a yes or no, and then I'll give you a chance to
11 respond.

12 A It's not really a yes or no question.

13 Q So you can't answer if it's reasonable to use the word
14 reasonable?

15 A I think of it -- can I explain?

16 Q Well, give me an answer first, and then you can explain. I'll
17 make a deal with you. And this is like a physician negotiation.

18 A It's a --

19 Q Answer my question, and then I'll give you a chance to
20 explain.

21 A It's the name of a program.

22 Q No. No. I know you want to say that. I know you want to
23 say that.

24 A So you don't want to negotiate with me?

25 Q No, sir. Listen, I don't want to get into any program. I don't

1 want to come within 100 miles of any of your programs, okay. I want to
2 know if the plan -- if most of the plans at the time had this language in
3 their plans, and we contend that that behavior began at that point, is it
4 reasonable for the jury to use United's definition of what was
5 reasonable?

6 A I will --

7 Q Yes or no?

8 A I will try to -- it's not a yes or no answer. I will try to answer
9 your question.

10 Q Well, here's what I'm going to do -- I really would give you a
11 full opportunity to explain, but you've got to answer my question first.
12 And so if you can't answer my question, we're going to move on, okay?
13 You with me?

14 A I have answered your question and said I'd like to explain
15 because it's not a yes-or-no answer.

16 Q Well, I thought -- and I wrote it down. I thought when your
17 lawyer was questioning you, and he asked you the same question,
18 whether reasonable and customary really means a reasonable rate, I
19 thought you said, "No. It means something else."

20 A And that's what I want to explain.

21 Q Yeah. Okay. All right. We're going to stand on that answer.
22 Reasonable does not mean reasonable?

23 A I --

24 Q It does not mean -- okay. We're --

25 A Can I --

1 Q -- going to move on.

2 A Can I explain my position, or no?

3 Q You already did. You already did in your response --

4 A I --

5 Q -- to his question. So I'm going to move on now. Okay?

6 A Yeah, okay.

7 Q Okay. Let's move on. Okay. Now --

8 MR. ZAVITSANOS: Oh, let's go to --

9 BY MR. ZAVITSANOS:

10 Q I think what started all of this stuff was Exhibit 154. That's
11 the exhibit that your lawyer went through about a program called
12 reasonable and customary. And you -- Mr. Haben, do you understand
13 that our contention is that although you may have a program that says
14 reasonable and customary, that is separate and apart from the obligation
15 to pay reasonable and customary pursuant to ASO claims? Those are
16 different. Do you understand, sir?

17 A If that's what you're saying, I understand what you're saying.

18 Q Okay. So let's look at -- and what you did -- and you didn't
19 intend to mislead anybody I suppose. You fused those two together,
20 right? That's what you did during your direct?

21 A You'd have to show me. I don't remember.

22 Q Okay. 154. And I want to go, please, to page 14. This is the
23 page --

24 MR. ZAVITSANOS: Pull up the box, please, Michelle.

25 BY MR. ZAVITSANOS:

1 Q This is the page that you went through with your lawyer, and
2 I'm going to -- the jury saw it already. But this is the page where
3 the punch line was this program, this reasonable and customary
4 program, does not apply to emergency room services out-of-network,
5 right?

6 A Emergency room physician services out-of-network.

7 Q Yes, sir. Okay. Now, that language -- now we agree that the
8 obligation to pay reasonable and customary, whether someone is in a
9 program or not on the ASO side, is dictated by the plan language, right?

10 A Ask that again, please.

11 Q Yes, sir. If an ASO client is not a member of this program,
12 they have an obligation, you have an obligation to pay charges at the
13 reasonable and customary rate, out-of-network emergency services, if
14 the plan language has that language, right?

15 A You said two different things. So you said if they don't have
16 this program, we're obligated to pay billed charges, and I disagree with
17 that.

18 Q No, I didn't say billed charges, sir. Listen to my question.

19 A I believe you did, but.

20 Q No, sir.

21 A Okay.

22 Q I am going to ask it one more time.

23 A Yeah, ask it again, please.

24 Q And I know you've been up there a while. Okay. Let me try it
25 again. Do you agree with me that the obligation to pay reasonable and

1 customary -- a reasonable and customary reimbursement for an ASO
2 client is governed by the plan language even if that client has not
3 subscribed to this program, right?

4 A I disagree.

5 Q Okay. Fair enough.

6 MR. ZAVITSANOS: Take that down.

7 BY MR. ZAVITSANOS:

8 Q Well, the plan language controls, right? The plan language
9 controls?

10 A Controls what?

11 Q Controls how you are going to reimburse --

12 A The --

13 Q -- out-of-network.

14 A The plan language describes the benefits for claims
15 administration for the members.

16 Q Yes. Thank you, sir. Okay. Now, let's go to Exhibit 5. And
17 Exhibit 5, this is a new document that the jury has not seen. And now,
18 we are going to go really back in time.

19 A Can I get that?

20 Q Sure. This is August 2015.

21 MR. ZAVITSANOS: Pull that up, Michelle.

22 BY MR. ZAVITSANOS:

23 Q And these are the programs. And by the way, these
24 programs, Mr. Haben, I mean, as you were going through with your
25 lawyer, they sounded all complicated and flow charts, and all this stuff.

1 But these programs are really nothing other than you deciding what
2 you're going to pay, right?

3 A I disagree.

4 MR. ZAVITSANOS: Okay. So close this out. And let's see
5 what programs were in place in 2015, before what we contend the
6 problems began. Let's go to the next page, Michelle.

7 BY MR. ZAVITSANOS:

8 Q Okay. So here we are. Here are the programs. You've got
9 in-network, right?

10 A I'm sorry, where do you --

11 Q Tier 1, right?

12 A The UnitedHealthcare network?

13 Q Yep. That's -- that's in-network, that doesn't apply here,
14 right?

15 A The UnitedHealth network is par providers.

16 Q And the other is this shared savings plan. That's what
17 existed, according to this, in 2015, right?

18 A Can I take a -- quickly look at this?

19 Q Sure. Sure.

20 A I haven't seen this for a while.

21 MR. ZAVITSANOS: Michelle, follow me here. Highlight the
22 whole thing, please. And underline the first part, "Savings via contracted
23 vendor wrap networks".

24 THE WITNESS: Okay.

25 BY MR. ZAVITSANOS:

1 Q Okay. So -- and I know we talked about this some, but this is
2 a new document, so let me just reconfirm. According to this document,
3 in 2015, there's two -- when we get to the fork in the road, you're either
4 in-network or if you're out-of-network, this is the out-of-network
5 program, SSP, which consists of the wrap network and negotiation with
6 the physician to see if they'll take a little bit less, right?

7 A If the client has signed up for shared savings, and that's what
8 the benefit plan says, yes.

9 Q Yes, sir. And my question is, in 2015, this was the world?

10 A It was not the world.

11 Q Okay. And by the way, there's nothing in here excluding
12 physicians in the INN, OON. I mean, physicians are included at -- in these
13 wrap networks, right?

14 A If they have a contract with MultiPlan and that's the wrap
15 network that we're using, then that would be included.

16 Q Okay. So let's also look -- let's look on page 9 of this
17 document.

18 MR. ZAVITSANOS: And Michelle, will you please pull up
19 from here -- from here --

20 MS. RIVERS: Uh-huh.

21 MR. ZAVITSANOS: -- to here. Okay.

22 THE WITNESS: Can I just take a quick peek?

23 MR. ZAVITSANOS: Sure.

24 THE WITNESS: Thank you.

25 MR. ZAVITSANOS: All right. Let me know when you're

1 ready.

2 THE WITNESS: I will. Okay.

3 BY MR. ZAVITSANOS:

4 Q Okay. Now, and I am going to keep them distinct, okay?
5 There's the obligation to pay reasonable and customary pursuant to a
6 plan. And then separate and apart from that, United apparently has a
7 program that's physician reasonable and customary, right?

8 A United has a physician reasonable and customary program.

9 Q And the exclusion that we saw in 154, page 14, about this
10 only operating when it's not at the INN level, that language is not there,
11 right?

12 A I don't know -- I don't remember what document you're
13 talking about. I'm sorry.

14 MR. ZAVITSANOS: Well, let's put them up next to each
15 other. Let's put up this next to 154, page 14.

16 BY MR. ZAVITSANOS:

17 Q And by the way, the program is determined by whoever sets
18 up the program. The program is whatever United says the program is,
19 right?

20 A No. Employer groups have a hand in what they want for --

21 Q Sir.

22 A -- a program.

23 Q Yeah.

24 A That's incorrect.

25 Q Okay. So -- and when the jury -- when the jury goes through

1 the exhibits, are they going to find even one sentence in any exhibit that
2 shows that an employer participating in crafting these programs?

3 MR. BLALACK: Object to the --

4 BY MR. ZAVITSANOS:

5 Q Are they going to find even one sentence?

6 MR. BLALACK: Object to the foundation of the sentence
7 given he's not a lawyer on the case.

8 THE COURT: Overruled.

9 BY MR. ZAVITSANOS:

10 Q Are they going to find even one sentence where these
11 programs were created with the employer, Mr. Haben?

12 A I don't know. I don't know all the documents.

13 MR. ZAVITSANOS: Okay. All right. Michelle, pull out
14 please, this is Exhibit 154. This is after we say the bad conduct started.
15 And this is 2015, before it started.

16 THE WITNESS: I can't read that.

17 MR. ZAVITSANOS: Sure. And Michelle, will you please pull
18 out the section -- okay. So let's take a look -- no. Hold on, Michelle,
19 close that up. I need you to pull out these right here. Just that -- just
20 that bullet point right there. Yep, that's it. Okay. And can we make that
21 smaller? And then go to Exhibit 5, page 9, the top half of the page.

22 BY MR. ZAVITSANOS:

23 Q Okay. All right. So this program, in 2000-and --

24 MR. ZAVITSANOS: Right there, Michelle.

25 BY MR. ZAVITSANOS:

1 Q This program, in 2018, has this language that it applies to
2 non-par claims paid at the OON benefit level, right?

3 A That's what that says.

4 Q Which cleverly does not include us, right, this program?

5 A It --

6 Q Right?

7 A It does not include ER physicians because they get paid at
8 the in-network benefit level.

9 Q Yes. Now, before we say the bad conduct started, it did
10 include us, right?

11 A That's incorrect.

12 Q Well, do you see that same language in this program in
13 2015?

14 A Which program are you talking about?

15 Q I'm talking about the physician R & C program, the one on
16 top of the highlight. Do you see that language, Mr. Haben?

17 A It doesn't need to say that.

18 Q What?

19 A No, I don't see it. And it doesn't need to clarify that.

20 Q Oh, it just -- people understand that it says that because you
21 don't need to write it down, everybody knows it. It's just like the sky is
22 blue, right?

23 A It is in the benefit plan. It outlined what level those services
24 are covered at.

25 Q Is that benefit plan from 2015 in evidence? Can we see it, Mr.

1 Haben?

2 A I don't know all the documents, sir.

3 Q So we've just got to take your word for it, right?

4 A You can go look at benefit plans, and I think you'll see things
5 in here.

6 Q Mr. Haben, you know these parties have been preparing for
7 this trial for years, and you have outstanding lawyers. They don't miss a
8 beat. Do you know whether this alleged benefit plan that supposedly
9 includes this language is in evidence, sir, from 2015?

10 A I don't know, sir.

11 MR. ZAVITSANOS: Take it down, Michelle.

12 BY MR. ZAVITSANOS:

13 Q By the way, I know I asked you this, and I'm sorry to do it
14 again. The provider groups here, Freemont, Ruby Crest, and Team
15 Physicians, they claim they are entitled to a reasonable rate, right?

16 A If that's what you say you understand.

17 Q Now, if the plan benefit says that for out-of-network
18 emergency room services, we get a nickel, you agree we're not bound by
19 that because we didn't sign off on it. And we're entitled to a reasonable
20 rate regardless of what the plan benefit says, agreed?

21 MR. BLALACK: Your Honor, may we approach?

22 THE COURT: You may.

23 [Sidebar at 11:22 a.m., ending at 11:23 a.m., not transcribed]

24 MR. ZAVITSANOS: May I proceed, Your Honor?

25 THE COURT: You may.

1 MR. ZAVITSANOS: Thank you.

2 BY MR. ZAVITSANOS:

3 Q Okay. Mr. Haben, I'll ask again. If the plan documents say
4 that for out-of-network emergency room services we get a nickel, just
5 from a lay perspective, you understand that's not binding on us because
6 we didn't sign the agreement, and it's not binding on the jury. Because
7 the jury's task is to come up with a reasonable rate. Right?

8 A We are required to administer the benefit plan as written.
9 Beyond that, I couldn't answer your question.

10 Q So are you telling me, Mr. Haben, that if the benefit plan that
11 you had one of your client's sign says we get five cents for saving
12 somebody's life in a gunshot, you're saying that's the appropriate rate; is
13 that what you're saying?

14 A No, that's not what I'm saying.

15 Q Well, I want to know.

16 A I'm saying I can't --

17 Q Are we entitled to a reasonable rate regardless of what the
18 plan documents say or not, Mr. Haben, from your standpoint?

19 A I'm trying to explain what I was --

20 Q It's a yes or no, Mr. Haben.

21 A No, it's not. We're required to administer per the benefit
22 plan. I can't pay anything different.

23 Q But you got the clients to change these plans. You were the
24 driving force behind it. We just saw, move -- migrate clients. Create a
25 sense of urgency. We've got a problem. Everybody's still on the old

1 plans, right?

2 A But not to a nickel, no.

3 Q I'm just asking theoretically. If it said a nickel, could you --
4 could you pay more than a nickel?

5 A We can't pay beyond what the benefit plan says.

6 MR. BLALACK: Object to form. Improper hypothetical.

7 THE COURT: Overruled.

8 MR. ZAVITSANOS: I'll move on, Your Honor.

9 BY MR. ZAVITSANOS:

10 Q Okay. By the way, do you know whether -- any you may
11 know. Do you know whether the jury is going to be asked that they are
12 going to limit -- they are going to be constrained by what is reasonable,
13 by what is in these plans that you began modifying in 2016?

14 MR. BLALACK: Object to the foundation. Calls for a legal
15 conclusion.

16 MR. ZAVITSANOS: I'm asking him.

17 THE COURT: Overruled.

18 BY MR. ZAVITSANOS:

19 Q Do you know, sir?

20 A I don't.

21 Q Okay. All right. Now, let's move on. Okay. One of the
22 documents you covered was Roseman University, right, with your
23 counsel. Exhibit -- Defense Exhibit 5503, page 31.

24 A Can I go get that, please?

25 MR. ZAVITSANOS: Yes, sir. Michelle, will you please pull

1 out from here to here.

2 THE WITNESS: I'm sorry, what's the number again?

3 MR. ZAVITSANOS: It's Defense Exhibit 5503, page 31.

4 THE WITNESS: Is that in a binder up here?

5 MR. ZAVITSANOS: You know what, Mr. Haben, you were
6 asked about this, and you talked extensively about it. It's up on the
7 screen.

8 MR. BLALACK: Counsel, I believe there's a list of admitted
9 exhibits sitting up next to him.

10 THE COURT: Why don't you approach so you can help him
11 find it?

12 MR. BLALACK: Yeah.

13 THE WITNESS: Is it in one of these?

14 MR. BLALACK: There's a list of admitted exhibits up here.
15 Try that one right here. No, right here.

16 THE WITNESS: Thank you.

17 MR. BLALACK: And if that's not it, I don't know.

18 MR. ZAVITSANOS: And Mr. Haben, when you get to that --

19 [Counsel confer]

20 THE WITNESS: I found it.

21 MR. ZAVITSANOS: Okay.

22 THE WITNESS: Thank you.

23 BY MR. ZAVITSANOS:

24 Q And I won't go there unless we need to. Will you tell me
25 what year this is, sir?

1 A Um --

2 Q If that's after 2016 or before?

3 A July 1 of 2017.

4 Q Okay. So it's after 2016, right?

5 A That would be correct.

6 Q Okay. And you all have stuck in here 125 percent, right?

7 A I wouldn't characterize it as stuck.

8 Q Okay. And sir, that's what you're going to pay, and this client
9 is going to also pay. In addition to the PMPM fee, this nonprofit
10 university is going to pay a shared savings fee of 35 percent on the
11 difference between the billed charge and what this says, right?

12 A Can I -- what -- I'm sorry, what page is this on so I can grab
13 it?

14 Q It's page 31.

15 A Thank you. Can you ask your question again?

16 Q Yes, sir. This client, in addition to the PMPM fee, which they
17 pay per member, per month, they're also going to pay 35 percent
18 between the billed charge and either of those two rates that are there,
19 right?

20 A I disagree.

21 Q If they're in the -- if they are in the SSPE program, they're not
22 going to pay a percentage?

23 A I believe this is a fully insured plan, and there is not a shared
24 savings fee associated with it.

25 Q Okay. So this is United's nickel, right?

1 A This is the benefit plan for a fully insured client.

2 Q Yeah. This is United's language about the terms under
3 which United will decide what it's going to pay?

4 A This is the language in the benefit plan.

5 Q That United wrote?

6 A I --

7 MR. BLALACK: Objection. Foundation.

8 THE COURT: Overruled.

9 BY MR. ZAVITSANOS:

10 Q I'm sorry, sir?

11 A I don't know who wrote it, but I'm assuming they did.

12 Q Okay. So United says, we're going to pay 125 percent, that's
13 what they say over here. And then when the doctor says United, can you
14 pay more -- I'm sorry, the plan says we can only pay 125 percent. That's
15 how it works, right, Mr. Haben?

16 A As I said before, you can't pay outside what the benefit plan
17 dictates.

18 Q Because United says so.

19 A That's the law, sir.

20 Q It's the law, sir?

21 A Yeah.

22 Q Of a fully insured plan, you can't change this? You can't pick
23 a higher number if you want because it's a fully insured plan?

24 A As I said before, fully insured plans are filed and approved in
25 the states as required by the states.

1 Q Let's move on. Let's go to Exhibit 27, another Roseman
2 document.

3 A I'm sorry, which one, sir?

4 Q Plaintiff's 27.

5 MR. ZAVITSANOS: Is that in?

6 THE COURT: I show that it is.

7 MR. ZAVITSANOS: Michelle, will you please go to -- now,
8 let's see the date on this please.

9 BY MR. ZAVITSANOS:

10 Q Okay. So this is 2016, right?

11 A Can I get there please?

12 Q Sure.

13 A Can I just take a look at it?

14 MR. ZAVITSANOS: Sure.

15 [Witness reviews document]

16 MR. ZAVITSANOS: And Michelle, will you please, while he's
17 doing that, will you please go to page 6? And let's see what the deal was
18 in 2016. Right here, Michelle. Medical emergency expenses. Pull that
19 whole thing up. All the way across, all the way across, all the way
20 across. Keep going. Right there. Okay. Highlight that.

21 THE WITNESS: Okay. What's your question?

22 BY MR. ZAVITSANOS:

23 Q Same client, one year earlier, 100 percent of the usual and
24 customary charges, right?

25 A I don't know for sure. It's the same name. I don't know if it's

1 the same policy.

2 Q Well, in fairness to you, sir, this is the policy for students a
3 year earlier. The other one was for employees.

4 A So they're different.

5 Q Yes, sir.

6 A Okay.

7 Q And here's what I want to know. One year earlier, the same
8 insurer, 2016 -- actually 2015, going into 2016, this was the benefit, 100
9 percent of usual and customary charges, right here, for medical
10 emergency expenses, right?

11 A That was the benefit for students, I think is what you said.

12 Q One year earlier, right?

13 A Yes. Not the employer.

14 Q Mr. Haben, where is the policy language for employees for
15 2016 and 2015, so that we can compare?

16 A I don't know.

17 Q And see if you all changed it.

18 A I don't know, sir. I don't know if they were a client or not at
19 that point.

20 Q Do you know why we don't have that, sir?

21 A I don't sir.

22 Q Do you know why it was not produced in this case, sir?

23 A I don't know if it exists, sir.

24 Q And coincidentally, Mr. Haben, while your lawyer is
25 questioning this jury and trying to show what the plan shows, which is

1 your own money, you're showing them the 2017 plan to make it seem as
2 though it was always like that, right, sir?

3 A I would disagree.

4 Q Well, let's compare. Can we compare?

5 A Sure.

6 Q Where is it?

7 A I don't know if they were a client. I don't know if there is a
8 document here or not.

9 Q Well, we know they were a client because in 2015, you
10 signed them up to insure students, right?

11 A That does not mean that the employer group is a client.

12 Q Let's move on, sir. Exhibit 255.

13 A I need to get that.

14 MR. ZAVITSANOS: Is it okay with you, Michelle? This is a
15 new document. Do we have an extra copy, please?

16 MS. RIVERS: It should be in there.

17 MR. ZAVITSANOS: It's in there?

18 MS. RIVERS: Yes.

19 MR. ZAVITSANOS: Michelle, you are a step ahead. Thank
20 you, very much.

21 BY MR. ZAVITSANOS:

22 Q All right.

23 MR. ZAVITSANOS: Okay. Michelle, let's see if we can --
24 follow me, Michelle. From here -- no, wait, from here. Let's see what
25 this is.

1 THE WITNESS: Can I just take a quick look?

2 MR. ZAVITSANOS: Sure. Let me know when you're ready.

3 THE WITNESS: I'll be ready quickly.

4 MR. ZAVITSANOS: Yeah.

5 BY MR. ZAVITSANOS:

6 Q And by the way, Mr. Haben, once we're done with this
7 document, we're going to move onto another topic, okay.

8 A Okay.

9 Q Okay. It looks like by 2018, Mr. Haben, you all were having a
10 problem because all these clients were still on the old plans, and you
11 needed to hit those profit targets, and so you identify a bunch of clients
12 that were on the old plan with no SSPE. They were just on SSP.

13 Meaning wrap network agreements and physician negotiation, right?

14 A I disagree.

15 MR. BLALACK: Object to form. Compound.

16 THE COURT: Well, it is compound.

17 MR. ZAVITSANOS: Let me rephrase.

18 BY MR. ZAVITSANOS:

19 Q This document is two -- this is an email 2018, right?

20 A Yes.

21 Q And the subject is urgent action required. SPD language for
22 language for clients without SSPE. Do you see that?

23 A Yes, I do.

24 Q It's urgent, right?

25 A That's what it says.

1 Q That we get these clients that are paying their usual and
2 customary rate over to SSPE so that we can make more, right?

3 A I disagree.

4 Q And would you agree with me that the companies on this
5 list --

6 MR. ZAVITSANOS: Start scrolling Michelle.

7 BY MR. ZAVITSANOS:

8 Q -- represent probably over 600,000 people? These are some
9 of the biggest companies. There's American Airlines. There's the
10 American Red Cross. There's AON, and ARCO. Keep going. I thought
11 you had told us that customers were thirsty for SSPE, and they were
12 coming to you.

13 MR. ZAVITSANOS: Keep scrolling, Michelle.

14 BY MR. ZAVITSANOS:

15 Q Right?

16 A Can you ask that again?

17 Q Mr. Haben, I thought you told us that customers were
18 thirsty -- stop. Hilton, Hallmark Cards. Oh, Michelle will like this, Louis
19 Vuitton. Okay. Mastercard. I mean there's probably seven or 800,000
20 people represented by these companies.

21 MR. ZAVITSANOS: Keep going, Michelle. Keep going. Keep
22 going. Keep going. Keep going. Keep going. I'll tell you when to stop.
23 Keep going. Stop. Oh, yeah, okay. Here we go. That's it. We got it.
24 Pull it out.

25 THE WITNESS: What page is that on, please?

1 BY MR. ZAVITSANOS:

2 Q That's on page --

3 MR. ZAVITSANOS: Michelle, I want you to pull that section
4 out, please. Page 8. Page 8, from here to here. Actually, go from the
5 State of Rhode Island down to the bottom.

6 BY MR. ZAVITSANOS:

7 Q Okay. Well, there's a familiar name. Do you see that?

8 A I do.

9 Q So let me see if got this straight. TeamHealth is self-insured,
10 right?

11 A I believe so.

12 Q They've got a plan --

13 MR. ZAVITSANOS: Michelle, can you go to page 1, so we
14 can get the columns up at the top?

15 BY MR. ZAVITSANOS:

16 Q They've got a plan that calls for the payment of bill charges,
17 right?

18 A I don't know what their plan is.

19 Q Well, you see urgent action required? You see the headings.
20 And then let's go to -- let's go to the page where TeamHealth is on.

21 MR. ZAVITSANOS: No, no, Michelle, I need that top page, if
22 you have it. Yeah, like this. But I need you to then go to page -- the one
23 that TeamHealth is on, Michelle. Page -- give me a second here. Page, I
24 think it's 13. Hold on. 13, Michelle.

25 BY MR. ZAVITSANOS:

1 Q Okay. All right. All right. So let's see if we can figure this
2 out. Does this indicate to you that TeamHealth is not even part of a wrap
3 agreement. They've got a plan that calls for the payment of bill charges,
4 and there's seven different plans there, right? And as far as SSP, it's no.
5 Do you see that?

6 A So first of all, I don't know -- I didn't write this. I don't know
7 what it means.

8 Q But, Mr. Haben --

9 MR. BLALACK: Your Honor, can the witness be allowed to
10 finish his answer?

11 MR. ZAVITSANOS: I'm sorry. You're right. You're right. My
12 apologies. Go ahead, Mr. Haben, my apologies. I should have let you
13 finish.

14 THE WITNESS: Yeah, that's fine. Again I didn't write this. I
15 don't know what it means. Okay. I don't know what the numbers mean
16 inside the document.

17 BY MR. ZAVITSANOS:

18 Q Mr. Haben, you just got done testifying at length about a
19 bunch of documents that you didn't write, and you were telling the jury
20 what this means and that means. Why is it that when I ask you a
21 question about the out-of-network programming involving your
22 programs, you don't know what this means? Can you tell me?

23 A Because I don't know what this document means.

24 Q Okay. Fair enough. Do you think it is the height of arrogance
25 that UnitedHealthcare would go to TeamHealth to try to sign them up for

1 this 60 percent discount off of the bill charges for the practice groups
2 that it manages? Do you consider that to be arrogant?

3 A Not at all. And I can explain. Would you like me to explain
4 why?

5 Q Sure, go ahead.

6 A We have many physician groups, hospitals, other entities
7 that have us as an employer group, an administrator. They have out-of-
8 network programs that manage their spend. Sometimes even their own
9 spend. They expect us to help them with that.

10 Q Mr. Haben, TeamHealth -- the impression your lawyer is
11 creating is TeamHealth is the driving force of this case, right?

12 A I don't know what impression he's driving.

13 Q Okay. Let's move on, Mr. Haben.

14 MR. ZAVITSANOS: By the way, Michelle, let's keep
15 scrolling.

16 BY MR. ZAVITSANOS:

17 Q I mean it looks like by 2018, these people really weren't
18 biting, right? I mean you've got all these companies here that despite
19 two years of efforts, want to protect their employees, no balance billing,
20 stick with the wrap agreement, right, Mr. Haben?

21 A I would disagree.

22 Q Okay. All right. Oh, Exhibit 175, page 6. I have one more
23 question on this reasonable and customary and then we'll move on.
24 This is the chart that I went through with you. I'm not going to do it
25 again. But this is the chart --

1 MR. ZAVITSANOS: Michelle, pull out -- pull out from here to
2 here.

3 BY MR. ZAVITSANOS:

4 Q Remember we went through this, and we showed how the
5 employer is actually paying more, even though you're telling them
6 they're going to pay less? Remember we went through this?

7 A That's not how I said that, or --

8 Q No, that's how I said it.

9 A Okay.

10 Q Okay. So -- and the jury can evaluate it for themselves. And
11 then what your lawyer did was, well, the member is paying less, right?

12 A That what is shown through those scenarios, yes.

13 Q Now if the -- if the doctor does not accept this sophisticated
14 Data iSight rate, and they stand on the demand that they get their bill
15 charges for anything below the wrap agreement that they're in, the
16 member can be balance billed, correct?

17 A You're conflating a couple programs. What do you mean?

18 Q No, sir, listen to my question.

19 A The wrap agreement is not part of this discussion.

20 Q Listen to my question, sir. If the bill charge comes in at
21 \$1,000, which is the assumption on this page --

22 A Okay.

23 Q -- and the allowed amount is \$400, okay. Okay?

24 A Okay.

25 Q And leaves a differential of \$600, right?

1 A Okay.

2 Q If the doctor insists on collecting his bill charge and will not
3 accept this allowed amount of \$400, the member can be balance billed,
4 right?

5 A The non-party ER physician staffing company is always able
6 to balance bill, send into collections for the amount.

7 Q Right. And so when you say here the eligible savings is \$600
8 because no balance billing, that's not true. That assumes the doctor is
9 going to be willing to eat it, and accept a lot less, right?

10 A 95 percent of the time it's accepted.

11 Q Well, sir, 95 -- do you think that a mom and pop operation
12 with four, or five, or six doctors has the resources to take on
13 UnitedHealthcare?

14 MR. BLALACK: Objection.

15 BY MR. ZAVITSANOS:

16 Q I mean, do you see how many people are in this room, sir?

17 MR. BLALACK: Object to form. Calls for speculation.

18 THE COURT: Objection is sustained.

19 MR. ZAVITSANOS: You can close it out, Michelle.

20 BY MR. ZAVITSANOS:

21 Q Let's move on, sir. Let's move on to the next document.

22 A May I put this one away?

23 Q Sure. Okay.

24 MR. ZAVITSANOS: Michelle, pull up Exhibit 290, page 28,
25 and put it next to Exhibit 444, page 1. All right. Michelle, pull this out.

1 And then please pull -- well, this name is blacked out.

2 THE WITNESS: What page on 290?

3 MR. ZAVITSANOS: No, which is the one without the
4 blackout? Who blacked that out? Okay. All right. Somebody is in
5 trouble. Okay.

6 THE WITNESS: Can I get those? Hold on.

7 MR. ZAVITSANOS: Sure.

8 THE WITNESS: So page --

9 MR. ZAVITSANOS: Okay. Here's what we're doing.

10 THE WITNESS: 290 on what page?

11 BY MR. ZAVITSANOS:

12 Q Yeah, let me orient you before I tell you what page.

13 A Okay.

14 Q Do you remember that Mr. Blalack suggested to the jury that
15 I misled the jury because I put up a AT&T benefit plan that used Data
16 iSight when an AT&T plan says you have to use the usual, reasonable, or
17 customary amount, and it didn't match? Do you remember that?

18 A I don't believe the benefit plan matched the EOB.

19 Q Okay. All right. And you know what, he's right, it doesn't
20 match. But what he didn't do was talk about the other document that I
21 showed you, Exhibit 120. Let's go to Exhibit 120.

22 A Okay, so which one am I looking at now?

23 Q Now we're going to Exhibit 120.

24 A Do I need 444?

25 Q Yes, sir, you do. Do you have the group plan on there, or is it

009296

009296

1 blacked out on the one that you have, Mr. Haben?

2 A Just a minute. On 444? The group plan is on there.

3 Q Okay. Your copy is not blacked out, right?

4 A I don't believe so.

5 Q Okay, beautiful. Okay. Now let's see if we can make sense of
6 this, Mr. Haben. The EOB for which Data iSight was applied, indicates
7 that the employee worked for AT&T Mobility, right?

8 A Is that 444?

9 Q Yes, sir.

10 A So 444, you're asking -- it's got Data iSight.

11 Q Yeah, do you see the employer on the front page?

12 A I do.

13 Q AT&T Mobility?

14 A Yes, and I see the Group number.

15 Q Okay. So this is --

16 MR. ZAVITSANOS: Hold on. Keep that up, Michelle. We're
17 not putting anything next to it.

18 BY MR. ZAVITSANOS:

19 Q AT&T Mobility. Now let's' go to -- this is Exhibit 120.

20 MR. ZAVITSANOS: Michelle let's go, please -- actually since
21 you got it on, Michelle, let's go right next to it, Exhibit 120, page 86.

22 Okay. Michelle, follow me here. From here to here. Michelle, will you
23 please highlight the following, from here -- no, no, go down a little more,
24 please. Good. No, no, no, right there. Okay. Right. Okay. So Michelle,
25 please highlight no less than the highest of. Circle the highest. Circle

1 the highest. And then highlight the second bullet. Okay.

2 BY MR. ZAVITSANOS:

3 Q That's the AT&T Mobility plan. This employee was an
4 employee of AT&T Mobility. Now, Mr. Haben, do you see anything in
5 this document that indicates that this plan is not applicable to this
6 member, sir?

7 A The plan would be applicable if the group numbers match.
8 They could have different group numbers.

9 Q Show me. Show -- let's -- because you suggested to the jury
10 that I misled them. So show me in this plan where this does not
11 explicitly match up with the EOB I just put up --

12 A So --

13 Q -- Mr. Haben.

14 A -- I did not imply that you misled them. What I was trying to
15 convey is that AT&T has many benefit plans. That's why there's group
16 numbers associated with each. I couldn't tell you what the group
17 number is associated inside this benefit plan. But you've got to look very
18 carefully into the plan.

19 Q Mr. Haben, are you telling the jury that this plan does not
20 apply to the EOB we just saw?

21 A I don't know that it does.

22 Q Well, Mr. Haben, you've been here a long time. I know that
23 you had an opportunity to visit with counsel. I know you had an
24 opportunity to go through what he was going to ask you.

25 MR. BLALACK: Object to form, Your Honor. It's improper.

1 MR. ZAVITSANOS: Let me rephrase.

2 BY MR. ZAVITSANOS:

3 Q Did you look at this Exhibit 120 before you took the stand and
4 told the jury that this EOB did not match Exhibit 290?

5 A Ask that again, please.

6 Q Yes, sir. We just looked at 290. That's the other AT&T
7 document. And you told the jury 290, those -- that plan does not match
8 the plan identified on the EOB, right? And the reason we're talking about
9 this, Mr. Haben, is because it looks like what you all did was whether the
10 plan language says it or not, you just apply Data iSight, so you could
11 take another taste.

12 A That's incorrect.

13 Q Okay.

14 A We have to follow the benefit plan.

15 Q Okay. So show me in this plan, if this is the language that
16 applies, then you agree with me you should not have applied Data
17 iSight, right?

18 A We follow the benefit plan and administrate --

19 Q Listen to my question, Mr. Haben. If that's the plan
20 language, you should not have applied Data iSight. You shouldn't have
21 cut our reimbursement by taking the money out of our pocket and
22 putting it into yours, right?

23 A I don't know if this is --

24 MR. BLALACK: Object to form. Argumentative.

25 THE WITNESS: -- the benefit plan that applies.

1 THE COURT: Overruled.

2 THE WITNESS: I don't know if this is the benefit plan that
3 applies.

4 BY MR. ZAVITSANOS:

5 Q And let's just look at a couple of others here.

6 A Can I --

7 MR. ZAVITSANOS: Is 142 in, Michael?

8 THE WITNESS: Can I put these away, or are we --

9 MR. ZAVITSANOS: Yeah.

10 MR. KILLINGSWORTH: Yes.

11 THE WITNESS: Hold on.

12 THE COURT: Exhibit 142 is admitted.

13 BY MR. ZAVITSANOS:

14 Q Now, Mr. Haben --

15 MR. ZAVITSANOS: Michael, is 53 in?

16 MR. KILLINGSWORTH: No.

17 MR. ZAVITSANOS: I'm sorry, Your Honor, I forgot to do this.

18 May I ask counsel if he has an objection to 53.

19 MR. BLALACK: Court's indulgence. One moment.

20 [Counsel confer]

21 MR. BLALACK: One second. I have to find this other packet.

22 MR. ZAVITSANOS: I think you all -- actually, I'm sorry,
23 counsel. You had this before trial, so I apologize.

24 MR. BLALACK: Okay. I don't see Mr. Haben. I object to the
25 foundation, Your Honor.

1 BY MR. ZAVITSANOS:

2 Q Mr. Haben, look at Exhibit 53. Please get 53. And take a
3 second to go through this and tell me if this deals with your programs,
4 ENRP, out-of-network claimants, and in connection with an ASO client.

5 A Okay. I will need a little bit of time, please.

6 MR. ZAVITSANOS: And, Your Honor, with the Court's
7 indulgence, if I could finish this document and then we can do lunch
8 break or whatever the Court's pleasure is.

9 THE COURT: I wanted to go until about 10 minutes after
10 12:00 if that's okay with everyone.

11 MR. ZAVITSANOS: I should be done.

12 THE COURT: But if anyone needs a recess, just let me know.

13 MR. ZAVITSANOS: My apologies, Your Honor. I do not
14 mean to cut you off. I should be done by that time.

15 THE WITNESS: You can start, and I'll pause you if I need to.

16 BY MR. ZAVITSANOS:

17 Q Yeah. Does this appear to deal, like for example, go to page
18 5. Does this deal with the, among other things, the shared savings
19 program?

20 A It does say that on there.

21 Q And does it deal with ENRP on page 1?

22 A Can you just point me to where it says ENRP? Oh, I see it. It
23 does have ENRP on there.

24 Q And Sarah Peterson, is that someone that was in your area of
25 the company?

1 A There's a period of time where she wasn't. I don't remember
2 exactly, but she was on my team periodically.

3 Q She was in your team for a period?

4 A Yes. I don't know if it was this timeframe.

5 Q Okay. And does it also deal with outlier cost management on
6 page 4?

7 A I do see that on there, yes.

8 Q And do you have any reason to dispute that this is a United
9 document?

10 THE WITNESS: No.

11 MR. ZAVITSANOS: Okay. I move for the admission of 53,
12 Your Honor.

13 MR. BLALACK: Objection to the foundation. The witness
14 didn't right it, receive it. It's not discussed in it.

15 THE COURT: You'll have to lay some additional foundation.

16 MR. ZAVITSANOS: Thank you, Your Honor.

17 BY MR. ZAVITSANOS:

18 Q Do you recognize some of the other names on this
19 document, sir, beyond Ms. Peterson?

20 A Yes, I do.

21 Q Okay. Do you recognize Ms. Carolyn, with a Y, Larson,
22 L-A-R-S-O-N?

23 A Yes.

24 Q Do you recognize -- I may mess this up.

25 A I recognize Ray Lopez, yes.

1 Q Yes? Okay. And how about Marie Brinkmeyer [phonetic]?

2 A I know the name. I don't know where she worked.

3 Q Susan Schick [phonetic]?

4 A Yes.

5 Q Okay. And these are all -- everything being discussed here

6 was under your responsibility, those programs were under your

7 responsibility in November of 2016, correct?

8 A I believe so.

9 Q I move for the admission of 53, Your Honor.

10 MR. BLALACK: Same position, Your Honor.

11 THE COURT: Objection is overruled. 53 will be admitted.

12 [Plaintiffs' Exhibit 53 admitted into evidence]

13 BY MR. ZAVITSANOS:

14 Q Okay. Now sir, is it correct that as soon as you all made the
15 decision to get more aggressive, use your wording, with these cuts, you
16 just started applying OCM regardless of what's in the plan document or
17 not?

18 A I disagree with your statement.

19 Q All right. Let's take a look and see what's going on here. So
20 let's start please on page 10. Let's see if we can do this quickly. Okay,
21 so these are two United employees, and the subject is Data iSight,
22 November 2016, right?

23 A Yes.

24 Q Okay. And this is Plaintiff's 53, page 10. "I've been getting a
25 lot of complaints. I've been getting a lot of complaints about pricing,

1 using Data iSight." Do you see that?

2 A I see that.

3 Q Now, in fairness to you, sir, you're not on this email, right?

4 A That is correct.

5 Q And you don't know what these complaints are about, right?

6 A That is correct.

7 Q Let's see if we can figure it out. Let's go now to page 9.

8 We're going to jump around a little bit, so we don't have to go through
9 the whole email. See if we can make sense of it. Okay, here's two more
10 United employees, right? Again, talking about Data iSight in this email
11 trail, right?

12 A Yes.

13 Q Okay. And there's a statement here that United Healthcare
14 does not want to pay bill charges on anything. You see that?

15 A Yes, I see that.

16 Q Okay. So now let's go up a little bit. And it looks like
17 somebody internally with United says, "This is a fully insured customer,
18 and we believe that Data iSight should not apply. Should these
19 discounts only apply to our ASO customers?" Do you see that?

20 A I do.

21 Q Okay. All right, now let's go up to page -- I'm going to skip a
22 few pages here and let's go to page 5. Okay. So it looks like there's a
23 bunch of discussion and then from right here to here. And we see that
24 Ms. Hopkins-Fernandez [phonetic] says, "That's my point. Out-of-
25 network claims should be paid at 90 percent of reasonable and

1 customary." Do you see that?

2 A I see that.

3 Q Now let's keep going up above. The shared savings
4 program allows United Healthcare to pay both the noncontracted facility
5 and physician claims at the discounted rate held by vendors like
6 MultiPlan. Now that's the rapid reading, right?

7 A Yeah. MultiPlan, First Health Group, TRPN, Beech

8 Q Okay, at the bottom. Although the SSP, the shared savings
9 program, provides negotiated discounts for healthcare providers, those
10 providers are not part of the UnitedHealthcare Network. Now that's what
11 we've been talking about, right?

12 A I see that.

13 Q Okay. Let's keep going and let's now go to page 3. And it
14 looks like this is a pretty long discussion, and let's pull up the bottom
15 email. And it looks like there's some confusion here. The claims that I'm
16 having a problem with are for out-of-network providers that are paid
17 according to out-of-network benefits in the past. Somehow they are
18 getting routed to OCM. Do you see that?

19 A I do.

20 Q So basically, everybody that was on a wrap network, whether
21 the plan says it or not, whether the policy says it or not, they're getting
22 routed here with the deeper discounts and you all are taking a fee, right?

23 A I disagree with that mischaracterization.

24 Q All right. Let's close it out. Let's keep going. Let's see what
25 happens. And it looks like Ms. Schick, another United employee, it

1 appears that the program is designed to apply to all non-network claims
2 no matter what the benefit determination may be. Do you see that?

3 A I do.

4 Q We're going to cut it. Doesn't matter what the plan says.
5 That's what that says, right?

6 A No, it does not.

7 Q And here, this is an issue because all out-of-network claims
8 should be paid at 90 percent of reasonable and customary -- now, here's
9 the part I want to ask about. This is -- they're talking about this policy
10 being a Union group. And this arrangement has already been bargained,
11 so we can't change the reimbursement. Do you see that?

12 A Yes, I do.

13 Q But you did?

14 A I disagree.

15 Q Okay. And that's what happened here. Unless the company
16 caught it, you just applied it. And AT&T didn't catch it for as big as they
17 are, right?

18 A I disagree.

19 Q You just flip the switch, apply Data iSight, stuffed your
20 pockets, doesn't matter what the client says.

21 MR. BLALACK: Object to the form of the question. It's
22 compound. It's also argumentative.

23 THE COURT: Objection sustained.

24 BY MR. ZAVITSANOS:

25 Q What you did, Mr. Haben -- by the way, these programs,

1 they're computer models, right? You get a programmer. As the claim
2 comes in, they're route it electronically, right?

3 A I disagree.

4 Q You don't have a computer program as these millions of
5 claims are coming in a day? Are you telling me somebody sits at desk
6 and goes through each one?

7 A Are you characterizing that the program is only the routing?

8 Q No. There's routing as part of the program, right?

9 A There's routing in the claim system that's not part of the
10 program.

11 Q Yeah. And what you did, Mr. Haben, was when you set up
12 this program, you set it up so that all claims were processed using Data
13 iSight?

14 A I disagree.

15 MR. ZAVITSANOS: Okay. Your Honor, this is a good
16 transition point if you'd like. I can keep going if you'd like.

17 THE COURT: Okay, very good. So we'll take our recess now.
18 It is 12:05.

19 During the recess, you're instructed do not talk with each
20 other or anyone else on any subject connected with the trial. Don't read,
21 watch, or listen to any report of or any commentary on the trial. Don't
22 discuss this case with anyone connected to it by any medium of
23 information. Including without limitation, newspaper, television, radio,
24 internet, cell phone, or texting.

25 Don't conduct any research on your own relating to the case.

1 Don't consult the dictionary, use the internet, or use reference materials.
2 Don't post on social media with regard to the trial. Don't talk, text, tweet,
3 Google, or conduct any other type of book or computer research with
4 regard to any issue, party, witness, or attorney involved in this case.

5 Most importantly, do not form or express any opinion on any
6 subject connected with the matter until the jury deliberates.

7 MR. BLALACK: Your Honor, before you excuse the jury,
8 could we approach for just a minute?

9 THE COURT: You may, of course.

10 [Sidebar at 12:06 p.m., ending at 12:06 p.m., not transcribed]

11 THE COURT: All right. So as it turns out, you're going to
12 have a longer lunch today, so we'll bring you back at 1:00, please. Thank
13 you.

14 THE MARSHAL: All rise for the jury.

15 THE COURT: And I do have schedules and letters you'll have
16 for your employers later this afternoon.

17 [Jury out at 12:07 p.m.]

18 [Outside the presence of the jury]

19 MR. BLALACK: Your Honor, here's the issue that I wanted to
20 raise. Last week, I advised the Court that I thought that we were -- the
21 pace in which we were making progress was not going to be sufficient
22 for concluding this trial by the time periods qualified, and I asked for a
23 time elevation at that time between the parties to make sure we had an
24 opportunity to present a defense before that deadline. The Court, at that
25 point, on Wednesday we planned to make a kind of allocation and

1 encourage counsel to expedite things.

2 I'm sure counsels made a mighty effort to do that. But we're
3 now on Friday and been into two weeks. I think we had something on
4 the order of six-and-a-half or seven days of proof, and our contribution
5 to that has been about six-and-a-half, seven hours. We're going to best
6 case. And it's the first two weeks with one witness completed, maybe
7 two, and if you count a video, but we're certainly not going to be through
8 two live witnesses.

9 So here's where we are, Your Honor. I need to make a
10 record on this. We don't think it is now -- it is going to be possible to
11 complete this trial before Thanksgiving by the deadline the Court
12 provided to the parties and to the jury in for which they were qualified,
13 unless Plaintiffs rest at the end of the day on Monday, and we get to start
14 our case on Tuesday. That would then give us -- and I don't even know if
15 we're still looking at a half day, partial day on Tuesday or Wednesday or
16 not.

17 THE COURT: No, I've reached out to get coverage for
18 Wednesday and Thursday, and I figured out what I can vacate and move.
19 So you will get full days. I have approval for overtime for an hour extra
20 every day next week as well. This is calculating what it's going to cost
21 you all.

22 MR. BLALACK: Right. So if they rest on Monday at the end
23 of the day, we can start on Tuesday. I believe we can finish the trial by
24 the deadline on the case. And while we will have to fair down too to get
25 that done in the time we have -- we had 15 witness I believe on our list

1 that will have to be reduced to give or take six, probably, to get it done.
2 And this obviously is some assumptions about what they do, but we
3 think that's the only way it's going to happen.

4 And I will advise the Court that, you know, I'm worried that
5 where we're headed is an outcome where the expectation is we're going
6 to go past Thanksgiving and that that's what Plaintiffs intend to do. And
7 when that happens, we're going to be the party responsible to the jury
8 for having caused the delay and having extended into December. That's
9 going to be incredibly prejudicial to my client and unfair.

10 So the purpose of this -- for me rising today, Your Honor, is
11 to ask or move the Court to ask, compel Plaintiffs to complete their case
12 by the end of the day on Monday so that we can start on Tuesday
13 morning. If the Court declines to grant that relief and Plaintiffs otherwise
14 don't finish on that time, we're going to feel propelled to file a motion for
15 mistrial at that time.

16 So I just wanted to give Plaintiffs' counsel and Your Honor --
17 to alert them to that, alert you to that. And ask -- we've all invested a lot
18 to get to this trial. We all represented we'd be done by the 22nd.

19 THE COURT: 23rd.

20 MR. BLALACK: 23rd. And we qualified a jury on that basis
21 expressly. And a world in which we get there on the 23rd and then the
22 jury goes home on Wednesday, is supposed to come back five days
23 before the last one and then us being held accountable for putting on our
24 case through and after Thanksgiving is just untenable.

25 So with that, Your Honor, I'm going to ask the Court to

1 compel Plaintiffs to complete their case by the end of the day Monday so
2 that we could finish on time.

3 THE COURT: Thank you. Any response?

4 MR. ZAVITSANOS: Would the Court like a response, Your
5 Honor?

6 THE COURT: Please.

7 MR. ZAVITSANOS: Okay. All right, Your Honor, first let me
8 say a couple things before I give a subsequent response.

9 So last night we eliminated two more witnesses. I think at
10 one point we had a dozen or so depositions. We've cut that down to
11 two. Those two depositions have been cut further. I have not had the
12 privilege or working with opposing counsel before. This is something I
13 hear in almost every case. In every case we finish.

14 I cannot underscore enough how fast this case is going to
15 move once we are done with this witness. Part of the challenge has
16 been getting in exhibits, which normally, you know, parties agree to.
17 The witness has not exactly been the most cooperative at times. I have
18 taken a long time and I knew it was going to take a long time. But I
19 would -- here's what I would suggest, Your Honor. Instead of giving us a
20 hard stop on Monday, why don't we exchange the witnesses that we
21 actually are going to call and let's be -- and I understand Mr. Blalack's
22 concern, because he's looking at a list of a bunch of folks. And I'm
23 telling you, I mean, we've got a bunch of what we need from this
24 gentleman.

25 THE COURT: Why haven't you done that then?

1 MR. ZAVITSANOS: I'm sorry?

2 THE COURT: Why haven't you done that now?

3 MR. ZAVITSANOS: Well, I want it to be mutual. I would like
4 it to be mutual. I mean, if they will give us a list of who they're actually
5 going to call. I don't mean like -- I mean, they call this -- I mean, I'm
6 willing to do that, and I don't -- we cannot finish by Monday, but I think, I
7 think there's a chance we could finish by Tuesday. And then, you know,
8 they're going to have the rest of the time.

9 I mean, I'm -- well, that's what I have to say, Your Honor.
10 And so, I would request, Your Honor, that before the Court gives this
11 serious consideration, that the Court wait to observe what the pace is
12 going to be by mid-morning or by mid-day Monday. I think you're going
13 to see -- I know you're going to see a dramatic difference in the pace in
14 the case. Because we don't need -- I had the challenge of having to go
15 through and explain a lot of these concepts and lay that groundwork
16 early on. And to some extent, counsel sort of got the benefit of that,
17 because a lot of it was not argumentative. It was going through the
18 definitions on these acronyms.

19 And so, I just know the case is going to move a lot faster
20 once -- I've got about 30 to 45 minutes left with this gentleman. We're
21 then going to play the video assuming Your Honor has completed it.

22 THE COURT: I have to do it over lunch.

23 MR. ZAVITSANOS: Yeah. And then Ms. Paradise is going to
24 take the stand. And I think her cross, Your Honor, is going to be max,
25 max three hours, max.

1 MR. BLALACK: Your Honor, may I response?

2 THE COURT: Yes, please.

3 MR. BLALACK: And I appreciate those comments, but let's
4 take everything that we've just said as given. If Mr. Haben has been on
5 the stand since last Tuesday, comes back after lunch, he's with him for
6 45 minutes, we're not going to -- best case, we're not going to get to a
7 video until 2:00-2:15. That's probably 40 minutes to an hour of
8 testimony. So we're now at 3:00, 2:30, 2:45, 3:00 when Ms. Paradise gets
9 on there. She's on his case for three hours max. That means she's not
10 passed to me until late in the morning on Monday. And then whenever
11 redirects going to happen. So now she's off the stand late Monday.

12 And then there's a gentleman named Mr. Ziemer who is a
13 UMR witness. By the way, just so you know, Your Honor, both Mr.
14 Haben and Ms. Paradise are only related to UnitedHealthcare and United
15 Health Services. So there hasn't been a single witness called for UMR,
16 or for Sierra, or for Health Plan of Nevada. They haven't called their
17 expert. They haven't called their corporate representative who was
18 there. They haven't called any of the physicians who were on there.
19 They haven't done any of that.

20 So the notion that they're going to finish in time to allow us
21 to put our case is intolerable. Let me illustrate why I'm concerned about
22 it. Can I approach, Your Honor?

23 THE COURT: You may.

24 MR. BLALACK: What I'm handing you, Your Honor, is an
25 email that was forwarded to me by one of my partners on Wednesday.

1 And it's an exchange that he had with a lawyer representing
2 TeamHealth, an affiliate of TeamHealth in another case. And as you
3 know by now, Your Honor, we're litigating cases like this all over the
4 country.

5 And in this email, which was on November 4th, which was
6 forwarded to me on the 10th, the lawyer representing TeamHealth asks
7 to continue a hearing in the case, which is in New Jersey until
8 after -- into December. And the reason given for that, he says, "In
9 particular, we'll be asking the Court to carry the oral argument on our fee
10 application currently scheduled for November 22nd until late December
11 or beyond to accommodate the trial schedule/schedules of the attorneys
12 who are currently litigating on behalf of TeamHealth affiliated entities in
13 the case against United in Nevada State Court. The trial in that matter is
14 expected to continue past Thanksgiving and possibly into December.
15 Some of the attorneys who are involved in that trial might be asked to
16 participate and assist with the oral argument in our case."

17 Your Honor, what I'm concerned about is that we're going to
18 end up in a situation where they say we're watching it. We're doing our
19 best, Your Honor. And every day goes by, and it's going to end up being
20 Friday of next week, Thursday or Friday of next week when they rest.
21 I'm going to start my case the day or two before Thanksgiving, and that's
22 just going to be intolerable for us to be the ones punished by the jury for
23 this delay.

24 THE COURT: I'm going to consider this an oral motion and
25 take it under submission. The parties will be ordered to present a

1 schedule to me Monday at 8:30 or before outlining how much time you
2 need and how much time you need. It doesn't have to match.

3 MR. BLALACK: Understood, Your Honor.

4 MR. ZAVITSANOS: So, Your Honor, let me just say --

5 THE COURT: But I've made it clear, I'm not going to let the
6 Plaintiff delay the case so that you don't get to defend.

7 MR. BLALACK: Well, that's my --

8 THE COURT: I understand.

9 MR. BLALACK: And I understand you won't do that, Your
10 Honor. What I'm worried about is that the only solution that will be
11 available at that time --

12 THE COURT: Well, I've got to tell you.

13 MR. BLALACK: -- is to hold the jury into December.

14 THE COURT: You have to finish, because I leave on the 26th
15 and don't get back until December 5th, and I have a firm setting again for
16 a trial on December 6th.

17 MR. BLALACK: And, Your Honor, I start a trial in Orlando, an
18 arbitration. A big 200-million-dollar arbitration in Orlando. It's been set
19 for six months. We then advised the Court back in June when we were
20 setting this --

21 THE COURT: I don't remember your schedule for June,
22 sorry.

23 MR. BLALACK: Well it's on the record, and I'm supposed to
24 be there on December 1st. And Mr. Roberts has a firm trial setting with
25 another judge in this courthouse on the 29th.

1 THE COURT: On the 29th?

2 MR. ROBERTS: Starting on November 29th. Ansara v.
3 Jacuzzi, Your Honor.

4 THE COURT: So that's for jury selection?

5 MR. ROBERTS: Yes.

6 THE COURT: Got it.

7 MR. ZAVITSANOS: Your Honor, let me just --

8 THE COURT: They're changing that in January by the way.

9 MR. ROBERTS: What's that?

10 THE COURT: We're going to be able to change that in
11 January.

12 MR. ROBERTS: Oh, okay. Good. Good. And I assume I am
13 going to have a jury, Your Honor? You know something I don't know?

14 THE COURT: I know nothing. All right. Quick response.

15 MR. ZAVITSANOS: Your Honor, let me just say this. I have
16 no idea who this gentleman is. I've never spoken to him. I couldn't pick
17 him out of a lineup. I have never said, and I'm -- Your Honor, I have
18 never even told my client we're going to go past Thanksgiving. The
19 message that I've consistently said over and over, we will be done by
20 that time. I have no idea where he got this. And I'm not going to vouch
21 for him or take up for him. I mean this -- I mean, frankly I'm a little
22 disappointed. I'm seeing this for the first time. I never said this.

23 And by the way, nobody speaks about the schedule on this
24 case unless it goes through me. And there's no way I would have said
25 anything like this.

1 THE COURT: You know, as an officer of the Court, I do not
2 believe that either of you would even shake the truth to me. I don't get
3 that impression.

4 MR. BLALACK: And I'm not suggesting counsel is shaking
5 the truth. What I'm suggesting is that they don't have --

6 THE COURT: So somebody out there thinks it's going to take
7 longer.

8 MR. BLALACK: Their client may think they've got that
9 leeway. And whether they do or not and whether you do or not, that's
10 the impression. And what I'm worried about is that no matter how hard
11 Mr. Zavitsanos works and tries, for good reason, bad reasons, no reason,
12 if I get the case after Tuesday, I can't get it done. That's just all there is
13 to it.

14 THE COURT: I got it gentlemen. You'll have schedules
15 Monday morning. We'll take it up from there.

16 MR. ZAVITSANOS: Thank you, Your Honor.

17 MR. BLALACK: Thank you.

18 THE COURT: All right. Have a good break.

19 MR. BLALACK: Thank you, Your Honor.

20 MR. ZAVITSANOS: Thank you, Your Honor.

21 [Recess taken from 12:20 p.m. to 1:07 p.m.]

22 THE COURT: Thanks everybody. Are we ready to bring the
23 jury?

24 MR. BLALACK: Defense is ready, Your Honor.

25 MR. ZAVITSANOS: Yes, Your Honor.

1 THE COURT: Thank you. So where you all came from, is
2 there a mask mandate in Texas? Is there a mask mandate?

3 MR. ZAVITSANOS: There's actually a mandate against
4 masks.

5 THE COURT: Okay. And how about in D.C.?

6 MR. BLALACK: Oh, I'm sure there is, Your Honor. I have no
7 idea. I don't remember the last time I was in D.C. I'm sure there is.

8 THE COURT: Are you not in the D.C. office?

9 MR. BLALACK: I do, but I've just been on the road so much.

10 MR. ROBERTS: The mayor of Atlanta lifted the Atlanta
11 mandate last month.

12 THE COURT: You know, the -- as soon as our metrics get a
13 little bit lower, we'll be fine. We're halfway there on the positivity rate,
14 but the cases per 100,000 is still over --

15 UNIDENTIFIED SPEAKER: Maybe that's because we have so
16 many [indiscernible].

17 THE MARSHAL: All rise for the jury.

18 THE COURT: I think so, too.

19 [Jury in at 1:08 p.m.]

20 THE COURT: Thank you. Please be seated. So we all hope
21 you enjoyed your lunch and welcome to Friday afternoon. Go ahead,
22 please, Mr. Zavitsanos.

23 MR. ZAVITSANOS: Thank you, Your Honor. May it please
24 the Court, counsel.

25 BY MR. ZAVITSANOS:

1 Q Okay, Mr. Haben, I'm going to switch topics now.

2 MR. ZAVITSANOS: Oh, before I do that, Your Honor, I
3 neglected earlier to point out we have another client rep, Dr. Nerissa
4 Bonina [phonetic]. Could you stand up, Dr. Bonina? And of course, Dr.
5 Soundrup, who's in the back has been here. And of course Dr. Scherr,
6 who's been with us.

7 THE COURT: Thank you all. Welcome.

8 MR. ZAVITSANOS: All right. Thank you, Your Honor.

9 BY MR. ZAVITSANOS:

10 Q Okay. Now I want to switch topics, sir, and talk about your
11 competition and how you were allegedly behind the competition.
12 Remember that discussion?

13 A Yes.

14 Q Okay. So I want to pull up Defendants' Exhibit 4569. And I
15 think this is the document that you covered.

16 A Is it in here or --

17 Q Well, I don't know where the Defendants exhibits are. It's up
18 on the screen.

19 MR. ZAVITSANOS: Michelle, can you please pull out this
20 email header?

21 THE COURT: I think Mr. Haben, where you are.

22 UNIDENTIFIED SPEAKER: I think there's a binder with his
23 name on it that has those exhibits.

24 MR. ZAVITSANOS: Oh, okay. Fabulous.

25 THE COURT: Mr. Haben, I think they're over in those binders.

1 MR. ZAVITSANOS: Actually, Michelle, let's --

2 THE WITNESS: Got it.

3 MR. ZAVITSANOS: -- let's -- before we do that, Michelle, go
4 to the -- go to page 2. Okay. Pull out the signature block at the bottom,
5 please.

6 THE WITNESS: I got it.

7 BY MR. ZAVITSANOS:

8 Q Okay. Okay. So this is a document that you discussed with
9 Mr. Blalack. And let's first of all identify who sent it. The person that
10 sent it was a salesman, right?

11 A It was Dale White.

12 Q Sales. He's sales?

13 A Sales and account management.

14 Q Yeah. His job is to sell, right?

15 A I don't know his specific job.

16 Q You don't know what sales means? Salespeople, their job is
17 to sell --

18 A Yes, I know that --

19 Q -- services or products?

20 A Yep. I know that.

21 Q Okay. So let's go to the first page. So this salesman sent
22 you this email to try to sell you, right?

23 A I disagree with that.

24 Q Huh. Well, okay. So it looks like's writing to you and Ms.
25 Paradise, right?

1 A Yes, he is.

2 Q "We appreciate the opportunity to walk through the proposed
3 savings initiatives for your fully insured and ASO market segments,"
4 right?

5 A I do see that.

6 Q That's the kind of statement that a salesman makes, right?

7 A I disagree with that characterization.

8 Q Well okay. So the part that Mr. Blalack asked you about is
9 the next sentence.

10 MR. ZAVITSANOS: Michelle, take -- get rid of the
11 highlighting and let's highlight the next sentence. "We believe the
12 implementation."

13 BY MR. ZAVITSANOS:

14 Q Do you see that?

15 A I do.

16 Q Now, this salesman, he doesn't have access to your
17 financials, does he?

18 A No, he does not.

19 Q He doesn't have access to all of the data that you keep on
20 members won or members lost, right?

21 A No, he does not.

22 Q I mean, this is a sales pitch, right?

23 A I wouldn't characterize it that way.

24 Q Well, okay. Let's compare. This is February, 2016, right?

25 A Yes, correct.

1 Q Exhibit --

2 MR. ZAVITSANOS: Put that up next to Exhibit 66, page 2.

3 Okay. Put up page 1 first, please, Michelle.

4 BY MR. ZAVITSANOS:

5 Q Now -- okay, so the MultiPlan salesman does not have your
6 financials or your performance in the market, but you do in 66, right?

7 And this is the '17 business plan put together in 2016, right?

8 A Yes. That's correct.

9 Q That would be the same year as this salesman's email, right?

10 A The email was in 2016.

11 Q Okay.

12 MR. ZAVITSANOS: Let's go to page 2 a 66, please, Michelle.

13 And would you please pull out the top three paragraphs? Include the
14 heading, please, Michelle. Great. Okay.

15 BY MR. ZAVITSANOS:

16 Q So it looks like you're number one -- I mean, we went
17 through this already. You're number one in the industry. You're not
18 behind the pack. You're way ahead of the pack, if we look at the actual
19 numbers, right?

20 A I don't know if it says that. I --

21 Q Well, remember this?

22 MR. ZAVITSANOS: Right here, Michelle.

23 BY MR. ZAVITSANOS:

24 Q "We will continue this growth by advancing our already
25 industry leading gross margins by \$5 PMPM." You see that?

1 A I do.

2 Q I mean, nobody in the industry and I mean nobody, is
3 earning what you are earning in 2016, right?

4 MR. BLALACK: Objection to foundation of the question.

5 THE COURT: Objection sustained.

6 MR. ZAVITSANOS: Let me rephrase.

7 BY MR. ZAVITSANOS:

8 Q According to this, industry leading. That means number one,
9 right?

10 A I see that it says industry leading.

11 Q Okay. So who should the jury believe about where you were
12 in 2016? Your audited financials internal to the company or some
13 salesman trying to sell you a service? Which one has more stock?

14 A I can explain that, why there's a difference.

15 Q Sir, I want to know which one should the jury put more stock
16 in, sir?

17 A They're not correlated.

18 Q Okay.

19 A They're totally --

20 Q All right.

21 A -- different.

22 Q Fair enough. Let's move on. Oh. Go and explain. Go ahead.

23 A So I'm not part of the E&I book of business, so I can't talk to
24 where they're at and what they say in terms of the leading. But what I do
25 know through talking with the sales organization and the consultants is

1 that in certain things, we weren't leading, that we were behind. And out-
2 of-network spend and addressing that spend by not using outlier cost
3 management or data, I say we were being the competition.

4 Q Give me the name of the consultant that told you and his title
5 and what company.

6 A I don't have the individual's name, but the consultants that
7 our salespeople work with, are AON Consulting --

8 Q No. No. No.

9 A -- Towers Willis [phonetic].

10 Q I want to know who is the consultant and what his title was
11 that told you that.

12 A I don't have their name.

13 Q Can you tell me exactly when they said that?

14 A No, but we were getting feedback, started in 2014.

15 Q Okay. Did you ever take a journalism class, the five Ws?
16 Who, what, when, where and why?

17 A I've heard that before.

18 Q Okay. So you can't tell us who, right?

19 A I told you it was AON and Towers -- Willis Towers Watson.

20 Q I want to know which consultant. AON's a big company.

21 Which con -- you can't tell us who, right?

22 A The name of the individual?

23 Q Yeah.

24 A I couldn't tell you that.

25 Q You can't tell us the date?

1 A Not specifically, no.

2 Q You can't tell us where they said it?

3 A No, I can't tell you that.

4 Q Okay. All right. Let's move on.

5 MR. ZAVITSANOS: Take that down, Michelle.

6 BY MR. ZAVITSANOS:

7 Q All right. Defendants' Exhibit 4570. Now, Mr. Blalack
8 covered this with you, but he left out the last part of the last sentence.

9 A Can I get that, please?

10 Q Sure.

11 MR. ZAVITSANOS: And Michelle, would you please -- let's --
12 first of all, let's see how this is from -- to.

13 BY MR. ZAVITSANOS:

14 Q Is that you?

15 A Yes, it is.

16 Q Okay. So talking points for OCM Data iSight, right?

17 A I see that.

18 Q Okay. And as we said earlier, Mr. Haben, your personal
19 evaluations were based on how much you could --

20 MR. BLALACK: Objection, Your Honor. Motion in limine.

21 THE COURT: Please approach.

22 [Sidebar at 1:18 p.m., ending at 1:18 p.m., not transcribed]

23 MR. ZAVITSANOS: May I continue, Your Honor?

24 THE COURT: Please.

25 MR. BLALACK: Just for the record.

1 THE COURT: 28.

2 MR. BLALACK: 28.

3 MR. ZAVITSANOS: And I'll wait, Your Honor.

4 THE COURT: Go ahead. Why don't you move on, and we'll
5 go back to that subject?

6 MR. ZAVITSANOS: Yes, Your Honor.

7 BY MR. ZAVITSANOS:

8 Q Okay. So -- all right. So Mr. Haben, this is your email, right?
9 Talking about Data iSight.

10 MR. ZAVITSANOS: Pull out the whole email, Michelle.

11 BY MR. ZAVITSANOS:

12 Q Right?

13 A Yes.

14 Q Talking about the benefits of Data iSight, right?

15 A That's correct.

16 Q Now, here's the part I want to ask you. Is Data iSight
17 supposed to be objective or it supposed to be a front to accomplish what
18 you want to do?

19 A It's an objective.

20 Q It's objective. Okay.

21 MR. ZAVITSANOS: Let's pull out the last paragraph,
22 Michelle. Close that out and let's pull out the whole last paragraph.

23 BY MR. ZAVITSANOS:

24 Q And let's see what you're telling the folks at United. "I
25 believe use of Data iSight --

1 MR. ZAVITSANOS: Hold on. No highlighting, Michelle.

2 BY MR. ZAVITSANOS:

3 Q -- would improve our network efficiency factor and have a
4 longer term positive influence on BIC as a result of a lower
5 reimbursement to non-par providers, lower than what they get today in
6 the SSP hierarchy," -- here's the part we're going to highlight -- "and
7 increase our leverage."

8 If Data iSight is supposed to be objective, how do you know before
9 you've even implemented it that it's going to increase your leverage with
10 physicians, so you pay lower?

11 A That's not what it says.

12 Q Well, what does increase our leverage mean?

13 A So the paragraph is related to our competition with
14 consultants. Network efficiency factor and best in class --

15 Q Sir --

16 A Well, I'm trying to explain.

17 Q I want to know -- I didn't ask what network efficiency means
18 or DIS. I want to know -- and you can take all the time you need to
19 explain. What does increase our leverage mean?

20 A The -- in the whole context of this paragraph, it's related to
21 our competition and our -- the consultants.

22 Q But --

23 A All of this is related -- I'm trying to explain it.

24 Q Yeah.

25 A All of this is related to what the consultants and how they

1 view our management of medical costs. And so in those situations,
2 there's two -- two items. One is best in class, and one is network
3 efficiency. And what I'm saying here is this will be a positive impact to
4 our competitiveness, because we will have Data iSight and we will be in
5 line with the competition.

6 Q Here is the problem I'm having with that answer, sir. I'm just
7 going by just plain English. It would improve A, and B and C, so C
8 cannot mean A and B, that's just basic English construction. Would you
9 agree?

10 A I disagree with the intent.

11 MR. BLALACK: Object to the form and asked and answered.

12 MR. ZAVITSANOS: Okay.

13 THE COURT: Overruled.

14 MR. ZAVITSANOS: Your Honor, may I have a ruling on
15 counsel's objection.

16 THE COURT: I overruled it.

17 MR. ZAVITSANOS: I'm sorry?

18 THE COURT: I overruled it.

19 BY MR. ZAVITSANOS:

20 Q Your evaluations, Mr. Haben -- your career evaluations within
21 the company were based on how much you could reduce the medical
22 spend, right?

23 A My career evaluations had an MBO that was related to
24 medical cost affordability.

25 Q Okay. Next -- we're going to switch topics now. We're going

1 to pick up the pace here. Escalating charges. Okay. I think you said that
2 the reason those documents that were looked at said that billed charges
3 were going down is because some large groups that used to be out-of-
4 network now went in-network, right?

5 A I believe that was the message, yes.

6 Q Yeah. For example, Exhibit 360, page 2. Oh, wait. Hold on.

7 MR. ZAVITSANOS: Back up, Michelle.

8 BY MR. ZAVITSANOS:

9 Q Let's look at the date, 360.

10 A Can I get it, please?

11 Q Sure.

12 MR. ZAVITSANOS: Date, Michelle.

13 BY MR. ZAVITSANOS:

14 Q So Mr. Haben, this is Exhibit 360 and this is an email to you
15 among other people, right?

16 A Yes.

17 MR. ZAVITSANOS: And let's go the next page, Michelle.

18 BY MR. ZAVITSANOS:

19 Q In 2019, mid-year. And there are a bunch of factors about
20 why the percentage income has gone down, right?

21 A Ask that again. I'm sorry.

22 Q There are a bunch of factors --

23 MR. ZAVITSANOS: Michelle, go to the next page. Page 3.

24 Page 4.

25 BY MR. ZAVITSANOS:

1 Q Okay, so there appear to be --

2 MR. ZAVITSANOS: Go back to page 2, please.

3 BY MR. ZAVITSANOS:

4 Q There appear to be 11 factors about why in 2019, the revenue
5 that you were making from these percentages was going down, right?

6 A There were a number of items that were talking about why
7 there were adjustments to the --

8 Q And in 2019 --

9 MR. ZAVITSANOS: Pull out number 1, Michelle.

10 BY MR. ZAVITSANOS:

11 Q In 2019, Quest, this large company, went from being out-of-
12 network to in-network, correct?

13 A That's correct.

14 Q Okay. Now, that doesn't really talk about the billed charges.
15 That's the amount of money that you all were earning from the savings
16 programs, right?

17 A That was the financial estimated impact, according to
18 finance.

19 Q Okay. Now, here's what I want to do. I want to go do Exhibit
20 370. And by the way -- hold on. Before I do that -- before I do that --

21 MR. ZAVITSANOS: Go back, Michelle, 360, page 2. Thank
22 you.

23 BY MR. ZAVITSANOS:

24 Q That's what you were talking about when you were trying to
25 explain to the jury this why billed charges were going down.

1 A What I was trying to explain to the jury is you have an
2 aggregate pool of billed charges made up of all non-par providers.
3 When you bring somebody in-network from a non-par pool of dollars
4 and now they're participating, those dollars that were associated with
5 that provider now are called in-network and they're nonparticipating, so
6 there's less billed charges --

7 Q Well, in the aggregate --

8 A -- in the overall pool.

9 Q -- right?

10 A In the aggregate.

11 Q Yes, sir. Okay. And I thought, Mr. Haben -- and I heard this
12 clear as a bell, so correct me if I'm wrong. I thought you said there was
13 one in particular that moved in-network that caused what you just
14 described and that was Quest, right, in 2019?

15 A I highlighted Quest, because they were first on the list.

16 Q Now let's go to 370. And let's go to page 2. And let's pull
17 out the top email, please. So Quest moved in --

18 MR. ZAVITSANOS: Wait a minute. Hold on Michelle. I got
19 the wrong one. I'm sorry. Oh, yeah. Hold on. That was right. Page 2,
20 top email. Thank you, Michelle. And highlight the last paragraph.

21 BY MR. ZAVITSANOS:

22 Q Okay. So in 2019, Quest moves in-network, but your
23 subordinate, Ms. Paradise, is reporting that billed charges have been
24 going down --

25 MR. ZAVITSANOS: Right here, Michelle, underline.

1 BY MR. ZAVITSANOS:

2 Q -- each year since 2016, right?

3 A That's correct.

4 Q Okay. So Quest going in-network would not account for why
5 billed charged were going down in 16, 17 or 18, right?

6 A Well, no, it wouldn't be they were contracted in '19. We
7 brought --

8 Q Right.

9 A -- other providers in-network, but yeah.

10 Q Where's the evidence of that, sir? Where's the evidence that
11 the reason these billed charges were going down is because people
12 were going in-network. Where is that?

13 A I couldn't tell you in the documents, but we have the largest
14 national network in the country. You can look at our directory.

15 Q Well, the jury can only go by what's in evidence. And what
16 we --

17 A Okay.

18 Q -- have in evidence is your subordinate saying billed charges
19 are coming down every years. Do you see that?

20 A I do see that.

21 Q Okay. Now, let's talk about this 500, 400, 350, 250, because
22 it's a little confusing. So which one is the benchmark, and which one is
23 the override? Is 500 the benchmark or is 500 the override?

24 A 500 was the initial benchmark.

25 Q All right. So let's see if we can figure this out, so we're going

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1 to call this part the ceiling. And we're going to call this part the floor.
2 Now the ceiling, that's the override. Or is that the benchmark, the 500?

3 A The benchmark -- so first of all, these are associated with
4 two different programs.

5 Q Sir.

6 A So --

7 Q -- I'm trying to get through this.

8 A I am too.

9 Q In order to get into the waterfall, is the top number the
10 benchmark or the override? The 500, is that the override or the
11 benchmark?

12 A The 500 is the egregious biller threshold that had been
13 defined.

14 Q But is that the benchmark or the override?

15 A That's the benchmark.

16 Q Okay. So the ceiling is the benchmark, and the floor is the
17 override. Right?

18 A The floor we also call the override, yes.

19 Q All right. Now let's talk about how this program works. So
20 what happens is the bill charge comes in and if the bill charge is above
21 the ceiling, it goes into the waterfall, right?

22 A If the bill charge is above the ceiling --

23 Q If the bill charge is above the benchmark, it goes into the
24 waterfall, right?

25 A That's incorrect.

1 Q If the bill charge comes in above 500 percent, right? Above
2 the benchmark, then it goes into the waterfall under SSPE, right?

3 A You want me to try to explain it? I don't know where
4 you're -- what you're trying to explain.

5 Q Sure, go ahead.

6 A Basically the purpose of the benchmark, I think, as we
7 discussed before, is that was a threshold based on the RAP network
8 agreements. If those agreements were 500 percent of Medicare or
9 lower, we would use those RAP agreements for the clients that had those
10 RAP agreements.

11 Q Okay. So if the bill charge or the RAP was above the ceiling,
12 it went to the waterfall, right?

13 A It's not "or the RAP." It's just the RAP agreement.

14 Q Good. Okay. Let's go with the RAP, forget the bill charge.
15 The RAP comes in. It's above the ceiling. It goes into the waterfall,
16 right?

17 A That's correct.

18 Q And the RAP is based off the bill charge. It's a percentage off
19 the bill charge, right?

20 A No, the threshold or the RAP is based on 500 percent of
21 Medicare.

22 Q No, no, no, sir. The RAP agreement itself -- forget this.
23 When a provider signs a RAP agreement, there's a discount off the bill
24 charge, right?

25 A Typically, there is a discount off the bill charges.

1 Q So if the charge comes in and the RAP is above the ceiling, it
2 goes in here, right?

3 A Can I clarify what you're saying? So if the claim comes in
4 and the RAP agreement applies and there's a discount taken, that view of
5 that value of that contracted rate, if it's at 500 percent or Medicare -- of
6 Medicare or lower, we will take that contract if the client has that RAP
7 network program and use that and pay the claim.

8 If that benchmark is worse, so in other words, the RAP agreement
9 is -- results in an amount 500 or above 500, then no, we will not use that
10 RAP agreement. Again, if the client has short savings program, RAP or
11 benchmark, I'm sorry.

12 Q Done. Okay, so if the RAP is above the ceiling, it goes into
13 the waterfall, right?

14 A If it's not as good --- if it doesn't meet the benchmark
15 threshold, it goes to the next step.

16 Q Okay.

17 A If the client has it.

18 Q Right. And then what happens is there's a series of steps,
19 the last of which is Data iSight. Data iSight runs its magical numbers
20 and after those numbers come out, you're going to pay the higher of the
21 Data iSight amount or the override?

22 MR. BLALACK: Objection to the form. It's argumentative.

23 THE COURT: Overruled.

24 BY MR. ZAVITSANOS:

25 Q Right?

1 A If the client has OCM --

2 Q Yes.

3 A Data iSight, and the claim comes through and it's -- it fails
4 because it's not good enough and it eventually gets down to the OCM,
5 there is an ER override. For ER physician clinics.

6 Q Okay. And they get -- the physician gets the higher of 350 or
7 the Data iSight rate, right?

8 A That is correct.

9 Q Okay. And the ceiling is 500. Okay. Now, Mr. Haben, would
10 you agree -- this is totally kind of make believe stuff --

11 A I just --

12 Q You knew exactly what you were doing, and you knew you
13 were always going to pay this.

14 A I disagree.

15 Q Do you have any examples, Mr. Haben, of emergency room
16 charges that were ever below 500 percent so that you would pay the RAP
17 agreement? Do you have examples for us?

18 A I don't know if there's any in the evidence or not.

19 Q Okay. So here's what we know. In two -- we just looked at a
20 memo that said that bill charges were coming down for three straight
21 years, right? We just looked at it.

22 A Understood

23 Q And the concern was uh-oh, we may actually have to pay
24 that. So what you did was you lowered the ceiling to 400, right?

25 A I disagree with that characterization.

1 Q Because did you lower the ceiling from 500 to 400?

2 A Yes, we did.

3 Q Okay. And then you dropped the floor from 350 to 250,
4 right?

5 A Yes, you want me to explain why?

6 Q No, sir. You dropped the floor from 350 to 250, right?

7 A We reduced the floor, and I can explain why that is.

8 Q And every single Data iSight calculation when it was 350,
9 equals 350. Every single Data iSight calculation, when it was 250,
10 equaled 250, right?

11 A I can't say that every single calculation was that way.

12 Q Yeah. This never came into play. That was for the public.
13 So that you could demonstrate that look, we're paying five times the
14 Medicare -- they just need to be reasonable, right?

15 A I disagree with that.

16 Q Okay.

17 A We're willing to pay a premium above the override in order
18 to take the member out of the middle.

19 Q Why did you drop it from 500 to 400 then? If the concern
20 was not what your colleague was saying that bill charges were coming
21 down and you might have to pay the 400.

22 A Because the providers charge master, the individual
23 provider's charge master, continued to increase. So whatever you
24 discount, you got, was erased the next year or the year after.

25 Q Well, Mr. Haben, that doesn't even make sense. You're

1 basing it off of a percentage of Medicare. Who cares what the providers
2 do?

3 A I explained before.

4 Q Let me finish.

5 A I could -- I thought you asked me a question.

6 Q Let me finish.

7 A Okay.

8 Q If the charges are going up, contrary to what this paradise is
9 saying, that doesn't matter because you're basing it off of a percent of
10 Medicare, right?

11 A I --

12 Q So that would mean and that would mean you should leave
13 it the same. Why did you drop it from 500 to 400? Why?

14 A I explained it. I can say it again.

15 Q Sure.

16 A Okay. So as I said before, those RAP agreements are based
17 off, typically a percentage off the bill charges. You look at those
18 percentage off of bill charges. You come up with a rate. That rate then,
19 you take the Medicare, and you say what does that look like compared to
20 Medicare? That benchmark is 500. As those agreements -- those charge
21 masters for those individual providers continue to increase, then it looks
22 like it's a higher amount, so we ended up dropping that back down then
23 to 400%.

24 Q I don't remember the year of the song. Switching topics
25 now, remember that song, Money for Nothing?

1 A I don't.

2 Q I won't say the second part of that. Okay. So you talked
3 about with your counsel, about how you really weren't doing nothing.
4 You actually did stuff to earn this billion dollars. Remember?

5 A I do.

6 Q And I wrote down what you said you did. Correct me if I'm
7 wrong, please. Live United earned 1 billion. The first one you said FTE,
8 second thing you said was HIPAA issues. And the third thing you said
9 was sending claims to a vendor. You a Seinfeld fan?

10 A So so.

11 Q Remember the yada yada yada episode?

12 A I don't know.

13 Q That's okay. Okay. And the fourth thing you said was "and
14 other things." Is that right? Is that what you said?

15 A I don't remember exactly my testimony.

16 Q Yeah. Okay. Let's talk about what this is. FTE is full time
17 equivalent. That's employees, right?

18 A That's correct.

19 Q And you're not -- I'm done. And United Healthcare,
20 worldwide, has about 300,000 employees?

21 A I believe about 330,000 employees.

22 Q And so, you hired what, like 12 people, FTE, for this one
23 billion, you hired 12 people.

24 A That's a mischaracterization.

25 Q How many did you hire?

1 A Many parts of the organization support our programs, not
2 just us.

3 Q How many FTEs did you hire for this SSPE?

4 A I can't tell you how many FTEs support our programs across
5 the board.

6 Q Okay. HIPAA issues -- HIPAA is a federal law that says you
7 have to make paying the confidentiality of people's medical records,
8 right?

9 A I think roughly, yes.

10 Q Yeah. I mean, you're already under that obligation as part of
11 your PMPM fee, right? There is no additional HIPAA issue under this
12 shared savings percentage. Is there, sir? A special HIPAA law that
13 applies to that?

14 A I disagree with how you characterize. I can explain. You
15 have to send claims out to the vendor, so that's a totally separate
16 component from the PEPM or PMPM fee.

17 Q I'm going to get to this one in just a minute. The HIPAA
18 issues which you listed as the second reason why you get a Bellagio
19 every year. There's nothing about HIPAA issues that you already were
20 not doing as part of your PMPM fee, right?

21 A I disagree.

22 MR. BLALACK: Objection to the form of the question. It's
23 argumentative.

24 THE COURT: Overruled.

25 BY MR. ZAVITSANOS:

1 Q Next, sending claims to the vendor. That means you have to
2 create a secure line and so when you press send, and the claims go out
3 to MultiPlan, people can't hack it, right?

4 A It's much more complicated than that.

5 Q Tell us, Mr. Haben.

6 A Okay, sure. So when claims are -- first, claims have to be
7 deemed eligible to go out to the vendors, so you have to look at the
8 client records. You have to look at the makeup of the claim. You have to
9 put the claim into a right format. That claim has to get put and
10 downloaded into a file. That file has to go out to the vendor. The vendor
11 does their work. The file has to come back. It has to come into the right
12 place inside the organization, and in the right timing of the system. Then
13 the data has to be populated back into our system which is a very unique
14 and I would say, cumbersome, database. So it's very expensive.

15 Q Everything you just said, to process the claim, everything.
16 Everything. You were already doing as part of the PMPM.

17 A I disagree.

18 Q When the claim comes in, to process the claim, you got to
19 get the records. You got to populate the data. And this is all done
20 electronically, right?

21 A Yes.

22 Q Okay. You got to do all of that. So what are you doing other
23 than just hitting send that entitles you to this billion dollars?

24 A I disagree with how you characterize it and I tried to explain
25 it. It's a totally separate process.

1 Q Let's get to the yada yada part. Now what about the other
2 thing? What other things, sir?

3 A So there's member service phone calls that have to be taken.
4 There's provider directories that have to be loaded. There is materials
5 that have to be put together for clients.

6 Q You mean little brochures that you already were printing and
7 making available for the clients as part of the PMPM fee? That kind of
8 stuff?

9 A I disagree. It's not the same thing.

10 Q Well, okay. Anything else we need to add to the list, sir?

11 A There is many more. I just couldn't quote it all.

12 Q And you said you weren't trying to replace -- is Exhibit 76 in?

13 A Yes.

14 Q Let's go to Exhibit 76, page --

15 MR. ZAVITSANOS: Mr. Killingsworth says it's in but I'm
16 going to go with the Court.

17 MR. BLALACK: We have it -- we have it admitted, Your
18 Honor.

19 THE COURT: Oh, I'm sorry. I was wrong. It is in. Trying to
20 multitask here with your order.

21 MR. BLALACK: Your Honor, this is an AEO document, I
22 guess, for your benefit.

23 BY MR. ZAVITSANOS:

24 Q Okay. Exhibit 76, Page 21. How many employees do you
25 have total, sir?

1 A United Health Group?

2 Q Yeah.

3 A 330,000.

4 Q And in order to earn a billion dollars, with all the programs --
5 MR. ZAVITSANOS: Right here, Michelle.

6 THE WITNESS: What page am I looking at, please?

7 MR. ZAVITSANOS: 21. Pull that out. 12 FTEs.

8 BY MR. ZAVITSANOS:

9 Q Have you been to Moneyline Pizza? Really good.

10 A Never heard of it.

11 Q Okay. So it's this pizza place in the barrio. I think they've got
12 20 employees at this pizza place.

13 A Okay.

14 Q I don't think they make a billion dollars. Is this right?

15 According to this document, it's only 12 people for all the programs to
16 generate this?

17 A No, that's not correct.

18 Q That's what it says.

19 A No, it doesn't.

20 Q Okay. All right. Now, all right. Okay. Now, let's go to 422.

21 By the way, is Naviguard? The -- did you try to kind of sneak that in, hope
22 they don't --

23 A Which one?

24 Q 422.

25 A What number?

1 Q Look at 422, please. Take a moment and go through 422 and
2 tell me please if this document, which I believe has Paradise's name on
3 it, relates to Project Airstream and Naviguard.

4 A I'll need a minute.

5 MR. ZAVITSANOS: And may I ask counsel if he has an
6 objection, Your Honor?

7 THE COURT: You may.

8 MR. ZAVITSANOS: 422, counsel?

9 MR. BLALACK: No objection.

10 THE COURT: Exhibit 422 will be admitted.

11 [Plaintiffs' Exhibit 422 admitted into evidence]

12 MR. ZAVITSANOS: Okay, Michelle, just pull it up. Okay.

13 BY MR. ZAVITSANOS:

14 Q So MultiPlan or excuse me, Naviguard was not designed to
15 replace MultiPlan. Is that your testimony?

16 A Yes.

17 Q Okay. Well, let's take a look here now. And the credo of
18 United Healthcare is transparency, integrity and compassion, right?

19 A Yes.

20 Q Okay. So let's pull out the bottom email. All the way down,
21 keep going. All right. Okay. So looks like somebody's consulting Jeff
22 Schnedwin [phonetic] who is, looks like a lawyer with UnitedHealthcare.
23 Do you see that?

24 A Will you point that out to me?

25 Q Yeah. Highlight the first paragraph, Michelle.

1 A Oh, I see it. Thank you.

2 Q Okay. And it looks like what you all were doing was you
3 were looking in the standard language that you all stick in these plans, to
4 see if you could slip in Naviguard in exchange for the prior vendor.
5 Right, sir?

6 MR. BLALACK: Object to form. Argumentative.

7 THE COURT: Overruled.

8 THE WITNESS: I disagree with how you characterize it.

9 BY MR. ZAVITSANOS:

10 Q Okay. Well let's take a look. We asked Jeff Schnedwin to
11 weigh in on how much Naviguard latitude we have with client OCM
12 language. You see that?

13 A I do.

14 Q OCM language being language in the plan, right?

15 A Can I just take a look at this, please?

16 MR. ZAVITSANOS: Sure. Michelle, highlight this paragraph
17 right here.

18 THE WITNESS: Okay. What was your question?

19 BY MR. ZAVITSANOS:

20 Q Okay. So clients were already paying for MultiPlan under
21 OCM, right?

22 A Yes.

23 Q They were paying like \$300 million a year. Remember when
24 we looked at that?

25 A Not just for OCM but yes.

1 Q Yes. Naviguard, excuse me. MultiPlan was earning \$300
2 million a year, right?

3 A Yes, I believe so.

4 Q Right. And so when I'm talking to the clients, what you all
5 did, was you talked to your lawyer to see how much latitude they have
6 under the current language to stick in Naviguard instead of MultiPlan,
7 right?

8 A I disagree with how you're characterizing that.

9 Q Let's just read it. The ASA and SPD. SPD is summary plan
10 description, right?

11 A Yep.

12 Q Language describing OCM looks very general. In other
13 words, it could be describing Naviguard. That language would clearly
14 not be applicable to Naviguard is the description and reference to the
15 SSP portion of SSPE, the wrap network references. Do you see that?

16 A I do.

17 Q Okay. So if you wanted to substitute, secretly, Naviguard for
18 MultiPlan, you could do it under the OCM language but not the wrap
19 network language; that's what that says?

20 A No, I disagree with how you're characterizing that.

21 Q Okay. And it looks like -- after you got this advice --

22 MR. ZAVITSANOS: Pull this up. Top email, all the way from
23 the top, Michelle, to here. No, no, no, no. Top email, Michelle. No, I
24 need the signature line too, please. Okay.

25 BY MR. ZAVITSANOS:

1 Q And this is in response to what we just read, "I spoke with
2 Becky Paradise this afternoon, and she has also been looking at this as
3 her team does with development of new OON programs," right?

4 A Yes, that's what that says.

5 Q Do you know if there's any emails where you're telling
6 clients, we're launching Naviguard, it's meant to replace the 300 million
7 that you all have been paying to MultiPlan and, oh, by the way, Multiplan
8 -- excuse me, Naviguard is owned by us. Is that in evidence?

9 A I don't know what all is in evidence.

10 Q Okay. Well, no doubt about it, Exhibit 273, page 8 --

11 A Can I go get that, please?

12 Q Sure.

13 MR. ZAVITSANOS: Michelle, right here. Bottom bullet.

14 BY MR. ZAVITSANOS:

15 Q This is November 11th, 2019, after Naviguard has been
16 launched and internally, the objective is what we're looking at up on the
17 screen, right?

18 A Can I just --

19 Q Sure.

20 A -- get some context here?

21 Q It's 273 --

22 A Yep.

23 Q -- page 8.

24 A Okay. What's your question?

25 Q That's the objective?

1 A What's that? I didn't -- I don't remember --

2 Q Profitability on the ASO plan is driven heavily by add-on
3 sales. Add-on sales. Sell Naviguard with this "free program", ENRP,
4 right?

5 A I disagree.

6 Q Okay. All right.

7 MR. ROBERTS: Let's close that out, Michelle.

8 BY MR. ZAVITSANOS:

9 Q And by the way, this MultiPlan, you said you went through
10 that little checklist about whether they're objective or not, remember,
11 with your counsel?

12 A Yes.

13 Q But the one thing we know for sure --

14 MR. ZAVITSANOS: 239, Michelle, please. Page 13.

15 BY MR. ZAVITSANOS:

16 Q The one thing we know for sure when we compare them --

17 A Can I get that, please?

18 Q Yes, sir.

19 MR. ZAVITSANOS: Michelle, pull out the blue box.

20 BY MR. ZAVITSANOS:

21 Q When we compare them to FAIR Health and which one is
22 more objective, one thing we know -- 20 percent of FAIR Health's
23 revenue is not dependent on UnitedHealthcare?

24 MR. BLALACK: Object to the foundation of that question.
25 Calls for speculation.

1 THE COURT: Overruled.

2 BY MR. ZAVITSANOS:

3 Q Right, sir?

4 A I don't know that answer.

5 Q Well, how did you know all the other things that you went
6 through the checklist with Mr. Blalack? How did you know that, but you
7 don't know this?

8 A Can I get through the document?

9 Q Sure.

10 A What page, please?

11 Q It's page 13.

12 A Thank you. Okay. So what's your question again?

13 Q Yeah. I mean, first of all, FAIR Health is a nonprofit, right?

14 A Yes, I believe so.

15 Q Okay. And they're not -- 20 percent of their revenue is not
16 from UnitedHealthcare, right?

17 A I don't know what their percentage revenue is.

18 Q Okay. Well, I thought you told Mr. Blalack you knew that all
19 these other companies subscribe too?

20 A Yeah, I don't know what they pay them.

21 Q All right. Fair enough. Now, let's look at -- and you said that
22 contrary to what I suggested, that Data iSight actually uses what claims
23 have been allowed to generate its numbers, right?

24 A Yes, they use claims paid data.

25 Q Yeah. Well, that's actually not proved, sir, right? That's

1 actually verifiably false, right?

2 A I don't agree with you.

3 Q Let's got to Exhibit 380. And let's go, please, to page 10.

4 MR. ZAVITSANOS: And Michelle, pull out the Data iSight
5 part. No, hold on. Yeah.

6 BY MR. ZAVITSANOS:

7 Q This is a United document that says what Data -- how Data
8 iSight does its thing. And remember we went through it and there were
9 a couple of things here you couldn't explain like this median conversion
10 factor?

11 A Can I get to that, please?

12 Q Sure.

13 A Where's median conversion factor?

14 MR. ZAVITSANOS: Right there, Michelle. Other CMS
15 guidelines.

16 BY MR. ZAVITSANOS:

17 Q It's up on your screen, sir.

18 A Okay.

19 Q Yeah. I mean, this is a lot more than paid data, right?

20 A I was just summarizing, sir.

21 Q You were summarizing?

22 A Yeah, I don't --

23 Q What is the median conversion factor?

24 A I don't know what they mean by that.

25 Q Does that mean whatever the client tells us to do -- if they

1 say jump, we say how high?

2 A No, I don't believe so.

3 Q Okay. By the way, I asked you earlier -- a couple -- few days
4 ago we had the break, whether you could explain why the Data iSight
5 number always comes out to -- where is it? 350 and 250, remember
6 that?

7 MR. BLALACK: Object to form. Assumes facts not in
8 evidence.

9 THE COURT: Overruled.

10 BY MR. ZAVITSANOS:

11 Q 350 and 250? Have you looked into that since the other day?

12 A No.

13 Q Okay. Let's move on. Let's talk about the median. Okay.
14 So let's look at Exhibit 14, please. This is a new document. Now, this is
15 an earlier talking points memo, okay?

16 A I need some time to get there, please.

17 Q Sure.

18 MR. ZAVITSANOS: And Michelle, can you please pull out
19 here. We looked at something similar to this in Exhibit -- excuse me,
20 labels. My apologies, labels, also from 2014. And Michelle, will you
21 please go --

22 THE WITNESS: What exhibit, please?

23 MR. ZAVITSANOS: It's --

24 THE WITNESS: 14?

25 MR. ZAVITSANOS: -- Exhibit 14. Yes, sir. Michelle, I'm not

1 going to go through this whole thing. The jury can do that on their time
2 but let's go to page 5, please.

3 BY MR. ZAVITSANOS:

4 Q And here's what I want to know. And by the way --

5 MR. ZAVITSANOS: Michelle, right here.

6 BY MR. ZAVITSANOS:

7 Q Here's what I want to know, sir. In 2014, you all issued these
8 talking points, but then after this document, what we have up on the
9 screen never appeared again.

10 MR. ZAVITSANOS: Michelle, highlight this last sentence.

11 BY MR. ZAVITSANOS:

12 Q Do you agree with UnitedHealthcare, Mr. Haben, that
13 reimbursements using the FAIR Health database is fair and within the
14 range of payments typically accepted?

15 MR. BLALACK: Object to the form of that question. Counsel
16 is testifying prior to the question.

17 THE COURT: Objection is sustained.

18 MR. ZAVITSANOS: Let me rephrase.

19 THE WITNESS: Can I just read this, please?

20 MR. ZAVITSANOS: Yes, sir. And let me know when you're
21 ready.

22 THE WITNESS: I will.

23 [Witness reviews document]

24 THE WITNESS: Okay.

25 BY MR. ZAVITSANOS:

1 Q Do you agree with this UnitedHealthcare document that the
2 compensation through the use of the FAIR Health database is fair and
3 within the range of payments typically accepted?

4 A So that's what that says here, and I think I'd clarify too, I
5 believe this is related to Oxford so like New York, New Jersey is the
6 market.

7 Q Sir --

8 A So the --

9 Q -- I understand. I'm just -- listen --

10 A You're asking me on the document. It's for Florida, New
11 York, New Jersey, Texas.

12 Q Sir, I understand that. The jury will go through these. They'll
13 see that there's Oxford and all this other stuff. I just want to know do
14 you agree with the statement that compensation based on the FAIR
15 Health database is fair and within the range of payments typically
16 accepted?

17 A That's what it says here, and I believe this was written in
18 2014.

19 Q So let me ask you something. Are you saying that there's a
20 different standard for the people of New York than the people of
21 Nevada?

22 A There's different -- well, there's -- first of all, New York is not
23 Nevada and Nevada is not New York. I think we can all agree on that.
24 There's different --

25 Q Thank goodness.

1 A -- there's different state laws as well.

2 Q No, no, sir. This has nothing to do with state law.

3 A Yeah, it does.

4 Q It's not the law. What law, sir?

5 A It's saying in the header of the document, this is for New
6 York, Florida, and New Jersey and New York, Texas.

7 Q I want to know exactly since you're an expert on the law --
8 tell me exactly what law you're referring to?

9 A I did not say I was an expert.

10 Q Okay. So I'm going to ask you one last time and then we're
11 going to move on. Do you agree with the United statement that
12 compensation based on the FAIR Health database is fair and within the
13 range of payments typically seen?

14 A I don't know if I can answer that. I didn't write this.

15 Q Okay, sir. Let's move on.

16 THE COURT: So gentleman, I have the answer to your
17 question up here. A copy for each. And then I also have this for you
18 which deals with overtime and what I think you can expect -- I'm not
19 certain.

20 MR. ZAVITSANOS: Yes, may I hand this to my colleagues,
21 Your Honor, so I can continue.

22 THE COURT: Of course.

23 MR. BLALACK: Thank you, Your Honor.

24 MR. ZAVITSANOS: May I continue, Your Honor?

25 THE COURT: Please.

1 BY MR. ZAVITSANOS:

2 Q Okay. All right, Mr. Haben, I just want to get done here. Oh,
3 by the way, I thought you said at the beginning of your direct with Mr.
4 Blalack that the percentage of out-of-network emergency room doctors
5 was a very tiny percentage. Did I understand that correctly?

6 A No, I don't think I said that.

7 Q Do you know what percent of emergency room doctors in
8 Nevada are out-of-network if you exclude Team Physicians, Ruby Crest,
9 and Fremont?

10 A I don't know that.

11 Q Do you know whether it's almost 50 percent?

12 A I don't know that.

13 Q And you understand that the decision that this jury makes in
14 this case affects them as well?

15 MR. BLALACK: Object to form. Argumentative. Testifying.

16 THE COURT: Sustained.

17 MR. BLALACK: Foundation.

18 MR. ZAVITSANOS: I'll move on, Your Honor.

19 BY MR. ZAVITSANOS:

20 Q You said you wanted to take the member out of the middle,
21 right?

22 A Yes, that's one of the services that we're getting paid for.
23 Yes.

24 Q Yeah, but the reality is ENRP, which is your flagship program
25 now, has no member protection, right?

1 A ENRP has no protection, no fee.

2 Q And in terms of the risk of balance billing, it's much higher
3 under ENRP because that's an 85 percent discount, versus the usual
4 customary and reasonable, which is a 10 to 20 percent discount?

5 A I would disagree. The risk of being billed is driven by the
6 staffing firm.

7 Q Okay. So a doctor getting 15 percent of the bill charge is just
8 as likely to balance bill a member as a doctor getting 90 percent of the
9 bill charge?

10 A It's all dependent on the amount that they're charging, and
11 their desire to collect and be aggressive.

12 MR. BLALACK: Your Honor, may we approach?

13 THE COURT: You may.

14 [Sidebar at 2:03 p.m., ending at 2:03 p.m., not transcribed]

15 THE COURT: Thank you, both.

16 MR. ZAVITSANOS: Thank you, Your Honor. Michael, is 422
17 in?

18 MR. KILLINGSWORTH: Yes. It's in.

19 BY MR. ZAVITSANOS:

20 Q Okay. So I've got -- Mr. Haben, I've got less than three
21 minutes.

22 A Okay.

23 Q You ready?

24 A Yeah.

25 Q Okay. Here we go. Let's go to Exhibit 403. 403, page 2.

1 THE COURT: It's in.

2 THE WITNESS: Sorry. It's at the back.

3 MR. ZAVITSANOS: Excuse me for one second.

4 [Counsel confer]

5 BY MR. ZAVITSANOS:

6 Q Okay. I'm asking about Naviguard.

7 MR. ZAVITSANOS: And Michelle, can we pull up strategic
8 solution summary? Actually, all the way to the bottom, Michelle. Okay.

9 BY MR. ZAVITSANOS:

10 Q So this is talking about -- and by the way, this has your name
11 on it, right, John Haben up at the top?

12 A Yes, it does.

13 Q Okay. And -- all right. And we see here it says transition
14 from dependents on ASO SSP revenue. The total cost of care model
15 with admin fee that includes non-par management and migrate off
16 vendor programs, Multiplan, a UHC managed programs by the end of
17 2022, right?

18 A I do see that?

19 Q And this is exactly what your lawyer asked you and you said
20 you're not going to do it, that this was not designed -- that this Project
21 Airstream, Naviguard, was not designed to migrate off of MultiPlan to a
22 UnitedHealthcare managed program, right?

23 A I think you mischaracterized what I said.

24 Q Okay. Well, what you're going to do, Mr. Haben, it looks like
25 you're going to get rid of the percentage fee. You're going to change it

1 to something called a PCOC model and then you're going to pair it with
2 this Naviguard, right?

3 A I think that's mischaracterizing it.

4 Q That's not what that says, sir?

5 A No, not entirely.

6 MR. ZAVITSANOS: I'll pass, Judge.

7 THE COURT: Okay.

8 MR. BLALACK: Your Honor, can we approach?

9 THE COURT: You may.

10 [Sidebar at 2:07 p.m., ending at 2:08 p.m., not transcribed]

11 THE COURT: All right, you guys. Time for the after lunch
12 break on Friday afternoon. We're at 2:08. I'll ask you to be ready at 2:20.
13 We have a matter to take up outside your presence. We may be longer.
14 If we are, we'll let you know.

15 During the recess, don't talk with each other or anyone else
16 on any subject connected to the trial. Don't read, watch, or listen to any
17 report of or commentary on the trial. Don't discuss this case with
18 anyone connected to it by any medium of information, including without
19 limitation newspapers, television, radio, internet, cell phones, or texting.

20 Don't conduct any research on your own relating to the case.
21 Don't consult dictionaries, use the internet, or use reference materials.
22 You may not post to social media with regard to the trial. But also, do
23 not talk, text, tweet, Google issues, or conduct any other type of book or
24 computer research with regard to any issue, party, witness, or attorney
25 involved in the case.

1 Most importantly, do not form or express any opinion on any
2 subject connected with the trial until the matter is submitted to you.

3 Please be ready at 2:20, and if we need longer, we will give
4 you a heads up.

5 THE MARSHAL: All rise for the jury.

6 [Jury out at 2:09 p.m.]

7 [Outside the presence of the jury]

8 THE COURT: Okay. The room is clear. Mr. Blalack?

9 MR. BLALACK: May I make an offer of proof, Your Honor?

10 THE COURT: Yes, you may.

11 MR. ZAVITSANOS: Your Honor, before Mr. Blalack begins,
12 we have no objection to Mr. Blalack doing this in summary fashion if that
13 would speed things up. I just offer that as an option. And we will not
14 claim on appeal, first trial or at any stage of this litigation that they have
15 waived anything by doing it that way.

16 THE COURT: And is it appropriate for Mr. Haben to be here
17 during this?

18 MR. BLALACK: Well Your Honor, I think for this, there are
19 some things I'm just going to submit a written offer of proof on.

20 THE COURT: That's fine.

21 MR. BLALACK: But for this issue, Your Honor, I think the
22 Court needs to hear it, and I think it is sufficiently discrete that it -- I
23 couldn't summarize it any better than I could just have him explain it.

24 THE COURT: That's fine. Go ahead.

25 BY MR. BLALACK:

1 Q All right. Mr. Haben, first of all, I want to direct you to an
2 exhibit that you were shown by Plaintiffs' counsel.

3 MR. BLALACK: And if I could have Shane bring up Plaintiffs'
4 Exhibit 255.

5 BY MR. BLALACK:

6 Q Now, sir, this document is an exhibit Mr. Zavitsanos just
7 showed you a moment ago, it's dated November 20th and 21st, 2018,
8 with a subject line on the first email that reads, "Subject: Urgent action
9 required, SPD language for clients with SSPE." It's on page two of the
10 document. Do you see that?

11 A I do.

12 Q Seeing this, sir, do you remember being questioned about
13 this document?

14 A I do.

15 Q And if you go to page eight of the document, down at the
16 bottom. And let me back up. This listing, do you understand that this is
17 a listing of UnitedHealthcare clients?

18 A Yes.

19 MR. ZAVITSANOS: Objection. Leading.

20 THE COURT: Overruled.

21 BY MR. BLALACK:

22 Q And do you see --

23 THE COURT: This is an offer of proof, so.

24 BY MR. BLALACK:

25 Q Do you see the reference, sir, fourth from the bottom, to a

1 client?

2 A On page two?

3 Q On page eight.

4 A Yes.

5 Q It's been highlighted for you. What is that client?

6 A TeamHealth.

7 Q TeamHealth is the -- you mean that is the owner and affiliate
8 of the three Plaintiffs in this case, correct?

9 A That's what I understood.

10 Q So just so the Court is clear, during the period of this dispute,
11 at least a portion of it, TeamHealth -- I mean, you understood
12 TeamHealth was a client of UnitedHealthcare?

13 A Yes.

14 Q How was it -- what was the nature of that client relationship?

15 A I'm not sure what you mean.

16 Q Well, in what way was TeamHealth a client of
17 UnitedHealthcare?

18 A Were they fully insured or ASO? They were -- I believe that
19 they were ASO.

20 Q So when you said they were ASO, are you testifying that
21 UnitedHealthcare served as the administrator of the TeamHealth health
22 plan?

23 A Yes.

24 Q Do you know under what circumstances United was serving
25 as the administrator for the TeamHealth health plan?

1 A In terms of did somebody sell to TeamHealth to become --

2 Q Have you ever heard of Equity Healthcare, sir?

3 A Yes, I have.

4 Q What is Equity Healthcare?

5 A I believe they're the parent company to TeamHealth and
6 other private entities.

7 Q Have you ever heard of Blackstone?

8 A Yes, I have.

9 Q Okay. What's the relationship -- I'm going to give you three
10 names and I want you to describe the relationship between them:
11 Blackstone, Equity Healthcare, and TeamHealth.

12 A Blackstone is a private equity entity, Equity Health is a private
13 equity entity, and TeamHealth is a subordinate underneath.

14 Q Okay. Are you aware that Equity Healthcare provides group
15 purchasing for health benefits for companies that are owned by
16 Blackstone?

17 A I believe so, yes.

18 Q Okay. Now, was there a time in the spring of 2019 -- I'll take
19 you to that time period, spring of 2019 -- when you were asked by others
20 within United Healthcare to prepare an analysis of the out-of-network
21 programs provided to TeamHealth and the other companies that are part
22 of Equity Health?

23 A Yes. I don't remember the exact date, but I do remember
24 that was asked.

25 Q I'm going to show you a document, sir. And this is Plaintiff's

009362

009362

1 Exhibit -- excuse me. This is Defense Exhibit 5319. If you can find that
2 real quick. If you don't have it, I can bring you a copy.

3 MR. BLALACK: May I approach, Your Honor?

4 THE COURT: You may.

5 MR. BLALACK: Okay.

6 MR. ZAVITSANOS: Your Honor, may I approach as well?

7 THE COURT: Of course. You may. You both may.

8 THE WITNESS: I found it, Counsel.

9 MR. BLALACK: Okay.

10 BY MR. BLALACK:

11 Q Now, just to orient the Court, this is an email from you dated
12 April 18, 2019, to Dan Schumacher; is that correct?

13 A That's correct.

14 Q And again, who was Dan Schumacher?

15 A I believe he was the leader of the commercial business
16 group.

17 Q And the subject of the email is what?

18 A "Equity Healthcare out-of-network program client summary."

19 Q Okay. Now, do you recall why Mr. Schumacher asked you to
20 prepare this summary?

21 A I believe he wanted to understand who the Equity Health
22 clients are and what did they have for their out-of-network plan.

23 Q Was he doing that in preparation for some kind of meeting
24 with Equity Healthcare?

25 A I believe so. Or a leadership meeting.

1 Q Now, if I could have Shane bring up that first paragraph. It
2 says, "Dan, attached is includes a listing of Equity Health clients from Al
3 Martinez' team. Most EH clients have SSPE, open paren, OCM with
4 benchmark pricing, and FR&C." Do you see that, sir?

5 A I do.

6 Q What does FR&C stand for?

7 A I believe that's -- well, that's the facility reasonable and
8 customary program.

9 Q Okay. And OCM with benchmark pricing, what does that
10 refer to?

11 A OCM with benchmark is SSPE or shared savings enhanced.

12 Q And just to remind the Court, OCM would be a program that
13 utilizes Data iSight?

14 A That's correct.

15 Q And then it says, "And only four," and then it's redacted
16 information under the limine orders. "Only four," and then it says, "one
17 is EH." Do you see that?

18 A I do.

19 Q And then it says, "You will see in Al's report, we charge
20 between 35 and 50 percent of savings for SSPE and FR&C, no charge
21 for," redacted. "There are large plan fee caps on almost all EH clients."
22 Do you see that?

23 A I do.

24 MR. BLALACK: If you go down, now, Shane, to the next
25 paragraph.

1 BY MR. BLALACK:

2 Q It says, "We were not able to determine how much of the \$50
3 million for not turning on OCM against TH in 2018, negatively impacted
4 these specific EH clients." Do you see that?

5 A I do.

6 Q And then it says, "But we thought it may be helpful to show
7 how EH clients saved money in 2018 with their current programs by
8 showing the impact if they did not have OCM or [indiscernible]." Do you
9 see that?

10 A I do.

11 Q "And also modeled out is the benefit if they all adopted
12 [indiscernible] plus [indiscernible] attached." Do you see that?

13 A I do.

14 Q Now, if you look at the attachment to this document, you see
15 a chart. Do you have that?

16 A Yes, I do.

17 Q And what is represented on the chart?

18 A These are the Equity Healthcare existing UHC clients and
19 their out-of-network programs.

20 Q So is this providing a summary of each of the Equity
21 Healthcare companies that are owned by Blackstone and which out-of-
22 network programs that were utilized?

23 A Yes.

24 Q And for each of these clients listed here, was
25 UnitedHealthcare the administrator of the health plan?

1 A Yes, I believe so.

2 Q And is TeamHealth listed in that list?

3 A Yes, they are. They're one, two, three, four, five from the
4 bottom.

5 Q Okay. Now, in the middle column, you'll see a header that
6 reads, "SSPE open plan OCM." Do you see that?

7 A I do.

8 MR. BLALACK: Shane, can you highlight that? That whole
9 column. I'd like to bring that up. I don't know if it's possible to bring it
10 up.

11 BY MR. BLALACK:

12 Q Now, sir, can you tell me, of the roughly, what, 20 to 25
13 companies listed there, can you tell me how many of those companies
14 as part of Equity Healthcare had selected Shared Savings Program
15 Enhanced with OCM?

16 A All but two of them.

17 Q And was one of the ones that did not TeamHealth?

18 A Yes.

19 Q Okay. And if you look in the right-hand --

20 MR. BLALACK: Pull that down, Shane. Move it down.

21 BY MR. BLALACK:

22 Q You'll see a column that says, "Large Plan Savings" in large
23 caps. Do you see that?

24 A I do.

25 Q And what is reflected in that column?

1 A There's a fee cap that's applied to large claims, and that's the
2 cap. I'm sorry. That's the cap on the shared savings fee we would
3 charge the client.

4 Q So for each of the clients that selected shared savings with
5 OCM, did they all have a fee cap?

6 A All except for two of them.

7 Q And in the far right-hand column, there is a -- the header, it
8 says, "Versus current state." Do you see that?

9 A I do.

10 Q And underneath that, there's a column that reads, "No OCM."
11 Do you see that?

12 A I do.

13 Q And underneath that, there's various numbers, correct?

14 A Yes.

15 Q What does that reflect?

16 A I believe what those reflect is if they didn't have OCM, they
17 would pay that additional dollar amount more. So if the header -- or
18 near the top, it says, like, two million as a plus. If they had OCM -- and I
19 don't know; it was redacted -- it would be 7.2 million. But with OCM and
20 the other deducted item, they would save \$4 million.

21 Q Okay. So was the no-OCM column intending to show how
22 much additional medical costs these clients would have spent --

23 A Yes.

24 Q -- if they had not had that program?

25 A Yes.

1 Q Okay. Now, do you remember being questioned --

2 MR. BLALACK: Thank you, sir. You can take that down,
3 Shane.

4 BY MR. BLALACK:

5 Q Do you remember being questioned just a moment ago
6 about Plaintiff's Exhibit 255 -- bring that up again -- in which Mr.
7 Zavitsanos suggested to you that this list of clients who had not yet
8 adopted Shared Savings Program Enhanced indicated that it was an
9 unpopular program that UnitedHealthcare could not sell to its clients?

10 A Yes.

11 Q Did UnitedHealthcare have any trouble selling Blackstone's
12 companies that were sister companies to TeamHealth?

13 A No, they were sold.

14 MR. BLALACK: Your Honor, that's all I have and I'd like to
15 permit -- have permission to present that testimony to the jury to rebut
16 the suggestion that the Shared Savings Program was not an attractive
17 program -- Shared Savings Program Enhanced was not an attractive
18 program for self-insured clients and by showing that the TeamHealth
19 entities that the TeamHealth companies that were run by Blackstone,
20 through whom they all got their business, the client out-of-network
21 programs, from this Defendant, all but four of them chose OCM.

22 THE COURT: Good enough. I'm going to ask Mr. Haben to
23 step out during the argument.

24 THE WITNESS: Now?

25 THE COURT: Please. Did you have any more argument?

1 MR. BLALACK: That's enough, Your Honor. Thank you.

2 THE COURT: Thank you.

3 MR. ZAVITSANOS: Your Honor, if I may?

4 THE COURT: You may.

5 MR. ZAVITSANOS: Okay, Your Honor. Several things. First,
6 the reason that list was put together is because TeamHealth, during the
7 course of these extensive settlement discussions with the Defendants,
8 during which, the comment about "close the hospitals" or "because I
9 can" came up. Our CEO suggested to the Defendants, to the Defendants
10 CEO, Mr. Schumacher, as a leverage point that if they did not cooperate
11 with us and treat us fairly and -- so that we can arrive at a mutually
12 satisfactory number to be in-network across the country, we were going
13 to approach Blackstone and ask Blackstone to move all of the other
14 companies that are completely autonomous to cancel the ASO
15 arrangement with them.

16 And Blackstone, they -- first of all, United was not moved by
17 that and Blackstone said no. They wouldn't -- they were not going to
18 interfere because their policy is, Your Honor, every one of these
19 companies is run completely autonomously. Completely autonomously.
20 We have no control whatsoever over these other companies that
21 Blackstone has. In fact, with some of these companies, I mean, we got
22 crosswise with them. So the idea that somehow what Blackstone,
23 another company owned by Blackstone did, that that's binding on us, is,
24 I think, is the reason why the Court ruled the way it did initially.

25 Second, to Counsel's suggestion that this was -- that I

1 suggested it was an unpopular program, I think what I said -- in fact, I'm
2 sure of what I said -- was there were lots and lots of companies with
3 hundreds of thousands of employees that had not switched over. And I
4 listed them on the sheet. That was the extent of it, because the witness
5 constantly said during the direct by Mr. Blalack that this was a
6 client-driven movement, which I objected to continuously based on their
7 failure to produce any documents during the course of this litigation to
8 support that. Your Honor overruled the objections and said we can deal
9 with that during the charge conference.

10 So that is why we added that document last night. That's the
11 best I could do -- at the Court's invitation, by the way. The Court invited
12 me to deal with it on recross, which is what I did. And that's the best
13 that I had. And that was -- it's the proverbial, you know, half a loaf of
14 bread is better than none. That was a half a loaf of bread in terms of
15 being able to attack this suggestion that this was always client-driven.

16 But the idea that we're somehow bound by what these other
17 companies -- I mean, just to give you an idea, Your Honor, our law firm
18 has had claims against some of these other companies. And we did
19 not -- and we have a very sophisticated conflict database -- it was not a
20 conflict to do that because they are operated completely autonomously.

21 So this has -- I think it remains out of bounds. I did not open
22 the door, and I think the Court's original ruling should stand.

23 THE COURT: And let me ask you both, is there a way you
24 can refute the unpopular program/couldn't sell it without all of that
25 foundation? Because the foundation flies in the face of previous orders

1 I've made.

2 MR. BLALACK: I think that I -- Your Honor, if -- I could
3 probably do it without getting into all of the setup for the meeting if I
4 could --

5 THE COURT: Because I don't want those negotiations to
6 come in.

7 MR. BLALACK: Right. And so --

8 THE COURT: You know, it's already come in that Blackstone
9 is --

10 MR. BLALACK: If I was permitted -- if I was permitted to
11 explain to the jury -- I could just show them the chart. Let's say I didn't
12 use the email. And I could show them the chart that these 25 companies
13 that are part of a purchasing group with TeamHealth. I don't have to say
14 Blackstone.

15 THE COURT: Well, they're -- but they're all autonomous.

16 MR. BLALACK: Yeah, but they're not, Your Honor. They are
17 not all autonomous. They're all separate companies, but every single
18 one of them purchased their healthcare as a group. They use the same
19 healthcare administrator. And just so it's clear, UnitedHealthcare was
20 fired as a result of this whole brouhaha, afterwards. I'm not getting into
21 that.

22 All I want to be able to do is show that -- I'm not suggesting
23 they're bound by it. But the notion that UnitedHealthcare as a client for
24 TeamHealth and a client for all of the other companies in their
25 purchasing group, they're one of two who did not purchase the very

1 program he's critical of. Every single one of the others bought it and is
2 using it.

3 So our position is we ought to be able to respond to the
4 suggestion that this is somehow a program that wasn't attractive in the
5 market because we couldn't sell it, which was the implication of that
6 document. I can do that without getting into anything to do with the
7 negotiations. And I can even do it without referring to Blackstone so
8 long as I have the ability to show the chart and explain that these other
9 companies that purchase health insurance from United as an
10 administrator of UnitedHealthcare together chose these other programs.

11 THE COURT: I think --

12 MR. ZAVITSANOS: Your Honor --

13 THE COURT: -- you can talk about -- give me a chance.

14 MR. ZAVITSANOS: I'm sorry.

15 THE COURT: I think you can talk about companies that are
16 within the umbrella of the ultimate owner of the business without
17 naming it.

18 MR. BLALACK: I agree.

19 THE COURT: And without the chart, if they purchased the
20 program.

21 MR. BLALACK: Well, just so I'm clear, Your Honor, don't I
22 need to -- I think if I showed the chart, Blackstone's own records --

23 THE COURT: Because I don't know how autonomous or
24 non-autonomous they are. I'm hearing conflicts here. But if they're all
25 separately owned, then they are separate.

1 MR. BLALACK: Right. But I guess my point is every
2 chart -- every company on that document he showed that suggests who
3 hadn't purchased, American Airlines, whoever the others were, they're
4 autonomous, too. But he went out of his way to --

5 THE COURT: Oh, that's right.

6 MR. BLALACK: -- highlight that they hadn't used --

7 THE COURT: You're right. You're right.

8 MR. BLALACK: -- the program.

9 THE COURT: You're right.

10 MR. BLALACK: So my point is --

11 THE COURT: The charts come in.

12 MR. BLALACK: -- I just want to take -- the same thing he did.
13 I want to take a list of companies and show that the list of companies
14 who hired United as their administrator as part of a group purchasing
15 organization each chose their own program.

16 THE COURT: But was it a group?

17 MR. BLALACK: It was a -- that is what Equity Healthcare is,
18 Your Honor. That's what the entity is.

19 MR. ZAVITSANOS: Your Honor.

20 MR. BLALACK: And I have testimony from Mr. Bristow in
21 this case. I think we have testimony from Mr. Murphy in this case on
22 that very thing.

23 THE COURT: All right.

24 MR. ZAVITSANOS: Your Honor, let me say a few things in
25 response.

1 THE COURT: This is the last word.

2 MR. ZAVITSANOS: Yes. We're in this situation because of
3 them, not because of me. I objected repeatedly during the testimony by
4 this witness that this was client-driven. Your Honor kept overruling me,
5 over and over and over again. So Your Honor, I'm in this deep hole and I
6 have to come back with this list. Now, he's saying because of the
7 position that he put me in that somehow he forced me to create this
8 unfairness when he put the ball in play. That's the first thing.

9 THE COURT: Well, the popularity of the program came up in
10 your case.

11 MR. ZAVITSANOS: Of course it did, Your Honor. But I did
12 not -- look, we did not raise an opening that this was a client-driven or
13 non-client-driven until this gentleman began saying it over and over on
14 day one of the cross in non-responsive fashion. In non-responsive
15 fashion. And then, Your Honor, the other thing is this: these companies
16 are completely autonomous. Our CEO tried to get them to just at least
17 even make the threat of cancelling and they would not do it. We have
18 zero control.

19 And so the implication here is that somehow, we're being
20 hypocrites because we -- I mean, baked into what he's trying to do here
21 is that we have control over these companies, and we do not. Here's
22 what I would suggest, Your Honor --

23 THE COURT: They are related. You can't deny that.

24 MR. ZAVITSANOS: They're owned by Blackstone --

25 THE COURT: Even if they're autonomous, they're related.

1 MR. ZAVITSANOS: Yeah. They're owned by Blackstone.
2 They're owned by Blackstone --

3 THE COURT: In the same umbrella.

4 MR. ZAVITSANOS: Yes, Your Honor. But they -- but unlike
5 UnitedHealthcare, where they all consolidate up, they all operate
6 completely autonomously. They're allowed to sue each other, Your
7 Honor. And here's what I would suggest, though, respectfully. I would
8 suggest that we wait until one of our witnesses -- I mean, he doesn't
9 need to get it from this witness, which is probably hearsay. He can get it
10 directly from our witnesses. And I would recommend, Your Honor, that
11 the Court maybe hear a little more testimony on that outside the
12 presence of the jury on this issue about how much control there is, and
13 then Your Honor could make a decision.

14 He's not being prejudiced in the least bit. If you let this in,
15 this is seriously prejudicing us because -- I mean, I wish we had control.
16 I mean, if we had been successful in convincing them, probably we
17 wouldn't be here because that would have been a significant loss of
18 business to them, and we would have worked out a deal. But we didn't.
19 So that's my suggestion.

20 THE COURT: Do you want to confer with Mr. Gordon?

21 MR. BLALACK: No, Your Honor. I think we -- I know. I mean,
22 I don't -- I think I've beaten this horse. I think you know what the
23 positions are on both sides, and I don't want to belabor it, Your Honor.
24 Our -- you know, Mr. Haben is not -- once he's released, I'm not bringing
25 him back, so. And quite frankly, having him come back, whenever this is

1 going to be, to rebut at some later time the suggestion that this program
2 was disfavored and not being used, it'll be lost forever. And I will say,
3 Your Honor, I don't have another witness I could get this in through.
4 This is an internal United document. I can't show it to Mr. Bristow or Mr.
5 Murphy and have them admit it. This is the person who prepared it. He
6 actually is the one who has personal knowledge of it. So that's the
7 problem.

8 THE COURT: All right. So I am going to allow some
9 testimony with regard to the popularity of the problem -- of the program,
10 and to rebut the argument that it couldn't be sold. However, you'll stay
11 away from any negotiations.

12 MR. BLALACK: Correct.

13 THE COURT: You know, you will talk about --

14 MR. BLALACK: Just the chart.

15 THE COURT: -- related companies and you can show them
16 the chart. But don't get into the actual structure.

17 MR. BLALACK: Understood.

18 THE COURT: And take ten, you guys. Let's come back at
19 2:45. Thank you.

20 MR. ZAVITSANOS: Your Honor, are you going to let him use
21 that as a demonstrative or are you going to admit that?

22 THE COURT: You used it as a demonstrative. Or was it
23 admitted?

24 MR. ZAVITSANOS: No, I used it --

25 MR. BLALACK: No. You admitted his email, his document,

1 and I want to admit mine and [indiscernible]. We won't do the email,
2 just the chart.

3 THE COURT: Just the chart. Yes, I'm inclined to admit it.
4 Take ten, guys. See you at 2:45.

5 MR. ZAVITSANOS: Thank you, Your Honor.

6 [Recess taken from 2:33 p.m. to 2:45 p.m.]

7 THE COURT: All right. Everybody ready to bring in the jury?

8 MR. ZAVITSANOS: Yes, Your Honor.

9 MR. BLALACK: Yes, Your Honor.

10 THE COURT: All right.

11 [Pause]

12 THE MARSHAL: All rise for the jury.

13 [Jury in at 2:47 p.m.]

14 THE COURT: Thank you. Please be seated. And please
15 proceed.

16 MR. BLALACK: Thank you, Your Honor. Judge, just a quick
17 follow-up on one point that Mr. Zavitsanos covered. If I could ask Shane
18 to bring up Plaintiffs' Exhibit 255, which was shown to you and the jury.

19 RECROSS-EXAMINATION

20 BY MR. BLALACK:

21 Q Could take a look at that, sir, and refamiliarize yourself with
22 it?

23 A Okay.

24 Q Sir, do you recall being shown this Exhibit 255, which is an
25 email dated November 21st, 2018, from some folks at UnitedHealthcare.

1 And then that is from a group of folks [indiscernible] November 20 of
2 2018, and the subject line, " Urgent action required, SPD language for
3 clients with SSPE or without SSPE." Do you see that?

4 A I do.

5 Q Do you remember being shown this document, sir?

6 A Yes.

7 Q And what's your recollection of what you were asked about
8 this list of clients?

9 A I think it was characterized is that there's a lot of clients on
10 here, that must mean clients don't want to adopt SSPE.

11 Q Just to remind the jury, this was a list of clients, that as of
12 this date, according to this document, had not yet decided to select the
13 share savings program enhanced, for their out-of-network program; is
14 that right?

15 A That's correct.

16 Q Just a reminder, the shared savings program enhanced
17 involves a combination of the original shared savings program, wrap
18 network, perspective negotiations, and the outlier cost management.?

19 A That's correct.

20 Q And the outlier cost management program relies on Data
21 iSight?

22 A That is correct.

23 Q Okay. Now if you go to eighth page, I think Mr. Zavitsanos
24 showed you at the bottom of the page, that one of the clients that had
25 not selected this program, was TeamHealth, correct?

1 A That's correct.

2 Q So just so the jury is tracking what this means, was
3 TeamHealth a client of UnitedHealthcare, at this time?

4 A Yes.

5 Q And when we say "client" in what way?

6 A UnitedHealthcare was the third party administrator.

7 Q Now I want to show you a different one, sir, this is Defense
8 Exhibit 5504.

9 MR. BLALACK: And, Your Honor, I'm going to move this into
10 evidence, based on our discussion, outside the presence of the jury.

11 MR. ZAVITSANOS: And, Your Honor, we stand on what we
12 said earlier.

13 THE COURT: Thank you. Exhibit 5504 will be admitted.

14 [Defendants' Exhibit 5504 admitted into evidence]

15 BY MR. BLALACK:

16 Q Now, sir, if you could look at this document, tell me if you've
17 ever seen it before?

18 A Yes, I have.

19 Q Were you involved in its preparation?

20 A Yes, I was.

21 Q Okay. At the top, do you have a general memory of when
22 this was prepared? Do you recall if it was April of 2019?

23 A Yes.

24 Q Now if you look at the top there's a letter that reads, "equity
25 healthcare listing, UHC customer, out-of-network program summary."

1 Do you see that?

2 A I do.

3 Q First of all, what was Equity Healthcare?

4 A They were a group purchasing organization.

5 Q And without getting into too much of the minutia, what does
6 a group purchasing organization?

7 A So usually there's clients or companies underneath that,
8 what they call a GPO, and that GPO is basically securing healthcare
9 coverage and administrative services throughout those affiliates.

10 Q So looking up, you'll see a column that reads "client," do you
11 see that?

12 A I do.

13 Q And underneath that --

14 MR. BLALACK: I don't know if you can pull that row out,
15 Shane? Can you pull the row -- the column, not the row, I'm sorry. No,
16 no, not the amount, the whole column under client. Can you do that?
17 There you go.

18 BY MR. BLALACK:

19 Q So you'll see a group of companies there, maybe 20 or 25.
20 Do you see that?

21 A I do.

22 Q And do you see down near the bottom, that TeamHealth is
23 one of the companies?

24 A I do.

25 Q What was the relationship of TeamHealth to these entities

1 that are listed with Equity Healthcare? And I'm only asking your
2 relationship to the group purchase order.

3 MR. ZAVITSANOS: Speculation, Your Honor. Foundation.
4 Speculation.

5 MR. BLALACK: I'm not asking him for any other relationship.
6 Just in connection with the group purchase.

7 MR. ZAVITSANOS: Speculation, Your Honor.

8 THE COURT: You can try to lay a foundation for that and
9 follow the guidelines.

10 MR. BLALACK: Yeah.

11 BY MR. BLALACK:

12 Q Your Honor -- I mean, excuse, Mr. Haben, why are these
13 clients the ones listed under the client group, for Equity Healthcare?

14 A They're part of Equity Healthcare's Group purchasing
15 organization.

16 Q And what does that mean? How does it work?

17 A So Equity Health secures, as I said before, either healthcare
18 coverage or administrative services for a group of clients. These clients
19 are part of that Equity Healthcare GPO.

20 Q So when you said earlier that TeamHealth was a client of
21 UnitedHealthcare, was it in connection with this group purchasing
22 organization, Equity Healthcare?

23 A Yes.

24 Q And are these other companies that are listed here, also
25 clients of UnitedHealthcare, through Equity Health?

1 A Yes.

2 Q Okay. Now what was the --

3 MR. BLALACK: You can pull that down, Shane.

4 BY MR. BLALACK:

5 Q What was the -- and I'm only asking why you were
6 summarizing this information? What were you trying to --

7 MR. ZAVITSANOS: Your Honor, can we approach, please?

8 THE COURT: You may.

9 [Sidebar at 2:54:42 p.m., ending at 2:55:47 p.m., not recorded]

10 THE COURT: All right. So I've overruled an objection. Re-
11 ask, please.

12 MR. BLALACK: Yes. Yes. Could you bring that back up,
13 Shane?

14 BY MR. BLALACK:

15 Q Now if you look under -- in the top row, after a column you'll
16 see a listing of various acronyms, under "Item Network Summary." Do
17 you see that?

18 A I do.

19 Q And do you see a column that reads SSPE OCM?

20 A I do.

21 MR. BLALACK: And then, Shane, could you bring up the
22 information underneath that column?

23 BY MR. BLALACK:

24 Q Sir, can you explain to the jury what's reflected in that
25 column for each of those clients?

1 A As we've talked before, that's the percentage of savings the
2 client has agreed to, to pay for the Shared Savings Program Enhanced,
3 with OCM.

4 Q So could you tell from looking at this column, how many of
5 these Equity Healthcare clients, including TeamHealth, had selected the
6 shared savings program enhanced, OCM program?

7 A All but two of them.

8 Q And is TeamHealth one of the two that had not?

9 A Yes.

10 MR. BLALACK: And you can pull that down, please.

11 BY MR. BLALACK:

12 Q And then a little to the right you'll see a column that reads
13 "large claim savings charged out. " Do you see that?

14 A I do.

15 Q And what does that reflect?

16 A So there is a large -- there's a cap on the shared savings fee.
17 If there happens to be a large claim that generated a large savings and
18 large fee, that fee is capped at that number.

19 Q Okay. And that's one of the fee caps you discussed when we
20 talked yesterday --

21 A Yes.

22 Q -- or the day before?

23 A Yes.

24 Q Now would the fee cap apply to any client in this room who
25 didn't already choose the shared savings program enhanced?

1 A Say that again, please.

2 Q Would the fee cap even apply or be relevant if the clients
3 didn't already select the shared savings program enhanced?

4 A No.

5 Q All right. The last thing I wanted to ask you, sir, in the right-
6 hand column there's a header that reads -- right hand side, "Versus
7 Current State." Do you see that?

8 A Yes, I do.

9 Q I'm interested in just the column that reads "OCM, no OCM."
10 Do you see that.?

11 A Yes, I do.

12 Q And then underneath that, do you see there are some
13 numbers?

14 A I do.

15 Q Can you explain, in that just that column what OCM meant,
16 and what those numbers reflect?

17 A I believe what was trying to be depicted is, if the client did
18 not have outlier cost management, what would be the estimate of
19 additional non-par or medical costs that they would incur if they didn't
20 have the programs. I believe at the top of that it adds up to about
21 \$2 million.

22 Q So if they had not selected outlier cost management as their
23 network program, these are additional medical cost dollars your benefit
24 client would incur, but for the price?

25 A Yes.

1 Q So if I'm right about this, for the clients -- you had healthcare
2 clients within the Equity Healthcare Group, which includes TeamHealth,
3 all but two had chosen to participate in the shared savings program
4 enhanced?

5 A That's correct.

6 Q Thank you, sir.

7 MR. BLALACK: Mr. Zavitsanos may have some follow-up
8 questions.

9 THE COURT: And briefly.

10 MR. ZAVITSANOS: Three minutes, Your Honor. You can put
11 me on the clock.

12 FURTHER REDIRECT EXAMINATION

13 BY MR. ZAVITSANOS:

14 Q Okay. First off, sir, on some of those clients you were
15 charging a 50 percent shared savings fee?

16 A Some of those clients agreed to a 50 percent shared savings
17 fee.

18 Q Okay. Now do you have third cousins?

19 A I'm assuming I do.

20 Q Okay. If your third cousin does something stupid, does that
21 bind you?

22 A Of course not.

23 Q Okay. Do you know the relationship -- the legal relationship
24 between TeamHealth and these companies, the exact legal relationship?

25 A No, I do not.

1 MR. BLALACK: Your Honor, we're going to get close to --

2 MR. ZAVITSANOS: But, Your Honor, I'll --

3 MR. BLALACK: This is going to get us to across a line.

4 THE COURT: I'm going to sustain.

5 MR. ZAVITSANOS: I'm asking about these entities, Your

6 Honor, not --

7 THE COURT: I'm going to sustain the objection.

8 MR. ZAVITSANOS: Okay.

9 BY MR. ZAVITSANOS:

10 Q Do you know whether TeamHealth has the ability to make
11 decisions for any of these other companies?

12 A I do not.

13 MR. ZAVITSANOS: Okay. I'll pass the witness, Your Honor.

14 THE COURT: All right. And --

15 MR. BLALACK: We're done, Your Honor.

16 THE COURT: All right. Does the jury have any questions for
17 Mr. Haben? If so, please write them down now for us, and then you
18 would sign it and date it. We have one? Yeah. Do we have others?
19 Okay. So, counsel, please approach so we can deal with those questions
20 that comes up.

21 [Sidebar at 3:00 p.m., ending at 3:04 p.m., not transcribed]

22 THE COURT: All right. We thank you for the question,
23 unfortunately it's not something that can be asked, so please don't take
24 undue, on the fact that we didn't ask your question. And also, we have
25 an issue with regard to your schedule, and we're more than happy to

1 accommodate that next week.

2 You'll have a revised scheduled on Wednesday that says that
3 we start at 8:45. So if there are no other questions, may we excuse,
4 Mr. Haben?

5 MR. ZAVITSANOS: Yes, Your Honor.

6 MR. BLALACK: Yes, absolutely.

7 THE COURT: Mr. Haben, you're excused, you may step
8 down.

9 THE WITNESS: Thank you, ma'am.

10 THE COURT: Safe travels.

11 THE WITNESS: Yeah. Thank you.

12 THE COURT: Thank you. Please call your next witness.

13 MR. ZAVITSANOS: Yes. I think we're calling Dan Rosenthal
14 by video deposition, Your Honor.

15 THE COURT: Thank you.

16 MR. ZAVITSANOS: I think both parties are. United CEO.

17 THE COURT: Is that correct.

18 MR. BLALACK: That's correct, Your Honor. United Health
19 Network.

20 THE COURT: All right.

21 [Video deposition of Dan Rosenthal was played in open court from
22 3:05 p.m. to 3:50 p.m.]

23 MR. BLALACK: I believe that's it, Your Honor.

24 THE COURT: Okay. Very good. Let's take a short break. It
25 will be our last break of the day, and it will only be ten minutes.

1 So your instructions during the recess. Do not talk with each
2 other, or anyone else on any subject connected to the trial. Do not read,
3 watch or listen to any report of or commentary of the trial, don't discuss
4 this case with anyone connected to it by any medium of information,
5 including without limitation, newspapers, television, radio, internet, cell
6 phones, or texting.

7 Don't conduct any research on your own related to the case,
8 don't consult dictionaries, using the internet or use reference materials.
9 Don't talk, text, Tweet, Google, or conduct any other type of social
10 media. Don't do any other book or computer research with regard to any
11 issue, party, witness, or attorney involved in this case.

12 Most importantly, do not form or express any opinion on any
13 subject connected with the trial until the matter is submitted to you.

14 You've been great this week. We're in the home stretch for
15 this week, and see you at 4:00 p.m.

16 THE MARSHAL: All rise for the jury.

17 [Jury out at 3:51 p.m.]

18 [Outside the presence of the jury]

19 THE COURT: The room is clear. Does anybody have
20 anything to put on the record before we take a recess?

21 MR. MCMANIS: Not before we recess, Your Honor. But after
22 the jury comes back we'd like to identify, for the jury's benefit and the
23 record, the trial exhibit numbers for some of the exhibits that were just
24 played, and then also move for the admission of those exhibits.

25 THE COURT: Good enough. Defendant, do you have

1 anything for the record?

2 MR. BLALACK: We do not, Your Honor.

3 THE COURT: Very good. Have a good break everybody.

4 MR. BLALACK: Thank you, Your Honor.

5 [Recess taken from 3:51 p.m. to 3:46 p.m.]

6 THE COURT: Please remain seated. Are we ready to bring
7 the jury in?

8 MR. BLALACK: The Defense is, Your Honor.

9 MR. AHMAD: Yes, Your Honor. And I think Mr. McManis
10 may have -- I think we're going to --

11 THE COURT: You had indicated --

12 MR. MCMANIS: We're going to do that in front of the jury.

13 THE COURT: Right. And then who will your next witness
14 be?

15 MR. AHMAD: Rebecca Paradise, Your Honor.

16 THE COURT: Thank you.

17 MR. AHMAD: She's outside, Your Honor. Do you want me
18 to bring her in or wait until the jury --

19 THE COURT: Let's wait just a minute.

20 MR. ZAVITSANOS: So, Your Honor, you're going to see an
21 interesting contrast. Mr. Ahmad speaks slower but moves faster.

22 THE COURT: I'm not saying a word.

23 MR. AHMAD: I don't know about the latter.

24 THE COURT: I'm just glad you both learned how to say
25 Nevada.

1 MR. ZAVITSANOS: Oh, yeah, yeah, yeah, listen we --

2 MR. AHMAD: Yeah.

3 UNIDENTIFIED SPEAKER: There was much effort put into
4 that, I might add.

5 THE COURT: I'm sure.

6 THE MARSHAL: All rise for the jury.

7 [Jury in at 4:03 p.m.]

8 THE COURT: Thank you. Please be seated. Mr. Ahmad.

9 MR. AHMAD: Yes, Your Honor. At this time, we would call
10 Rebecca Paradise. But I believe Jason McManis here has some exhibits
11 to enter.

12 THE COURT: You can bring in the witness. You can bring in
13 the witness. And Mr. McManis?

14 MR. MCMANIS: Yes, Your Honor. Just for the benefit of the
15 record and for the jury to identify the numbers for the exhibits that were
16 played in Mr. Rosenthal's deposition. Deposition Exhibit Number 4 has
17 been admitted as Trial Exhibit 96. Deposition Exhibit 42 --

18 MR. ZAVITSANOS: Slow down, Jason.

19 MR. MCMANIS: -- has admitted as Trial Exhibit 94.
20 Deposition Exhibit 25 is Trial Exhibits 31 and 32. Those have been
21 conditionally admitted, and we would move for full admission at this
22 time.

23 THE COURT: Any objection?

24 MR. BLALACK: No objection.

25 THE COURT: Exhibits 4, marked as 96; 42 to the deposition,

1 marked as 94; and 25 to the deposition marked as 31 and 32 will be
2 admitted.

3 [Plaintiffs' Exhibits 96, 94, 31, 32 admitted into evidence]

4 MR. MCMANIS: And just a few more, Your Honor.

5 Deposition Exhibit 26 is Plaintiff's Trial Exhibit 33 and Plaintiff's Trial
6 Exhibit 37; 33 has not been admitted, 37 has been conditionally admitted.
7 We would move for full admission of both of those exhibits at this time.

8 THE COURT: Any objection?

9 MR. BLALACK: No objection, Your Honor.

10 THE COURT: Exhibits 33 and 37 will be admitted.

11 [Plaintiff's Exhibit 33 and 37 admitted into evidence]

12 MR. MCMANIS: And the last two, Your Honor, Deposition
13 Exhibit 27 is Plaintiff's Trial Exhibit 85 and Deposition Exhibit 28 is
14 Plaintiff's Trial Exhibit 100. Those have both been conditionally admitted
15 and would move for full admission at this time.

16 THE COURT: Any objection to 85 and 100?

17 MR. BLALACK: No objection, Your Honor.

18 THE COURT: Exhibits 85 and 100 will be admitted.

19 [Plaintiffs' Exhibit 85 and 100 admitted into evidence]

20 THE COURT: And you have called Rebecca Paradise, Mr.
21 Ahmad.

22 MR. AHMAD: Thank you, Your Honor.

23 THE COURT: We need to swear her, please.

24 REBECCA PARADISE, PLAINTIFFS' WITNESS, SWORN

25 THE CLERK: If you could please state and spell your first and

1 last name for the record?

2 THE WITNESS: Sure. Rebecca Paradise. R-E-B-E-C-C-A P-A-
3 R-A-D-I-S-E.

4 THE COURT: Thank you, please have a seat. Go ahead,
5 please.

6 MR. AHMAD: Thank you, Your Honor.

7 DIRECT EXAMINATION

8 BY MR. AHMAD:

9 Q Ms. Paradise, my name is Joe Ahmad. You understand I
10 represent some of the Plaintiffs, the healthcare providers in this case.
11 Freemont, Ruby Crest, and Team Physicians.

12 A I do.

13 Q Okay. And by the way I'm going to try this without a
14 microphone. Can you hear me okay?

15 A Yep. As of right now, yeah.

16 Q Okay. If you can't hear me just let me know. But my voice is
17 hopefully pretty fresh and hopefully you can hear me. Ms. Paradise
18 you're employed by United Healthcare Services?

19 A Yes.

20 Q You're the Vice President of Out-of-Network Payment
21 Strategy?

22 A That's correct.

23 Q Now if we went back -- you understand this concerns some
24 events two, three years ago, right?

25 A I do.

1 Q And if we went back to 2017, '18 and 2019, what would your
2 position have been?

3 A In 2017, I was on the Out-of-Network team in a director role.
4 I didn't have full accountability for all of the out-of-network programs.

5 Q Okay. And during that 2017 to '19 -- and by the way, can the
6 jury not see you? We can move the TV.

7 THE COURT: Can you come forward closer to the
8 microphone, please?

9 THE WITNESS: Oh, sure.

10 THE COURT: Thank you.

11 BY MR. AHMAD:

12 Q Do you want to raise -- do you have the ability to raise your --

13 A No, this isn't a raisable chair.

14 THE COURT: We can't raise the chair?

15 THE WITNESS: No, it's not --

16 THE MARSHAL: No, it's not.

17 THE WITNESS: Sorry, I'm short.

18 MR. AHMAD: I'm not going to ask you to stand.

19 THE COURT: Can everybody hear her okay? Because the
20 microphone is right here.

21 THE WITNESS: Okay.

22 THE COURT: Go ahead, please.

23 THE WITNESS: Okay.

24 BY MR. AHMAD:

25 Q Okay. During that 2017 to 2019 timeframe, who did you

1 report to?

2 A I reported to John Haben.

3 Q And was he the Vice President of Out-of-network Payment
4 Strategy back then?

5 A He was, and he had some other responsibilities.

6 Q Okay. And who did he report during that time period?

7 A Can you restate the time period again?

8 Q 2017 to 2019. Was it a Mr. Rosenthal?

9 A Yes.

10 Q Okay. And all told you've been at UnitedHealthcare for over
11 25 years?

12 A That's correct.

13 Q And basically at one UnitedHealthcare entity or another,
14 correct?

15 A Correct.

16 Q I know you were at Optum for a while. That's also a United
17 entity; correct?

18 A It is.

19 Q And you have overseen or had some responsibility for
20 overseeing out-of-network programs since 2015; is that right?

21 A That's incorrect.

22 Q Okay. Since how long?

23 A Since 2015.

24 Q Oh, okay. I'm sorry. Would you be the person at United who
25 is responsible for the relationship for the company known as MultiPlan?

1 A I am.

2 Q And MultiPlan is the company that provides the tool Data
3 iSight, correct?

4 A Yes.

5 Q Is it possible you have daily contact, weekly contact with the
6 people at MultiPlan?

7 A It's possible. It depends.

8 Q And I noticed you were designated by United as their
9 corporate representative during depositions for a variety of topics about
10 out-of-network programs, correct?

11 A That's correct.

12 Q Okay. Let me start off by talking about something known as
13 reasonable and customary. Do you remember that?

14 A I understand that program.

15 Q Okay. And it involves at least reference of data from FAIR
16 Health; is that correct?

17 A Our physician R&C program, yes.

18 Q And United has a license to obtain FAIR Health bench
19 marking data?

20 A Correct.

21 Q In fact United provides payer data, its own data to FAIR
22 Health, correct?

23 A That's correct.

24 Q And FAIR Health gets data from other payers?

25 A Correct.

1 Q You're familiar with reasonable and customary being called
2 R&C?

3 A Yes.

4 Q Also a term UNC?

5 A Yes, that term is used sometimes.

6 Q That's usual and customary?

7 A Correct.

8 Q And how about UCR? That would be usual, customary and
9 reasonable?

10 A Yes.

11 Q And you all used to do that, correct?

12 MR. BLALACK: Object to form. Vague.

13 THE COURT: Overruled.

14 THE WITNESS: Not sure what you mean by used to do that.

15 BY MR. AHMAD:

16 Q Well, you used to pay claims based upon, let's say
17 reasonable and customary at the 80th percentile of FAIR Health?

18 A Reasonable and customary is one of many programs that
19 United offers.

20 Q Okay. And that was based off of FAIR Health.

21 A The physician R&C program is based on FAIR Health.

22 Q Okay. Now speaking of these acronyms, R&C, UNC and
23 UCR, at some point, and I'll focus on UNC, United made a decision that it
24 was going to try to move away from UNC?

25 A I'm sorry, was that a question?

1 Q Yes.

2 A Can you restate?

3 Q Sure. United made the decision to move away from UNC,
4 usual and customary, correct?

5 A I wouldn't characterize move away. We were evaluating the
6 right programs for our clients.

7 Q Okay. And would you have -- would you have been involved
8 in the decision -- and I don't want to get caught up in terminology. Move
9 away or move away from, offer programs in addition to usual and
10 customary; would you have been involved in that?

11 A Yes.

12 Q Okay. And let's take a look at Exhibit 243 if we can.

13 MR. AHMAD: And if you can kind of blow up the middle of
14 the page, under UMR Benchmark Program.

15 BY MR. AHMAD:

16 Q Can you see that document?

17 A Do you have the paper document, so I could -- it was pretty
18 small, so I could read the whole.

19 UNIDENTIFIED SPEAKER: It's behind you, ma'am.

20 THE WITNESS: Oh, behind.

21 MR. AHMAD: Yeah, t's behind you in these notebooks, and I
22 can -- if I may, I can --

23 THE COURT: He'll help you.

24 THE WITNESS: Okay.

25 THE COURT: There should be more.

1 MR. AHMAD: Yes.

2 THE COURT: They should be sequential.

3 MR. AHMAD: So Volume 3 looks like it would have Exhibit
4 243. Do you see the label?

5 THE WITNESS: 243.

6 THE COURT: I show that 243 is admitted.

7 MR. AHMAD: Yes.

8 THE COURT: Thank you.

9 BY MR. AHMAD:

10 Q And that is an email from you to I believe Mr. Haben, who
11 you reported to at the time; is that correct?

12 A I see that, yes.

13 Q Okay. And if we look towards that middle of the page, that
14 we were blowing up before, you're talking about the UMR Benchmark
15 program. Do you see that?

16 A Yes.

17 Q Okay. And if we go down a couple of lines, it says "we also
18 generate additional savings." Do you see that?

19 A I see that.

20 Q "By not running the claims through UNC, but rather driving
21 all OON claims to a more aggressive pricing and managing appeals to
22 try to hold a member harmless."

23 A I see that sentence.

24 Q And that's what you wrote. Those are your words, right?

25 A This is an email from me, yes.

1 Q And OON is out-of-network, correct?

2 A Yes.

3 Q And so would it be fair to say, I won't use move away. But
4 would it be fair to say that you were trying to not run the claims through
5 UNC but to drive them to a more aggressive pricing model?

6 A So as I read this email, part of this was taken from an email
7 -- you know, information from the UMR team. And was outlining this
8 program. Had other options than R&C.

9 Q Okay. Certainly UMR is a United entity, correct?

10 A It is.

11 Q Okay. You weren't saying you disagree with that, right?

12 A Disagreed with?

13 Q Driving the out-of-network claims to a more aggressive
14 pricing level?

15 A The reasonable and customary program was becoming
16 unaffordable, so we had to develop other options.

17 Q Yeah, so you were -- you were trying to do something more
18 aggressive in your pricing?

19 A We were looking for other options to drive savings for our
20 clients.

21 Q Well, and generate revenue for United, right?

22 A I'm focused on driving savings for the clients. I don't have
23 accountability for any revenue related to the programs.

24 Q Well, I know, but United does concern itself with that,
25 correct?

1 A They may.

2 Q They may? You don't know?

3 A I don't have accountability for any revenue that's generated
4 related to these out-of-network programs.

5 Q Well, let's talk about how it works. First of all, we'll see
6 sometimes the term FI. That means fully insured, right?

7 A It means fully insured.

8 Q And that is pretty simple. The less United pays to the
9 provider, the more United gets to keep. Fair?

10 A I wouldn't characterize it that way.

11 Q Okay. Well, I mean let me see how this works. If they get a
12 claim for \$1,000 and they paid 1,000, then United would be out 1,000,
13 right?

14 A Fully insured plans charge a premium. So there are times
15 the savings may be pushed back into lower premiums to offer more
16 programs.

17 Q Well, I understand, but if United is the one that has to pay the
18 claim, obviously if it pays less, it gets to keep more. Do you disagree
19 with that?

20 A I'm not accountable for revenue generations. So I'm unsure
21 what happens with savings. I'm sure sometimes, yes. Sometimes it's
22 passed through again to lower premium to provide more offerings for
23 our clients.

24 Q Okay. And for ASO, do you know what that -- we'll go to
25 that. That's administrative services only?

1 A That's right.

2 Q And that is where somebody else is paying the claim.

3 Typically the employer, right?

4 A That's accurate.

5 Q And you all are doing the third party administration?

6 A Correct.

7 Q Okay. But sometimes, and we'll talk about this in a little bit,
8 sometimes you take a percentage for these ASO clients on the amount
9 saved, correct?

10 A We provide a service that drives savings. And yes, we may
11 take a fee on that.

12 Q Okay. Now by the way in MultiPlan for these ASO clients,
13 they also will take a percentage of the savings, correct?

14 A Are you asking if MultiPlan takes the fee from the client?

15 Q Yes. They take a percentage of the savings, correct, as does
16 United?

17 A United may charge a client. United may pay MultiPlan for
18 their services.

19 Q And it charges a percentage of the savings, correct?

20 A MultiPlan may charge for a percentage of the savings.

21 Q Well, you know this, right? As a person responsible for that
22 relationship, they were getting, I think at one point 9.75 percent, correct?

23 A Some of their services they charge a percent of savings.

24 Q And did that one seem familiar to you, 9.75 percent?

25 A That was an old rate, yes.

1 Q Okay. And let me just ask you about -- can you turn to
2 Exhibit 170? I don't know if it's in the same notebook or not. If it's not
3 in, we can put it up.

4 MR. BLALACK: What was the number?

5 MR. AHMAD: 170.

6 MR. BLALACK: No objection.

7 THE COURT: Exhibit 170 will be admitted.

8 [Plaintiffs' Exhibit 170 admitted into evidence]

9 BY MR. AHMAD:

10 Q And you'll see 170 is an email from an Emma Johnson --

11 MR. AHMAD: We can put that up.

12 BY MR. AHMAD:

13 Q -- to you and others at United.

14 A I see that.

15 Q Referencing a meeting and a presentation from the day
16 before; is that correct?

17 A That's what I see.

18 Q Okay. And this email is dated March 14th of 2018; is that
19 right?

20 A I see that.

21 Q And the presentation and PowerPoint would have been done
22 the previous day; is that right?

23 A The attachment name is dated the previous day.

24 Q And does MultiPlan do what they would call their United
25 update? The MultiPlan United update periodically?

1 A Yes.

2 Q And if you look to Exhibit 170-A. Do you have it in front of
3 you?

4 A Yes.

5 Q And that is the MultiPlan update for UnitedHealthcare that
6 you all went over the previous day?

7 A That's the document that was attached.

8 Q Okay.

9 MR. AHMAD: Your Honor, I don't know if there's any
10 objection. I'd move to admit Exhibit 170-A.

11 MR. BLALACK: No objection, Your Honor.

12 THE COURT: 170-A will be admitted.

13 [Plaintiffs' Exhibit 170-A admitted into evidence]

14 BY MR. AHMAD:

15 Q Okay. Now if we go to page 10, MultiPlan was suggesting
16 some strategic initiatives for ASO clients?

17 A That's what this page says.

18 Q Okay. And again, you were at this presentation, correct?

19 A I believe I was, yes.

20 Q Okay. And it -- if we go down to like the third bullet point, it
21 talks about for plans with UNC base benefit limits. It talks about
22 establishing more aggressive percentiles. Do you see that?

23 A I see that bullet.

24 Q Do you know what percentiles they're talking about?

25 A I'm sorry, did you say what percentiles?

1 Q Yes. What type of percentiles?

2 A Yes. The UNC plan referenced here would have been related
3 to facility usual and customary program, and the percentiles that are
4 used to support that methodology.

5 Q Is that like a 60th percentile, 80th percentile? Something like
6 that?

7 A Correct.

8 Q Okay. And then it says for plans with UNC based benefits,
9 using the benefit limit as the benchmark for network pricing and
10 negotiation. Do you see that?

11 A I see that bullet.

12 Q And then -- and then the one below, replacement of UNC
13 with Data iSight as the benefit limit methodology, right?

14 A I see that.

15 Q Okay. And Data iSight again is their tool?

16 A Yes. It's MultiPlan's tool.

17 Q Okay. Now, I think we mentioned facility, but I don't -- I don't
18 see facilities anywhere on here.

19 A Correct. MultiPlan provides a solution for facility R&C. Or --
20 yes. Sorry. And the third bullet where it's referencing different
21 percentiles for that would have been with respect to facility R&C or UNC,
22 as they don't manage the physician UNC program.

23 Q Okay. But they certainly provided Data iSight for physician
24 reimbursement, right?

25 A The second to last bullet you referenced --

1 Q Yeah.

2 A -- Data iSight was being proposed as an option to replace
3 both facility and physician R&C.

4 Q And ultimately it did replace physician R&C?

5 A Well, it's an offering that clients can select. It wasn't just
6 changed out on a client.

7 Q And I understand. But would it be fair to say that you all
8 were trying to drive clients away from the R&C and into using OCM,
9 which includes Data iSight?

10 A Due to egregious billing practices of providers that were
11 driving up the R&C percentiles, we were providing or looking for other
12 options for our clients to ensure we could provide affordable benefits.

13 Q Yeah. But I want to talk to you about -- I mean, I've heard a
14 lot already about the egregious billing. And I -- for now, I just want to
15 ask you though because you mentioned it, that seems to be one of the
16 United talking points; is it not?

17 A We were seeing the rate at which providers were billing was
18 being -- was escalating. And in some cases, was egregious.

19 Q Okay. But my question was this is one of United's talking
20 points, that term egregious billing?

21 MR. BLALACK: Objection. Vague.

22 THE COURT: Overruled.

23 BY MR. AHMAD:

24 Q Right? That's one of their talking points, which they try to
25 get people -- which they try to advocate to the public, right, the term you

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1 just mentioned, egregious billing?

2 A Well, I would not characterize it as a United term. I think
3 egregious is a word many payers on the market may use to describe the
4 practices that we were seeing by physicians of ratcheting up their bill
5 charges in an effort to get paid more in many circumstances.

6 Q Well, is it a United talking point?

7 A I mean --

8 Q Is it something they try to tell you all to say?

9 A That's a mischaracterization. I don't agree with that.

10 Q Well, can we look at Exhibit 239?

11 MR. AHMAD: Because we're going a little bit out of order
12 now, is that one in?

13 MR. BLALACK: I believe it is.

14 MR. AHMAD: Okay.

15 BY MR. AHMAD:

16 Q And this is the out-of-network change the narrative change
17 performance, right?

18 A I see that title.

19 Q Okay. Let's go to page 3. Can we look at the bullet points at
20 the bottom? And it talks about build robust advocacy program to protect
21 members and clients from exploitation and egregious billing practices.
22 Do you see that?

23 A I see that.

24 Q Is that a term that United uses publicly when it advocates to
25 the public, that there is egregious billing practices going on?

1 A United is going to use egregious or other terms to describe
2 the billing practices that we were seeing evolve in the market.

3 Q Okay. Now, to be clear, we are here, Fremont Ruby Crest
4 team physicians, seeking reasonable reimbursement on 11,000 claims.
5 Is it your testimony that any of the Plaintiffs in those 11,000 claims has
6 egregiously billed?

7 A I don't agree with that statement. I am not making that
8 statement.

9 Q So is your --

10 A And I can explain.

11 Q I'm sorry?

12 A And I can explain.

13 Q Sure.

14 A Yeah. I don't have data specifically in front of me on
15 Fremont that would show exactly what their billed charges were. I don't
16 know those details. So I'm not going to be characterized as saying that
17 they were billing egregiously. We definitely were seeing those practices
18 evolve in the market, specifically with ER staffing companies.

19 Q Okay. But are you here to say that any of the Plaintiffs in this
20 case was egregiously billing?

21 A I don't have the data in front of me to say 100 percent
22 certainty. I can just, you know, state that ER physician staffing groups
23 were driving up billed charges.

24 Q Is that a no, you are not here to say that?

25 A I do not have data in front of me. No, I can't state specifically

1 about Freemont's billing practices.

2 Q Okay. Well, let's go back to Exhibit 170-A. If we can look at I
3 believe it's page 12. And it looks like they're talking about there can be
4 incremental annual savings of 456 million going below the UCR, usual,
5 customary, and reasonable, correct?

6 A Can I have just one minute to look at the slide?

7 Q Sure.

8 A Okay. Okay.

9 Q That's what it says, right?

10 A Can you restate the question?

11 Q Yes. MultiPlan is saying you can save 456 million annually in
12 going below usual, customary, and reasonable.

13 A Well, the savings would have been for our clients. But I see
14 that statement on the slide.

15 Q And also, United, as it charges a percentage, correct?

16 A Well, a percent of the savings wouldn't be savings. It would
17 be revenue.

18 Q To United?

19 A Possibly.

20 Q Possibly?

21 A If there was a fee charged on those savings, yes, United
22 could generate revenue from that.

23 Q Okay. Now let's go to page 13. And if we can look at the
24 bottom, the very bottom, kind of the fine print. And it talks about its
25 estimated Data iSight savings from UCR. Do you see that?

1 A I see that line.

2 Q And then at the very, very bottom, something interesting that
3 they point out, only six percent of claims will be -- would be appealed
4 with savings retained on 46 percent of appealed charges. Six percent
5 appeals? That's pretty good, isn't it?

6 A I think that's relative, depending on the program.

7 Q Okay. Well, let me ask you this. We've had some testimony
8 about whether MultiPlan is neutral or not. Neutral, as between the
9 insurance company and the healthcare provider. Do you think they're
10 neutral?

11 A I think MultiPlan provides a service. And they work with both
12 payers and providers. And they provide a valuable service that payers
13 like United purchase.

14 Q Are they neutral?

15 A In my experience, MultiPlan's been neutral.

16 Q Okay. And you were -- again, you were at this presentation,
17 right?

18 A I was at -- I believe I was at this presentation.

19 Q Okay. And let's go to page 17. And it talks about reducing
20 the OPR percentile for benefit remit calculation, right?

21 A I see that.

22 Q OPR, is that outpatient payment rate?

23 A Outpatient facility. Correct.

24 Q Okay. And by looking at -- under rationale, the third bullet
25 point down, they all told you that if United believes the benefit plan

1 language required 60th percentile? Now, let me just stop you right there.

2 Is it your position that United has to follow the benefit plan language?

3 A United would follow the benefit plan language.

4 Q Because it has to?

5 A Yes. It's the benefit plan. Our job is to administer the benefit
6 plan language as it's written.

7 Q But MultiPlan is saying here that even if the benefit plan says
8 60th percentile, they -- we -- MultiPlan can price as a lower percentile.
9 And then, if it gets appealed, then adjusted to the 60th percentile, right?

10 A That's what the bullet says.

11 Q Now, doesn't that sound like cheating?

12 A I wouldn't characterize it that way. It's an option they
13 provided.

14 Q An option to depart from the benefit plan to go lower, and
15 then if they get caught on appeal, then they apply a benefit claim, right?

16 A The bullet says what it says. It doesn't mean it was
17 implemented.

18 Q Well, I understand. But that's what they're saying they will
19 do.

20 A The bullet says what it says.

21 Q Do you trust them after what they presented to you?

22 A MultiPlan's a vendor that provide -- provides options.

23 Ultimately, UnitedHealthcare makes the final decisions on what
24 programs we're going to implement. And we're always going to be
25 ensuring that we're administering the benefit plan appropriately.

1 Q Well, I mean, do you have anything to say about MultiPlan's
2 position that they can pay less than the 60th percentile? And for those
3 that appeal, that those few, I think six percent, then they can adjust? And
4 then of course, the 94 percent that I guess didn't read the plan language
5 and bother to appeal --

6 MR. BLALACK: Objection to the form of that question.

7 MR. AHMAD: Well --

8 THE COURT: Objection's sustained.

9 BY MR. AHMAD:

10 Q Do you have any position on the fairness of this?

11 A It's a bullet on the page. You know, it would be highly
12 unlikely United would ever implement something that would conflict
13 with being able to administer the benefit as it's written.

14 Q Okay. But you don't have a position on what MultiPlan is
15 saying, right, do you?

16 A I can't control what a vendor puts on a PowerPoint slide.

17 Q Okay. And by the way, for a member to appeal, I guess I
18 would have to know that the benefit plan -- I would have to read the
19 benefit plan and see 60th percentile, right?

20 A Can you clarify your question?

21 Q Yes. I mean, this contemplates that they will adjust it if
22 there's an appeal. But in order to appeal, you have to know what the
23 benefit plan language says, right?

24 A Well, the facility R&C program, if a provider disputes at the
25 reimbursement level, they can dispute that.

1 Q Well, the patient can dispute it too, right?

2 A The patient I guess can dispute a claim.

3 Q I mean, for example, if a patient notices that they're getting
4 balance billed because United didn't pay the entire charge and they want
5 to appeal, they would have to read through the benefit plan language,
6 correct?

7 A He could also call their health insurance company and talk to
8 an agent that could advise them of their appeal rights and their benefit
9 plan language.

10 Q Okay. And apparently, all said, 94 percent of people don't do
11 that, right?

12 A That's a mischaracterization of that statistic. That statistic
13 relates to provider disputes. Not member disputes.

14 Q Okay. Do you think the percentage is higher for members?

15 A I don't know at the time of this what the member dispute was
16 specifically for this program.

17 Q Okay. Does MultiPlan brag that they are magical in what
18 they do?

19 A I'm not sure what you're referring to. I've never known
20 MultiPlan to brag in our business meetings.

21 Q Well, do they brag about being magical in meetings with the
22 insurance industry?

23 A I don't recall that.

24 Q Okay. Can we look at Exhibit 282? And it's not in. Now, that
25 is an attendee's list. And if we keep scrolling down, there's -- and if we

1 scroll down to the middle towards the bottom, I think we see your name
2 about halfway up in the middle. There it is. Were you an attendee at the
3 MultiPlan Client Advisory Board meeting in 2019?

4 A At this meeting in 2019, yes.

5 Q Okay. And I notice John Haben, he's there, too. I see people
6 from other healthcare insurance companies, Aetna, Cigna, Humana. I
7 think I saw Blue Cross/Blue Shield. A lot of people in the insurance
8 industry there, right?

9 A Yes. It appears so.

10 Q Okay. And then if we go to 284.

11 MR. BLALACK: No objection.

12 THE COURT: Exhibit 284 will be admitted.

13 [Plaintiffs' Exhibit 284 admitted in evidence]

14 BY MR. AHMAD:

15 Q And this presentation was given by Dale White. I see -- I
16 think we heard about him earlier in this case. He is the executive vice
17 president -- I think it's executive vice president of sales and account
18 management. But he's an executive vice president, right?

19 A That's what it says on the slide.

20 Q And you know Dale White, right?

21 A I know Dale White.

22 Q Okay. And is he -- is he talking about some of the things that
23 he can do for the insurance company at this meeting?

24 A The client advisory board meetings, yeah, typically, they talk
25 about, you know, things they've implemented, other things they're

1 looking at, providing other industry new information.

2 Q Okay. And if we look at page 2. And this is the reference, by
3 the way, that I was talking about. That's a picture of Dale White, right?

4 A It looks like a photoshopped picture of Mr. White.

5 Q Well, I didn't photoshop it. Right. I mean, he did that; is that
6 right?

7 A I'm unsure if Dale White himself created this PowerPoint.

8 Q Oh, okay. Well, MultiPlan did, right?

9 A It's a MultiPlan PowerPoint.

10 Q Okay. And if you'd go to page 4. And into this -- do you
11 remember this slide being talked about, the medical costs on the left side
12 and medical cost reduction over the years?

13 A I don't specifically remember this being discussed in the
14 meeting. Obviously, it was presented at the meeting.

15 Q Well, obviously, whether you call it magic or innovative or
16 what have you, their presentation to the insurance industry was how
17 about -- they were going to reduce medical costs, right, significantly?

18 A I think the slide shows their performance and a projection of
19 the medical cost savings they were providing throughout all of their
20 programs.

21 Q Okay. And you still think they're neutral between healthcare
22 provider and insurance company?

23 A MultiPlan's a business. They provide solutions to help
24 payers determine what's appropriate to pay for out-of-network claims. I
25 think they're interested in ensuring that the healthcare market has

1 affordable care provided to patients. And that, you know, health -- or I'm
2 sorry, clients can provide cost effective plans for their members.

3 MR. AHMAD: Your Honor, my watch says 4:46. I'm at a
4 good place.

5 THE COURT: Okay. We'll take our recess until Monday at
6 8:30 a.m. During the recess, don't talk to each other or anyone else on
7 any subject connection with the trial. Don't read, watch, or listen to any
8 report of or commentary on the trial. Don't discuss this case with
9 anyone connected to it by any medium of information including without
10 limitation, newspapers, television, radio, internet, cell phones, or texting.

11 So don't conduct any research on your own relating to the
12 case. Don't consult dictionaries, read the expert, or use reference
13 materials. Don't post on social media that you're in a jury trial. Don't
14 talk, text, Tweet, Google, or conduct any other type of research with
15 regard to any issue, party, witness, or attorney involved.

16 Mostly important, do not form or express any opinion on any
17 subject connected with the trial until the jury deliberates. Thank you for
18 a great week, everybody. Have a fun weekend. See you Monday at 8:30.

19 THE MARSHAL: All rise for the jury.

20 [Jury out at 4:47 p.m.]

21 [Outside the presence of the jury]

22 THE COURT: Okay. The room is clear. Plaintiff, do you have
23 anything for the record?

24 MR. AHMAD: I do not, Your Honor.

25 THE COURT: Defendant, do you have anything for the

1 record?

2 MR. BLALACK: We do not, Your Honor.

3 THE COURT: All right. So Monday morning at 8:30. Be
4 ready with your schedules. You don't have to say the name of the
5 witness unless it's the next witness. And we will -- I have approval for
6 Monday after work, to work for an hour to talk about jury instructions
7 and verdict form.

8 MR. BLALACK: Thank you, Your Honor.

9 THE COURT: Thanks, guys.

10 [Proceedings adjourned at 4:48 p.m.]

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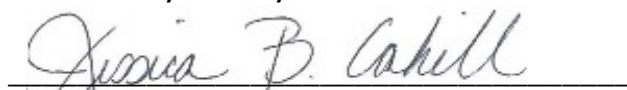
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ATTEST: I do hereby certify that I have truly and correctly transcribed the
audio-visual recording of the proceeding in the above entitled case to the
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DISTRICT COURT

CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES
(MANDAVIA), LTD., a Nevada professional
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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

**PLAINTIFFS' TRIAL BRIEF
REGARDING SPECIFIC PRICE
TERM**

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1 Fremont Emergency Services (Mandavia), Ltd.; Team Physicians of Nevada-Mandavia,
2 P.C.; Crum, Stefanko and Jones, Ltd. dba Ruby Crest Emergency Medicine (collectively the
3 “Health Care Providers”) submit this Trial Brief Regarding Specific Price Term (the “Trial
4 Brief”). This Trial Brief is based upon the record in this matter, the points and authorities that
5 follow, the pleadings and papers on file in this action, and any argument of counsel entertained
6 by the Court.

7 POINTS AND AUTHORITIES

8 I. RELEVANT FACTS

9 In its Proposed Jury Instructions, United disingenuously claims that “[t]he specific price
10 to be paid for services is a material term that must be agreed upon by the parties.” *See*
11 Defendants’ Proposed Jury Instructions at 27:8-9. It then goes on to cite to *Matter of Est. of*
12 *Kern* to contend that this case supports such a proposition, asserting that *Matter of Est. of Kern*
13 concluded that “price is a material term that is an essential element of a valid contract.” 107
14 Nev. 988, 991, 823 P.2d 275, 276–77 (1991). United also proposes similar jury instructions
15 relating to the “certainty” of a contract claiming that: “If any of the essential terms of a contract
16 are left for future determination, there is no binding contract until all essential terms have been
17 determined. The specific price for services to be paid is a material term that must be agreed upon
18 by the parties.” *See* Defendants’ Proposed Jury Instructions at 35:6-9. United relies on *Stoddart*
19 *v. Miller*, 124 Nev. 1499, 238 P.3d 845 (2008) for this proposition.

20 As is detailed herein, no such conclusion has been rendered by the Nevada Supreme
21 Court or any published decision within this jurisdiction. In fact, the Nevada Supreme Court has
22 expressly recognized that a specified price need not be included in an agreement in order for the
23 implied in fact agreement to be deemed enforceable. *Certified Fire Prot. Inc. v. Precision*
24 *Constr.*, 128 Nev. 371, 380, 283 P.3d 250, 256 (2012). Under those circumstances, a reasonable
25 price term may be implied. *Id.* The proper inquiry is not whether a specific price exists, but
26 rather, whether there remains any uncertainty in the material terms of an agreement. Here, the
27 parties agreed that the Health Care Providers would be paid a usual and customary rate of
28 reimbursement and even if no agreement as to price existed, the factfinder can infer a reasonable

price term under *Certified Fire Prot. Inc. v. Precision Constr.* Accordingly, United's requested jury instruction -- that a contract is not enforceable absent specific price term -- should be denied.

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. Under *Certified Fire*, Absent An Agreement As to Price, A Price May Be Inferred In An Implied In Fact Agreement.

As noted in *Certified Fire*, "to find a contract implied-in-fact, the fact-finder must conclude that the parties intended to contract and promises were exchanged, the general obligations for which must be sufficiently clear. It is at that point that a party may invoke quantum meruit as a gap-filler to supply the absent term." *Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. at 379–80, 283 P.3d at 256. Further, the Nevada Supreme Court explicitly acknowledged that "quantum meruit [for an implied in fact contract] fills price term when it is appropriate to imply the parties agreed to a reasonable price" and "[w]here such a contract exists, then, quantum meruit ensures the laborer receives the reasonable value, usually market price, for his services." Thus, contrary to United's unsupported position, price need not be agreed to in order for an implied in fact contract to be deemed enforceable. In fact, this is the very purpose of employing quantum meruit – to determine the reasonable value of services when such value had not already been agreed upon between the parties. While United and the Health Care Providers did impliedly agree that United would pay the Health Care Providers a reasonable, usual and customary rate of reimbursement, no such agreement is required in order for the Health Care Providers to prevail on their claim for breach of implied in fact agreement and the Health Care Providers should not be required to satisfy this condition which is contrary to Nevada law.

C. Alternatively, Even If An Agreement As to Price Was Required, There is No Requirement to Agree to A *Specific* Price to Be Paid for Emergency Services Rendered to Create an Enforceable Implied In Fact Agreement.

Although “[a] valid contract cannot exist when material terms are lacking or are insufficiently certain and definite[,] [a] contract can be formed, however, when the parties have agreed to the material terms, even though the contract’s exact language is not finalized until later.” *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005); *see also Brinkerhoff v. Foote*, 132 Nev. 950, 387 P.3d 880 (2016). “Which terms are essential ‘depends on the agreement and its context and also on the subsequent conduct of the parties, including the dispute which arises and the remedy sought.’” *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 131, cmt. g (1981)); *see also Aliya Medcare Fin., LLC v. Nickell*, No. CV1407806MMMSHX, 2015 WL 11089594, at *9 (C.D. Cal. May 28, 2015) (interpreting Nevada law). “In determining whether a contract or its terms are definite, an important consideration is ‘whether the court can ‘determine [the putative contract’s] exact meaning and fix the legal liability of the parties.’” *Chung v. Atwell*, 103 Nev. 482, 484, 745 P.2d 370, 371 (1987) *quoting Pendleton v. Sard*, 297 A.2d 889, 892 (Me.1972).

With respect to a price term, “‘absolute certainty is not required; only reasonable certainty is necessary.’ ...[N]ot all terms, such as price, need be set out in the contract as long as they are in fact fixed and determinable or reasonably certain. In fact, ‘words that fix an ascertainable fact or event, by which the term of a contract can be determined, make the contract definite and certain in that particular.’” *LaMore Rest. Grp., LLC v. Akers*, 2008 S.D. 32, ¶ 18, 748 N.W.2d 756, 762 (internal citations omitted); *see also Willow Park Convalescent Home, Inc. v. Crestmont Cleveland P’ship*, 2003-Ohio-172, ¶ 44, 2003 WL 132291 * 7 (Ct. App. Oh., Jan. 17, 2003) (finding that purchase price based on a third party appraisal was sufficiently certain); *In re Crusader Energy Grp. Inc.*, No. 09-31797-BJH-11, 2011 WL 479565, at *5 (Bankr. N.D. Tex. Feb. 3, 2011) (“price was not a material term of the parties’ agreement”); *Flagship Marine Servs., Inc. v. Belcher Towing Co.*, 966 F.2d 602, 606 (11th Cir. 1992), opinion vacated, appeal dismissed (Mar. 25, 1994), opinion reinstated, 23 F.3d 341 (11th Cir. 1994) (oral

1 agreement missing price term enforceable due to the prior course of dealings between the parties
2 and the understanding that a reasonable price would be paid for the services rendered).

3 In the context of healthcare reimbursement, it is well-established that an implied
4 agreement to provide services in exchange for the usual, customary and reasonable amount
5 sufficiently describes the price term so as to render such an agreement enforceable. *Summit Est.,*
6 *Inc. v. Cigna Healthcare of California, Inc.*, No. 17-CV-03871-LHK, 2017 WL 4517111, at *4
7 (N.D. Cal. Oct. 10, 2017) (“complaint sufficiently alleges the substance and general terms of the
8 contract that Plaintiff alleges it entered into with Defendants namely, that Plaintiff would
9 provide substance abuse treatment services in exchange for reimbursement at the UCR.”);
10 *California Spine & Neurosurgery Inst. v. United Healthcare Ins. Co.*, No. 19-CV-02417-LHK,
11 2019 WL 4450842, at *3 (N.D. Cal. Sept. 17, 2019) (“The Court finds that because the FAC
12 alleges that Defendant gave ‘express and/or implied resultant assurances’ that Plaintiff ‘would
13 be paid at least 70% of the usual and customary value of its medical services anticipated to be
14 rendered,’ the FAC has alleged sufficient facts to plausibly suggest the formation of either an
15 implied or express contract.”). Indeed, where there is an established reasonable rate of
16 reimbursement, there is no need to set a specific price term in order to render an agreement
17 enforceable.

18 To support its argument that a price term is always required so as to render an agreement
19 enforceable, United cites to *Matter of Est. of Kern*. *Matter of Est. of Kern* does not stand for
20 this proposition. In that case, the Court considered whether a purchase agreement was
21 enforceable where it lacked numerous material terms. The “purchase agreement” stated: “‘The
22 propert [sic] situated in Cheyenne Wells Colo described as followes [sic]. Abstracts to same
23 have been approved to transfer property into DorKay Corporation. It is resolved that all mineral,
24 oil, gas rights herewithin [sic] as described in the abstracts go with the land purchased by
25 DorKay Corporation.’” 107 Nev. 988, 990, 823 P.2d 275, 276 (1991). The Court concluded
26 that this “agreement” lacked details concerning the description of the property, the subject
27 matter, price, payment terms, quantity, and quality. *Id.* While, in another document, there was
28 a reference to using shares for the purchase of the property, there was no valuation of the shares

1 and the Court concluded that such shares were “worthless”. *Id.* at 277. Thus, the Court
2 concluded, taken as a whole, the agreement could not be deemed enforceable. *Id.* at 276.

3 United also cites to the unpublished disposition, *Stoddart v. Miller*, 124 Nev. 1499, 238
4 P.3d 845 (2008), to infer that a lack of agreement on a price term would render any agreement
5 unenforceable. *Stoddart* does not support this conclusion. In *Stoddart*, the plaintiff and
6 defendant were in the process of negotiating a joint venture agreement and, while the plaintiff
7 argued that a final oral agreement had been reached, the evidence presented at trial demonstrated
8 that no final agreement had been reached between the parties. The evidence admitted at trial
9 showed that: (1) “Stoddart repeatedly stated that he was considering Peccole's proposal”, (2)
10 “Stoddart [] made a new proposal” with differing terms, (3) “the parties never agreed on the
11 price per acre of land” under joint venture, (4) there was an incomplete written agreement with
12 several missing terms including, (a) whether the cost for the land, once agreed-upon, was to
13 apply to gross or net acreage, (b) the project's total acreage and (c) the terms of the project's
14 termination and dissolution (5) the parties continued to negotiate after Stoddart sent his letter
15 and even drafted, but failed to complete, the written joint venture contract. *Id.* at *4. Thus, the
16 Court concluded that based on all the evidence presented to the factfinder, no agreement had
17 been finalized. Just as was the case in *Matter of Est. of Kern*, the Court was focused on the
18 totality of the evidence and whether it demonstrated the existence of an enforceable agreement.
19 Given that the parties were continuing to negotiate final terms and even made offers that differed
20 from the alleged oral agreement terms, there was no question that a final agreement had not been
21 reached. The Court’s focus was not on the absence of a price term on its own as United would
22 like this Court to believe, but rather, the testimony and conduct of the parties demonstrating that
23 both believed an enforceable contract did not exist at the time.

24 Here, the terms of the implied in fact agreement between United and the Health Care
25 Providers are definite and certain. United has repeatedly represented that it would pay the Health
26 Care Providers their reasonable, usual and customary rate of reimbursement. Just as was the
27 case in *Flagship Marine Servs., Inc. v. Belcher Towing Co.*, United is fully aware of the Health
28 Care Providers’ billed charges and would expect to pay the reasonable charges when their

patients need emergent care from the Health Care Providers. Further, the price term of UCR is well-established in the healthcare industry and can readily be ascertained through the Fair Health database which can be used to determine the usual and customary rate of reimbursement for any geographic region. Not a single case supports United's unwieldy position and its attempt to limit implied in fact agreements to those with specified price terms should be rejected outright.

III. CONCLUSION

For the foregoing reasons, the Health Care Providers respectfully request that the Court instruct the jury that a price term need not be specified in order for an implied in fact contract to be deemed enforceable.

DATED this 14th 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 14th day of November, 2021, I caused a true and correct copy of the foregoing **PLAINTIFFS' TRIAL BRIEF REGARDING SPECIFIC PRICE TERM** to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

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STEVEN D. GRIERSON
CLERK OF THE COURT

NOV 15 2021

BY: 
J.L. QUAMINA, DEPUTY

JURL

DISTRICT COURT
CLARK COUNTY, NEVADA

**FREMONT EMERGENCY
 SERVICES (MANDAVIA) LTD,
 PLAINTIFF(S)
 VS.
 UNITED HEALTHCARE
 INSURANCE COMPANY,
 DEFENDANT(S)**

CASE NO.: A-19-792978-B

DEPARTMENT 27

A-19-792978-B
 JURL
 Jury List
 4973682



2nd AMENDED JURY LIST

- | | |
|--|-----------------------|
| 1. Nerissa Gonzaga | 7. Dinah Hortillas |
| 2. Cindy Springberg | 8. Elizabeth Trambulo |
| 3. Katelyn Landau | 9. Michael Cabrales |
| 4. Zerrick Walker- EXCUSED-11/15/2021 | 10. Paul Reese |
| 5. Angelo Torres-EXCUSED-11/3/21 | 11. Isis Wynn |
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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 (CONTESTED)**



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 (Contested). Defendants reserve the right to amend their
 15 proposed jury instructions based on, among other things, the evidence admitted at the trial.

16 Dated this 15th day of November, 2021.

17 /s/ Colby L. Balkenbush

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JURY INSTRUCTION NO. D____

1
2 MASCULINE AND FEMININE FORM OF INSTRUCTIONS

3 The masculine form as used in these instructions, if applicable as shown by
4 the text of the instruction and the evidence, also applies to a female person or a
5 corporation.

6
7 ***SOURCE/AUTHORITY:***
8 NEV. J.I. 1.4 (2018).
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JURY INSTRUCTION No. D ____

JURORS MAY ASK QUESTIONS OF WITNESSES

We also permit jurors to ask questions of witnesses. However, asking questions is the primary responsibility of the attorneys, not the jurors. The procedure for a juror to ask a question is somewhat complicated and has a tendency to prolong the trial. Any question that a juror asks must be factual in nature and designed to clarify information already presented. You will not be permitted to become “the third attorney” or advocate a position and I have discretion to preclude you from asking excessive numbers of questions. If you feel that you must ask a question of a witness, you must write out the question on a piece of paper and do so while the witness is still present. Raise your hand before that witness leaves the courtroom and give the question to the marshal/bailiff. I will then halt the trial, review the question with the attorneys and, if the question is appropriate, ask the question on your behalf. The attorneys will then be permitted to ask follow up questions on that subject.

Do not feel disappointed if your question is not asked. Your question may not be asked for a variety of reasons. For example, the question may call for an answer that is not allowed for legal reasons. Also, you should not try to guess the reason why a question is not asked or speculate about what the answer might have been. Because the decision whether to allow the question is mine alone, do not hold it against any of the attorneys or their clients if your question is not asked.

I caution you not to place undue weight on the responses to your questions as opposed to other evidence in the case.

SOURCE/AUTHORITY:
NEV. J.I. 1.12 (2018).



JURY INSTRUCTION NO. D____

EVIDENCE ADMITTED FOR LIMITED PURPOSE

Certain evidence was admitted for a limited purpose. At the time this evidence was admitted it was explained to you that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. You may only consider that evidence for the limited purpose that I described and not for any other purpose.

SOURCE/AUTHORITY:
NEV. J.I. 2.6 (2018).



JURY INSTRUCTION NO. D____

ATTORNEY'S RIGHT TO INTERVIEW WITNESS

An attorney has a right to interview a witness for the purpose of learning what testimony the witness will give. The fact that the witness has talked to an attorney and told that attorney what he or she would testify to does not reflect adversely on the truth of the testimony of the witness.

SOURCE/AUTHORITY:
NEV. J.I. 2.14 (2018).



JURY INSTRUCTION NO. D____

BURDEN OF PROOF: CLEAR AND CONVINCING EVIDENCE

“Clear and convincing evidence” is proof that the factual element is highly probable. The proof must be so strong and cogent as to satisfy the mind and conscience of a common person, and so to convince that person that they would venture to act upon that conviction in matters of the highest concern and importance to their own interest.

SOURCE/AUTHORITY:

NEV. J.I. 2.1 (2018) (modified) and NEV. J.I. 2.2 (2018) (modified).



JURY INSTRUCTION NO. D__

CLAIMS AND DEFENSES OF MULTIPLE PARTIES TO BE CONSIDERED
SEPARATELY

You should decide the case for or against each plaintiff separately as if it were a separate lawsuit. Each plaintiff is entitled to separate consideration of its own claims and defenses. Unless I tell you otherwise, all instructions apply to each plaintiff.

You should decide the case for or against each defendant separately as if it were a separate lawsuit. Each defendant is entitled to separate consideration of its own claims and defenses. Unless I tell you otherwise, all instructions apply to each defendant.

SOURCE/AUTHORITY:

NEV. J.I. 1.13 (2018) (modified); *see Doe By & Through G.S. v. Johnson*, 52 F.3d 1448, 1459 (7th Cir. 1995); *City of Bridgewater v. Morris, Inc.*, 594 N.W.2d 712, 716 (1999); *Arbach v. Gruba*, 89 S.D. 322, 334, 232 N.W.2d 842, 849 (1975).



JURY INSTRUCTION NO. D____

CONTRACT INTRODUCTION

The Plaintiffs, Fremont, Ruby Crest, and Team Physicians, each claim that they and one or more of the Defendants, UHIC, UnitedHealthcare, UMR, Sierra, and Health Plan of Nevada, entered into an implied contract for reimbursement of emergency medicine services that were provided to patients of health plans that were issued and/or administered by the Defendants.

Each of the Plaintiffs further contend that the Defendants with whom they allegedly contracted breached this implied contract by paying reimbursements for 11,584 benefit claims for emergency medicine services at a lower rate than was required by the Parties' implied contracts.

Plaintiffs also claim that Defendants' breach of this implied contract or contracts caused harm to Plaintiffs, for which the responsible Defendant who breached should pay damages.

Defendants each deny these claims. They deny that any implied contract was formed between any of the Plaintiffs and any of the Defendants, deny that an implied contract was breached, and deny that Plaintiffs have been harmed.

For 62 benefit claims, Defendants assert that the claim pertained to the Medicare and/or Medicaid programs and that Plaintiffs are not seeking damages for underpayments of any benefit claims relating to the Medicare or Medicaid programs.

For 445 benefit claims, Defendants assert that the patient was not covered by any health plan insured or administered by any Defendant and that no Plaintiff submitted any of these claims for reimbursement to any Defendant.

SOURCE/AUTHORITY:

Nevada Pattern Civil Jury Instruction 13.0. Contract: Introduction (2018). Pattern Note: "This instruction is intended to introduce issues relating to the case. It may be read at the beginning of the trial or as part of the instructions on the law."



JURY INSTRUCTION NO. D____

PLAINTIFFS' CLAIM FOR BREACH OF IMPLIED-IN-FACT CONTRACT

Each Plaintiff asserts that it has an implied-in-fact contract with each Defendant. A contract may be implied as well as expressed. For an implied-in-fact contract, the existence and terms of the contract are inferred from the conduct of the parties, but both an express and implied contract require a manifestation by the parties of an intent to contract and an ascertainable agreement on material terms. The specific price to be paid for services is a material term that must be agreed upon by the parties.

SOURCE/AUTHORITY:

Nevada Pattern Civil Jury Instruction 13.11. Formation: Implied Contracts (2018); Nevada Pattern Civil Jury Instruction 13.1 Elements: Proof Requirements; *Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 379-80, 283 P.3d 250, 256 (2012); *Warrington v. Empey*, 95 Nev. 136, 138, 590 P.2d 1162, 1163 (1979); *Smith v. Recrion Corp.*, 91 Nev. 666, 668, 541 P.2d 663, 664-65 (1975); *Matter of Est. of Kern*, 107 Nev. 988, 991, 823 P.2d 275, 276-77 (1991) (price is a material term that is an essential element of a valid contract).



JURY INSTRUCTION NO. D____

CONTRACT REQUIREMENTS

An enforceable contract requires an offer and acceptance, a meeting of the minds, and consideration.

SOURCE/AUTHORITY:

Nevada Pattern Civil Jury Instruction 13.2. Elements: Contract Requirements (2018); *Anderson v. Sanchez*, 132 Nev. Adv. Op. 34, 373 P.3d 860 (2016) (“An enforceable contract requires an offer and acceptance, meeting of the minds and consideration.”); *Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 283 P.3d 250, 255 (2012) (noting that a contract requires an offer and acceptance, meeting of the minds, and consideration); *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005) (citing *Keddie v. Beneficial Ins., Inc.*, 94 Nev. 418, 421, 580 P.2d 955, 956 (1978) (Batjer, C.J., concurring)).



JURY INSTRUCTION NO. D____

CONTRACT FORMATION: OFFER

An offer is a promise to do or not to do something on specified terms that is communicated to another party under circumstances justifying the other party in concluding that acceptance of the offer will result in an enforceable contract.

Unless otherwise agreed, a party making an offer may revoke the offer at any time before acceptance of the offer, by communicating notice of revocation of the offer to the party or parties to whom the offer was made before the communication of an acceptance of the offer by a party to whom the offer was made.

SOURCE/AUTHORITY

Nevada Pattern Civil Jury Instruction 13.5. Formation: Offer (2018); *Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 27-28, 359 P.2d 85, 86 (1961) (noting that an offer by one party for performance can be accepted by compliance with the terms of the offer); *cf. Gulf Oil Corp. v. Clark County*, 94 Nev. 116, 118, 575 P.2d 1332, 1333 (1978); *McCone v. Eccles*, 42 Nev. 451, 457, 181 P. 134, 136 (1919) (finding that where there is no fixed period the offer may be revoked at any time before acceptance); *Farago Adver., Inc. v. Hollinger Intern., Inc.*, 157 F. Supp. 2d 252, 258-59 (S.D.N.Y. 2001) (finding that an offer is an act on the part of one party which gives the other the power to create a contractual obligation and can dictate the manner of the offeree's acceptance); *Morrison v. Rayen Investments, Inc.*, 97 Nev. 58, (1981) ("It is a settled principle of contract law that, 'the power to create a contract by acceptance of an offer terminates at the time specified in the offer, or, if no time is specified, at the end of a reasonable time.' RESTATEMENT OF THE LAW OF CONTRACTS, S 40(1).").



JURY INSTRUCTION NO. D____

CONTRACT FORMATION: ACCEPTANCE

An acceptance is an unqualified and unconditional assent to an offer without any change in the terms of the offer, that is communicated to the party making the offer in accordance with any conditions for acceptance of the offer that have been specified by the party making the offer, or if no such conditions have been specified, in any reasonable and usual manner of acceptance.

A qualified or conditional acceptance or one that changes any terms of the offer is a rejection of the offer that terminates the offer. It is a counteroffer, which, in turn, must be accepted without any qualifications, conditions or changes in terms for a contract to be formed.

SOURCE/AUTHORITY

Nevada Pattern Civil Jury Instruction 13.6. Formation: Acceptance (2018); *Morrison v. Rayen Investments, Inc.*, 97 Nev. 58, (1981) (finding that an offer creates the power to create a contract by acceptance); *James Hardie Gypsum (Nevada) Inc. v. Inquipco*, 112 Nev. 1397, (1996) (“The fact finder should look to objective manifestations of intent to enter into a contract.”); *Industrial America, Inc. v. Fulton Indus., Inc.*, Del. Supr., 285 A.D.2d 412, 415-16 (1971) (finding that manifestation of intent must be overt, not subjective); *Keddie v. Beneficial Insurance, Inc.*, 94 Nev. 418, 421-22, 580 P.2d 955, 957 (1978) (Batjer, C.J., concurring) (finding that an acceptance cannot modify or alter any of the essential terms of the offer); RESTATEMENT (SECOND) CONTRACTS § 30 (1981).



JURY INSTRUCTION NO. D____

CONTRACT FORMATION: CONTRACTUAL INTENT

A contract requires a “meeting of the minds;” that is, the parties must assent to the same material terms and conditions in the same sense, including the price for any services contracted for because the specific price for services to be paid is a material term. However, contractual intent is determined by the objective meaning of the words and conduct of the parties under the circumstances, not any secret or unexpressed intention or understanding of one or more parties to the contract.

SOURCE/AUTHORITY

Nevada Pattern Civil Jury Instruction 13.7. Formation: Contractual Intent (2018); *Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 380, 283 P.3d 250, 2556 (2012) (finding that a meeting of the minds exists when the parties have agreed upon the contract’s essential terms including the price for work); *James Hardie Gypsum (Nevada) Inc. v. Inquipco*, 112 Nev. 1397, 1402, 929 P.2d 903, 906 (1996), overruled on other grounds by *Sandy Valley Associates v. Sky Ranch Estates Owners Ass’n*, 117 Nev. 948, 955, 35 P.3d 964, 969 (2001); *Matter of Est. of Kern*, 107 Nev. 988, 991, 823 P.2d 275, 276–77 (1991) (price is a material term that is an essential element of a valid contract); *Hotel Riviera, Inc. v. Torres*, 97 Nev. 399, 401, 632 P.2d 1155, 1157 (1981); *Warrington v. Empey*, 95 Nev. 136, 138, 590 P.2d 1162, 1163 (1979); *Morrill v. Tehama Consolidated Mill & Mining Co.*, 10 Nev. 125, 134 (1875); *Hillyer v. The Overman Silver Mining Co.*, 6 Nev. 51, 56-57 (1870).



JURY INSTRUCTION NO. D____

CONTRACT FORMATION: CONSIDERATION

Consideration is necessary to make a promise enforceable. Consideration can be performance or a promise to perform.

Consideration must be sought by the promisor in exchange for the promisor's promise and consideration must be given by the promisee in exchange for that promise.

Consideration may include:

1. money,
2. an act, or a promise not to act, or
3. a return promise.

Consideration may be found anywhere in the transaction, whether or not it is spelled out in writing as "consideration."

In determining whether there was a bargained-for exchange, you must consider only the outward expression of the intention of the parties.

A benefit conferred or detriment incurred in the past is not adequate consideration for a present bargain, and consideration is not adequate when it is a mere promise to perform that which the party making the promise is already legally obligated to do.

SOURCE/AUTHORITY: Nevada Pattern Civil Jury Instruction 13.8. Formation: Consideration (2018); RESTATEMENT (SECOND) OF CONTRACTS § 90 (1) (1973)); *Torres v. Nev. Direct Ins. Co.*, 131 Nev. Adv. Op. 54, 353 P.3d 1203, 1211 (2015) (finding that the person who made the promise will only be liable for conduct intended to induce reliance on a promise if the action induced amounts to a substantial change of position—detrimental reliance does not apply when the complainant's act is caused by his or her own mistake in judgment); *Vancheri v. GNLV Corp.*, 105 Nev. 417, 421, 777 P.2d 366, 369 (1989) ("The doctrine of promissory estoppel, which embraces the concept of detrimental reliance, is intended as a substitute for consideration, and not as a substitute for an agreement between the parties."); *Jones v. SunTrust Mortg., Inc.*, 128 Nev. 188, 191, 274 P.3d 762, 764 (2012) ("Consideration is the exchange of a promise or performance, bargained for by the parties."); *Pink v. Busch*, 100 Nev. 684, 688, 691 P.2d 456, 459 (1984); *County of Clark v. Bonanza No. 1*, 96 Nev. 643, 650-51, 615 P.2d 939, 943-44 (1980); *Walden v.*



Backus, 81 Nev. 634, 637, 408 P.2d 712, 714 (1966).

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JURY INSTRUCTION NO. D____

FAILURE OF CONSIDERATION

A contract cannot be enforced against a party who proves that party did not receive the consideration specified in the contract or (if no consideration is specified) agreed upon by the parties in exchange for their promise or performance.

SOURCE/AUTHORITY

Nevada Pattern Civil Jury Instruction 13.8. Formation: Consideration (2018); *Mahaffey v. Investor's Nat. Sec. Co.*, 103 Nev. 615, 617–19, 747 P.2d 890, 892–93 (1987) (By virtue of fraudulent inducement and failure of consideration a contract was held null and void.); *Charleston Hill Nat. Mines Inc. v. Clough*, 79 Nev. 182, 189, 380 P.2d 458, 461 (1963) (Extrinsic evidence is admissible to prove consideration or lack thereof even if a contract says “for value received.”).



JURY INSTRUCTION NO. D____

CONTRACT FORMATION: CERTAINTY

To be enforceable, a contract must be sufficiently definite and certain so that the contract's meaning can be determined and the responsibilities of the parties can be fixed.

If any of the essential terms of a contract are left for future determination, there is no binding contract until all essential terms have been determined.

The specific price for services to be paid is a material term that must be agreed upon by the parties.

However, if an essential term is uncertain, but the contract provides a means or formula by which the essential term can be determined, or the parties' performance has rendered the uncertain term definite and certain, then the contract becomes enforceable.

SOURCE/AUTHORITY:

Nevada Pattern Civil Jury Instruction 13.13. Formation: Certainty (2018); *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005) ("With respect to contract formation, preliminary negotiations do not constitute a binding contract unless the parties have agreed to all material terms. A valid contract cannot exist when material terms are lacking or are insufficiently certain and definite. A contract can be formed, however, when the parties have agreed to the material terms, even though the contract's exact language is not finalized until later."); *Grisham v. Grisham*, 128 Nev. 679, 686, 289 P.3d 230, 235 (2012) (citing *May v. Anderson*, 121 Nev. 668, 672 (2005)); *Chung v. Atwell*, 103 Nev. 482, 484, 745 P.2d 370, 371 (1987) ("A contract, to be enforceable, must be sufficiently definite."); *Matter of Est. of Kern*, 107 Nev. 988, 991, 823 P.2d 275, 277 (1991) ("material terms such as . . . price" are an essential element of a valid contract) (cited with approval in *May v. Anderson*, 121 Nev. at 672 n. 4); *Stoddart v. Miller*, 124 Nev. 1499, 238 P.3d 845 (2008) ("The parties' lack of agreement on material terms leaves nothing for the law to enforce and demonstrates that the parties had "contracted," at most, to agree to form a joint venture in the future... [Plaintiff] admits that the parties never agreed on the price per acre of land that [Defendant] would receive for the land used in the joint venture.").



JURY INSTRUCTION NO. D____

PERFORMANCE/BREACH: TIME OF PERFORMANCE

If a contract does not specify a time within which some act must be done, then it must be done within a reasonable time. What is a reasonable time depends upon the nature of the transaction and the particular circumstances.

A contract should not be construed so as to impose a perpetual obligation on the parties. However, when the language of a contract clearly provides that the contract is to have a perpetual duration, the contract must be enforced according to its terms.

SOURCE/AUTHORITY

Nevada Pattern Civil Jury Instruction 13.29. Defenses: Failure of Consideration (2018); *Mayfield v. Koroghli*, 124 Nev. 343, 349, 184 P.3d 362, 366 (2008) (The time for performance under a contract is not considered of the essence unless the contract expressly so provides or the circumstances of the contract so imply. If time is not of the essence, the parties generally must perform under the contract within a reasonable time, which depends upon the nature of the contract and the particular circumstances involved.); *Bell v. Leven*, 120 Nev. 388, 391-92, 90 P.3d 1286, 1288-89 (2004) (When the language of a contract clearly provides that the contract is to have a perpetual duration, the courts must enforce the contract according to its terms.); *Soper v. Means*, 111 Nev. 1290, 1294, 903 P.2d 222, 224 (1995) (When a contract does not specify a time within which performance must be rendered, what constitutes a reasonable period of time for performance must be determined from the nature of the agreement and the particular circumstance involved.).



JURY INSTRUCTION NO. D____

DEFENSES: FAILURE OF CONDITION PRECEDENT

A condition precedent is an act that must be performed before a contract duty arises.

However, any acts that must be performed pursuant to a condition precedent may but need not be performed if they are waived, excused or if the party asserting the condition voluntarily prevented or made the occurrence of the condition impossible.

SOURCE/AUTHORITY

Nevada Pattern Civil Jury Instruction 13.30. Defenses: Failure of Condition Precedent (2018); *NGA #2 Ltd. Liability Co. v. Rains*, 113 Nev. 1151, 1158–63, 946 P.2d 163, 167–70 (1997) (“A condition precedent to an obligation to perform calls for the performance of some act after a contract is entered into, upon which the corresponding obligation to perform immediately is made to depend.” Conditions precedent may be waived or a person may be estopped from claiming a breach of contract.); *Goldston v. AMI Inv.*, 98 Nev. 567, 569-71, 655 P.2d 521, 523 (1982) (A material breach by a seller of land (failure to remove a fence) can prevent the seller from claiming that the buyer’s deposit of money was a condition precedent to closing.); *R & S Investments v. Howard*, 95 Nev. 279, 282–83, 593 P.2d 53, 55 (1979) (The buyer cannot sue the seller unless the buyer has performed all conditions precedent or such performance has been excused.); *Cladianos v. Friedhoff*, 69 Nev. 41, 45–46, 240 P.2d 208, 210 (1952) (If the promisor is himself the cause of the failure of performance, he cannot take advantage of a condition upon which his own liability depends.); *Summa Corp. v. Richardson*, 93 Nev. 228, 564 P.2d 181 (1977) (A condition precedent can be waived.) *cf. Reno Realty & Investment Co. v. Hornstein*, 72 Nev. 219, 301 P.2d 1051 (1956) (Condition precedent was not waived.); *Gershenhorn v. Stutz*, 72 Nev. 293, 303, 304 P.2d 395, 400 (1956) (Substantial compliance of a condition precedent).

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JURY INSTRUCTION NO. D____

MEASURE OF DAMAGES FOR BREACH OF IMPLIED-IN-FACT CONTRACT CLAIM

The measure of damages for a breach of contract is the amount that will reasonably compensate an injured party for all the detriment, harm or loss flowing from the breach and which was reasonably foreseeable (that is, which might have been reasonably contemplated by the parties) as the probable result of the breach when the contract was made, together with any additional damages that resulted from special circumstances known, or which should have been known, to the breaching party when the contract was made.

If the contract was one entire contract that was enforceable as to its future performance, and not divisible into separate promises each made in exchange for a separate consideration, then the damages awarded should be sufficient to place the injured party in the position that they would have been in had the entire contract been fully performed. However, the injured party is not entitled to damages in a greater amount or duplicate awards for the same detriment, harm or loss.

If the contract was divisible or terminable at will, or could not be performed or enforced as to its future performance, then the damages awarded should only make the injured party whole for the detriment, harm or loss they suffered while the contract terms were being performed.

Generally, damages are to be measured as of the date the contract was breached.

SOURCE/AUTHORITY:

Nevada Pattern Civil Jury Instruction 13.45. Damages: Measure of Damages (2018); *Dynamic Transit v. Trans Pac. Ventures*, 128 Nev. 755, 291 P.3d 114, 118 (2012); *Conner v. Southern Nevada Paving, Inc.*, 103 Nev. 353, 355-56, 741 P.2d 800, 801 (1987); *Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels Corp.*, 98 Nev. 113, 115-16, 642 P.2d 1086, 1087-88 (1982); *Johnson v. Utile*, 86 Nev. 593, 599, 472 P.2d 335, 338 (1970); *Hornwood v. Smith's Food King No. 1*, 107 Nev. 80, 84, 807 P.2d 208, 211 (1991); *Colorado Environments, Inc. v. Valley Grading Corp.*, 105



1 Nev. 464, 470-72, 779 P.2d 80, 84 (1989); *Fuller v. United Elec. Co.*, 70 Nev. 448, 452-54, 273
 2 P.2d 136, 137-38 (1954); *Edwards Industries, Inc. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1034, 923
 3 P.2d 569, 574-75 (1996); *Hanneman v. Downer*, 110 Nev. 167, 172-73, 871 P.2d 279, 283 (1994);
 4 *Dalton Properties, Inc. v. Jones*, 100 Nev. 422, 424, 683 P.2d 30, 31 (1984); *Cheyenne Const.,*
 5 *Inc. v. Hozz*, 102 Nev. 308, 312-13, 720 P.2d 1224, 1227 (1986); *Road & Highway Builders, LLC*
 6 *v. Northern Nev. Rebar, Inc.*, 128 Nev. 384, 391-92, 284 P.3d 377, 381-82 (2012); *Davis v. Belling*,
 7 128 Nev. 301, 316-322, 278 P.3d 501, 512-15 (2012); *Dynalectric Co. of Nev., Inc. v. Clark &*
 8 *Sullivan, Inc.*, 127 Nev. 480, 484-86, 255 P.3d 286, 288-90 (2011); *J. A. Jones Constr. Co. v.*
 9 *Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 289, 89 P.3d 1009, 1018 (2004).

JURY INSTRUCTION NO. D____

UNJUST ENRICHMENT

The Plaintiffs, Fremont, Ruby Crest, or Team Physicians, may recover the reasonable value of a benefit conferred by it on one or more of the Defendants, UHIC, UnitedHealthcare, UMR, Sierra, or Health Plan of Nevada if:

- (1) the Defendant on whom a Plaintiff conferred the benefit knew of the benefit conferred,
- (2) the Defendant on whom a Plaintiff conferred the benefit accepted the benefit, and
- (3) retention of the benefit by that Defendant would be unjust without paying that Plaintiff its reasonable value.

Plaintiffs cannot recover on their implied-in-fact contract and unjust enrichment claims, as they are argued in the alternative. If you conclude that Plaintiffs have prevailed on their implied-in-fact contract claim, you will not consider the unjust enrichment claim. An unjust enrichment claim cannot exist in situations where there is an enforceable contract. For the same reason, because the Nevada Unfair Claims Practices Act is only available where there is a valid insurance contract, Plaintiffs cannot recover on both their unjust enrichment and Nevada Unfair Claims Practices Act claims. Therefore, if you find that each Plaintiff, Fremont, Ruby Crest, or Team Physicians met their burden of proof on each of their implied-in-fact contract claims, you must not find Defendants liable for unjust enrichment.

SOURCE/AUTHORITY:

Nevada Pattern Civil Jury Instruction 13.12 (2018); *Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 283 P.3d 250, 256 (2012) (finding that the old quasi contract claim is actually two claims, one for implied in fact contracts which require conduct that meets the elements of a contract, but the price is presumed to be a reasonable value, usually the market value, and a claim for relief relating to unjust enrichment where a contract is implied in law based on a benefit conferred which is unjustly retained without payment of the reasonable value); *Allegiant Air, LLC v. AAMG Mktg. Grp., LLC*, 2015 WL 6709144 (Nev. Oct. 29, 2015) (“When a plaintiff seeks as much as he ... deserve[s] based on a theory of restitution ... he must establish each element of unjust enrichment.”) (internal quotation marks omitted); *Leasepartners Corp. v. Robert L. Brooks*



1 *Tr. Dated Nov. 12, 1975*, 113 Nev. 747, 756, 942 P.2d 182, 187 (1997) (“The doctrine of unjust
2 enrichment or recovery in quasi contract applies to situations where there is no legal contract but
3 where the person sought to be charged is in possession of money or property which in good
4 conscience and justice he should not retain but should deliver to another or should pay for.”).
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JURY INSTRUCTION NO. D____

UNJUST ENRICHMENT: MEASURE OF DAMAGES

Enrichment from the receipt of benefits may be measured by:

- (a) the value of the benefit in advancing the purposes of the defendant,
- (b) the cost to the claimant of conferring the benefit,
- (c) the market value of the benefit, or
- (d) a price the defendant has expressed a willingness to pay, if the defendant's acceptance of the benefit may be treated as valid on the question of price.

The actual value of recovery is usually the lesser of the market value and a price the defendant has expressed a willingness to pay.

If one or more Defendants have been unjustly enriched, you will determine the amount by which a Plaintiff or Plaintiffs has unjustly enriched a Defendant or Defendants using the above measure.

SOURCE/AUTHORITY:

Restatement (Third) of Restitution and Unjust Enrichment § 49 (2011); *Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 381, 283 P.3d 250, 257 (2012) (citing to Restatement (Third) of Restitution and Unjust Enrichment § 49); *Koebke v. Koebke*, 476 P.3d 926 (Nev. App. 2020) ("Nevada jurisprudence relies on the First and Third Restatements of Restitution and Unjust Enrichment for guidance.").



JURY INSTRUCTION NO. D____

NEVADA UNFAIR CLAIMS PRACTICES ACT: DEFINITION

Nevada's Unfair Claims Practices Act prohibits any insurer from engaging in activities which constitute an unfair or deceptive act or practice. In order to establish a claim for violation of the Nevada Unfair Claims Practices Act against a particular Defendant, each Plaintiff must prove that:

1. Each Defendant is an "insurer" within the meaning of the Act;
2. The Plaintiff is an "insured" within the meaning of the Act;
3. An insurance contract exists between each Plaintiff on the one hand and each Defendant on the other;
4. Each Defendant violated a provision of the Nevada Unfair Claims Practices Act;
5. An officer, director, or department head of each Defendant was aware of every alleged violation; and
6. The violation was a substantial factor in causing each Plaintiff's damages.

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.

You may only consider this claim with respect to a Plaintiff and a Defendant you have previously concluded entered into an insurance contract.

SOURCE/AUTHORITY:

Nevada Pattern Civil Jury Instruction 11.20. Unfair Trade Practices: Definition (2018); Nevada Pattern Civil Jury Instruction 4.5. Negligence: Legal Cause: Definition; NRS 686A.020 prohibits engaging in "an unfair or deceptive act or practice in the business of insurance." *Gunny v. Allstate Ins. Co.*, 108 Nev. 344, 346, 830 P.2d 1335, 1336 (1992) (holding that only an insured has a private right of action under the Act and that third party claimants do not have a private right of action); *Fulbrook v. Allstate Ins. Co.*, 2015 WL 439598, at *4 (Nev. Jan. 30, 2015) (same) (unpublished).



JURY INSTRUCTION NO. D____

NEVADA UNFAIR CLAIMS PRACTICES ACT: INSURER

Nevada's Unfair Claims Practices Act applies only to insurers. An insurer is a company engaged in the business of entering into contracts between that company and an insured or a prospective insured under which the company agrees to pay a premium in advance on behalf of the insured or prospective insured in exchange for repayment of the amount advanced with interest or some other consideration.

A third-party administrator of an insurance policy is not an insurer under the Nevada Unfair Claims Practices Act. You must determine separately whether each Defendant is an insurer.

SOURCE/AUTHORITY:

NRS 686A.520 (providing that NRS 686A.310 applies only to companies within the definition stated in NRS 686A.330); NRS 686A.330(2) (defining "Company" as "a person engaged in in the business of entering into agreements or purchasing agreements"); NRS 686A.330(1) (defining "Agreement" as "a contract between a person and an insured or prospective insured under which the person agrees to pay a premium in advance on behalf of the insured or prospective insured in exchange for repayment of the amount advanced with interest or for some other consideration"); *Albert G. Wohlers & Co. v. Bartgis*, 114 Nev. 1249 (1998) (holding that the administrator of a health insurance policy was not subject to statutory liability for unfair claims practices because it did not qualify as "insurer" under the act).



JURY INSTRUCTION NO. D____

NEVADA UNFAIR CLAIMS PRACTICES ACT: INSURED

Under Nevada's Unfair Claims Practices Act, an insurer is liable only to its insured for any damages sustained by the insured as a result of the commission of an unfair practice.

An "insured" means a person covered by a policy of health insurance issued in this state by an insurer.

SOURCE/AUTHORITY:

Pioneer Chlor Alkali Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pennsylvania, 863 F. Supp. 1237, 1243 (D. Nev. 1994) (prior to A.B. 811, enacted in 1987, all remedies in the Act accrued to the Commissioner and A.B. 811 created a private right of action for the insured); *Crystal Bay Gen. Imp. Dist. v. Aetna Cas. & Sur. Co.*, 713 F. Supp. 1371, 1377 (D. Nev. 1989) (prior to 1987, the Nevada Unfair Claims Practices Act had no private right of action); A.B. 811, 1987 Nev. Stat. 1067 ("In addition to any rights or remedies available to the commissioner, an insurer is liable to its insured for any damages sustained by the insured as a result of the commission of any act set forth in subsection 1 as an unfair practice."); NRS 686A.310(2) ("In addition to any rights or remedies available to the Commissioner, an insurer is liable to its insured for any damages sustained by the insured as a result of the commission of any act set forth in subsection 1 as an unfair practice."); *Gunny v. Allstate Ins. Co.*, 108 Nev. 344, 346 (1992) (third-party claimant has "no private right of action under NRS 686A.310); *Bell v. American Fam. Mut. Ins. Co.*, 127 Nev. 1118, 373 P.3d 895 (2011) (without assignment of rights, third-party claimant lacked standing to proceed directly against insurer); NRS 679B.530 (defining "insured" as a person covered by a policy of health insurance issued in this state by an insurer).



JURY INSTRUCTION NO. D____

NEVADA UNFAIR CLAIMS PRACTICES ACT: CLAIMS

Engaging in the following activity is considered to be an unfair claims practice: Failing to effectuate prompt, fair, and equitable settlements in which liability of the insurer has become reasonably clear.

Where the amount of additional liability is a subject upon which reasonable minds could disagree, the liability of the insurer is not reasonably clear.

SOURCE/AUTHORITIES:

Nevada Pattern Civil Jury Instruction 11.21. Nevada Unfair Claims Practices Act Claims (2018); NRS 686A.310(1)(e); *Cordova v. Am. Fam. Mut. Ins. Co.*, 2015 WL 3660329, at *6 (D. Nev. June 12, 2015), *aff'd in part, rev'd in part*, 700 F. App'x 762 (9th Cir. 2017); *Nolan v. Am. Fam. Ins. Co.*, 2016 WL 7190542, at *3 (D. Nev. Dec. 12, 2016); *Sherwin v. Infinity Auto Ins. Co.*, 2013 WL 5918312, at *4 (D. Nev. Oct. 31, 2013), *aff'd*, 639 F. App'x 466 (9th Cir. 2016) ("As discussed above, Infinity's liability to pay the balance of the policy limit is not reasonably clear. Plaintiff promptly paid \$3,183 under the policy, based upon its calculation of Plaintiff's damages. Whether Plaintiff is entitled to any additional amount is a disputed question of fact for the jury, and is the crux of Plaintiff's breach of contract claim. Because it is not reasonably clear that Infinity is liable to pay more under the policy, Plaintiffs allegations do not support a claim of Unfair Trade Practices under NRS 686A.310. Infinity is entitled to summary judgment on this claim.").



JURY INSTRUCTION NO. D____

NEVADA UNFAIR CLAIMS PRACTICES ACT: OFFICER, DIRECTOR, OR
DEPARTMENT HEAD

In order to hold a Defendant liable for the failure to effectuate prompt, fair, and equitable settlements in which liability of the insurer has become reasonably clear on any individual claim, each Plaintiff must prove that officer, director, or department head for each Defendant knowingly permitted such act or had prior knowledge thereof.

A claims manager is not an officer, director, or department head.

Prior knowledge, not after-the-fact ratification is required.

SOURCE/AUTHORITIES:

NRS 686A.270 (“No insurer shall be held guilty of having committed any of the acts prohibited by NRS 686A.010 to 686A.310, inclusive, by reason of the act of any agent, solicitor or employee not an officer, director or department head thereof, unless an officer, director or department head of the insurer has knowingly permitted such act or has had prior knowledge thereof.”); *Hackler v. State Farm Mut. Auto. Ins. Co.*, 210 F. Supp. 3d 1250, 1255 (D. Nev. 2016) (finding “Claims Teams Managers” did not qualify under the statutory requirements of NRS § 686A.270); *see also Yusko v. Horace Mann Servs. Corp.*, 2012 WL 458471, at *4 (D. Nev. Feb. 10, 2012) (granting summary judgment where plaintiff had not presented any evidence that an officer, director, or department head was aware of the conduct in question); *Goodrich v. Garrison Prop. & Cas. Ins. Co., Inc.*, 526 F. Supp. 3d 789 (D. Nev. 2021) (“Claims managers generally do not qualify as department heads, officers, or directors.”); *Skinner v. GEICO Cas. Ins. Co.*, 2018 WL 1075035, at *7 (D. Nev. Feb. 26, 2018) (“[T]he statute’s unambiguous language requires prior knowledge, not after-the-fact ratification.”).



JURY INSTRUCTION NO. D____

NEVADA UNFAIR CLAIMS PRACTICES ACT: DAMAGES

An insurer is liable to its insured for any damages sustained by the insured as a result of the commission of any unfair practice set forth in the prior instruction.

An insurer is liable to an insured only for damages that arose from the improper claims handling rather than from the underlying injury.

SOURCE/AUTHORITY:

NRS 686A.310(2); *Yusko v. Horace Mann Servs. Corp.*, 2012 WL 458471, at *4 (D. Nev. Feb. 10, 2012).



JURY INSTRUCTION NO. D____

PUNITIVE DAMAGES: RECOVERY AND MEASURE

Each Plaintiff seeks punitive damages against each Defendant only with respect to their claim under Nevada's Unfair Claims Practices Act. Therefore, if you find that Fremont, Ruby Crest, or Team Physicians suffered damages as a proximate result of a violation of Nevada's Unfair Claims Practices Act for which UHIC, UnitedHealthcare, UMR, Sierra, or the Health Plan of Nevada is liable you may then consider whether you should award punitive or exemplary damages against only the Defendant or Defendants you have found liable under Nevada's Unfair Claims Practices Act. Punitive or exemplary damages are used to make an example of or punish wrongful conduct. You have discretion to award such damages, only if you find by clear and convincing evidence that the Defendant was guilty of oppression, fraud or malice in that Defendant's conduct that violated Nevada's Unfair Claims Practices Act.

However, failing to effectuate prompt, fair, and equitable settlements of claims by insureds in which the liability of the insurer to the insured has become reasonably clear alone does not mean that a Defendant acted with oppression, fraud or malice. Instead, you must separately find oppression, fraud or malice by clear and convincing evidence. This is a higher standard of proof than that required for the underlying claim of failing to effectuate prompt, fair, and equitable settlements of claims by insureds in which the liability of the insurer to the insured has become reasonably clear.

"Malice" means conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others.

"Oppression" means despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of that person.

"Fraud" means an intentional misrepresentation, deception or concealment of



1 a material fact known to a Defendant with the intent to injure or deprive a person of
2 rights or property.

3 “Conscious disregard” means knowledge of the probable harmful
4 consequences of a wrongful act and a willful and deliberate failure to avoid these
5 consequences.

6 If you find by clear and convincing evidence that UHIC, UnitedHealthcare,
7 UMR, Sierra, or the Health Plan of Nevada was guilty of oppression, fraud, or malice
8 in the conduct providing the basis for liability under Nevada’s Unfair Claims
9 Practices Act against Fremont, Ruby Crest, or Team Physicians, then I will instruct
10 you further regarding the measure of such damages in a later phase of this case.

11 **SOURCE/AUTHORITY:**

12 Nevada Pattern Civil Jury Instruction 12.1. Punitive Damages: Recovery and Measure (2018);
13 NRS 42.005; *Wyeth v. Rowatt*, 126 Nev. Adv. Op. 44, 244 P.3d 765 (2010); *Countrywide Home*
14 *Loans, Inc. v. Thitchener*, 124 Nev. 725, 192 P.3d 243 (2008); *Evans v. Dean Witter Reynolds,*
15 *Inc.*, 116 Nev. 598, 5 P.3d 1043 (2000); *Clark v. Lubritz*, 113 Nev. 1089, 944 P.2d 861 (1997); *see*
16 *also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513 (2003); *White v.*
17 *Ford Motor Co.*, 312 F.3d 998 (9th Cir. 2002); *Betsinger v. D.R. Horton, Inc.*, 126 Nev. Adv. Op.
18 17, 232 P.3d 433 (2010); *Bongiovi v. Sullivan*, 122 Nev. 556, 138 P.3d 433 (2006); *Dillard Dep’t.*
19 *Stores, Inc. v. Beckwith*, 115 Nev. 372, 989 P.2d 882 (1999), *cert. denied*, 530 U.S. 1276 (2000);
20 *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 969 P.2d 949 (1999), *cert. denied*, 527 U.S.
1038 (1999); *Guaranty Nat’l Ins. Co. v. Potter*, 112 Nev. 199, 912 P.2d 267 (1996); *Ace Truck &*
Equip. Rentals, Inc. v. Kahn, 103 Nev. 503, 746 P.2d 132 (1987); *Phillip Morris USA v. Williams*,
549 U.S. 346 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of*
North America, Inc. v. Gore, 517 U.S. 559 (1996).



JURY INSTRUCTION NO. D____

PUNITIVE DAMAGES: EVIDENCE RELATED TO OUT-OF-STATE
CONDUCT OR NON-PARTIES

Evidence has been received regarding one or more Defendants' conduct occurring outside of Nevada. This evidence may be considered only in determining whether those Defendants' conduct occurring in Nevada was reprehensible, and if so, the degree of reprehensibility. The evidence is relevant to that issue, if it bears a reasonable relationship to the Nevada conduct of those Defendants against whom you have found liability under the Nevada Unfair Claims Practices Act, if any, which is directed at or acts upon Fremont, Ruby Crest, or Team Physicians, and demonstrates a deliberateness or culpability by those Defendants in the conduct upon which you have based your finding of liability for each specific Defendant against each specific Plaintiff. Further, acts or conduct wherever occurring, that are not similar to the conduct upon which you found liability cannot be a basis for finding reprehensibility.

However, you must not use out-of-state evidence to award Fremont, Ruby Crest, or Team Physicians punitive damages against those Defendants against whom you have found liability under the Nevada Unfair Claims Practices Act, if any, for conduct, whether lawful or unlawful, that occurred outside of Nevada.

Additionally, evidence has been received related to persons or entities that are not parties to this lawsuit. Punitive damages may not be used to punish those Defendants against whom you have found liability under the Nevada Unfair Claims Practices Act, if any, for the impact of alleged conduct, whether lawful or unlawful, on persons other than Fremont, Ruby Crest, or Team Physicians.

SOURCE/AUTHORITY:

CACI 3945; BAJI 14.71.1; *Philip Morris USA v. Williams*, 549 U.S. 346, 353–354 (2007) (holding the United States Constitution requires an instruction that punitive damages may not be awarded for a party's conduct related to non-parties); *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 422 (2003) (holding the United States Constitution requires an instruction that punitive damages may not be awarded for a party's conduct that occurred in another State);



1 *White v. Ford Motor Co.*, 312 F.3d 998 (9th Cir. 2002) (holding Nevada jury was required to be
2 instructed that a defendant cannot be punished for conduct, lawful or unlawful, that occurred in
3 another state).
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JURY INSTRUCTION NO. D____

NEVADA PROMPT PAYMENT ACT: INSURERS WHO ISSUE GROUP
POLICIES AND/OR INDIVIDUAL INSURANCE POLICIES

If Defendants UHIC, UnitedHealthcare, UMR, Sierra, or Health Plan of Nevada were obligated under Nevada law to approve or deny a claim submitted by Plaintiffs Fremont, Ruby Crest, and Team Physicians relating to an individual policy of health insurance, group health insurance, or blanket insurance, then Defendants were required to pay the approved claim within 30 days after UHIC, UnitedHealthcare, UMR, Sierra, or Health Plan of Nevada received the claim. If UHIC, UnitedHealthcare, UMR, Sierra, and Health Plan of Nevada, approved a particular claim from Plaintiffs, they were obligated to pay the claim within 30 days after it was approved. Defendants were not permitted to only pay part of an approved claim that was deemed fully payable by Defendants. Whether Defendants deemed a particular claim submitted by Plaintiffs approved and fully payable, and whether they made payment to Plaintiffs within 30 days of making that determination, is an issue of fact for you to decide.

SOURCE/AUTHORITY:

NRS 689B.255 (group and blanket health insurance); NRS 689A.410 (individual health insurance); NRS 683A.0879 (third party administrator); NRS 689C.485 (health insurance for small employers); NRS 695C.185 (HMO).



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.



JURY INSTRUCTION NO. D____

DEFENDANTS' AFFIRMATIVE DEFENSES

Defendants allege five affirmative defenses in response to the Plaintiffs' claims. An affirmative defense is an argument or assertion of fact that, if true, will defeat the Plaintiffs' claim even if all of the facts alleged by the Plaintiffs in support of their claims are true.

If you find that the Defendants have shown any of the following affirmative defenses by a preponderance of the evidence, then you must find against the Plaintiffs' claims:

- Unclean hands doctrine
- Accord and satisfaction
- Waiver
- Laches
- Setoff and/or recoupment

SOURCE/AUTHORITY:

Douglas Disposal, Inc. v. Wee Haul, LLC, 123 Nev. 552, 557, 170 P.3d 508, 513 (2007) ("An affirmative defense is an argument or assertion of fact that, if true, will defeat the plaintiff's claim even if all allegations in the complaint are true.").



JURY INSTRUCTION NO. D____

UNCLEAN HANDS AFFIRMATIVE DEFENSE

Defendants UHIC, UnitedHealthcare, UMR, Sierra, and the Health Plan of Nevada allege that the Plaintiffs Fremont and Ruby Crest may not succeed on their claims due to the unclean hands doctrine. The unclean hands doctrine bars relief to a party who has engaged in improper conduct in the matter in which that party is seeking relief.

If you find that UHIC, UnitedHealthcare, UMR, Sierra, or the Health Plan of Nevada showed, by a preponderance of the evidence, that Fremont and Ruby Crest engaged in improper conduct during the course of their dealings with UHIC, UnitedHealthcare, UMR, Sierra, or the Health Plan of Nevada, you must find that the unclean hands doctrine precludes the Plaintiffs Fremont and Ruby Crest from recovering damages for their claims.

SOURCE/AUTHORITY:

“The doctrine [of unclean hands] bars relief to a party who has engaged in improper conduct in the matter in which that party is seeking relief.” *Truck Ins. Exch. v. Palmer J. Swanson, Inc.*, 124 Nev. 629, 638, 189 P.3d 656, 662 (2008); *Camp v. Jeffer, Mangels, Butler & Marmaro*, 41 Cal. Rptr. 2d 329, 340 (Cal Ct. App. 1995) (“[T]he doctrine of unclean hands may apply to legal as well as equitable claims.”); *Salas v. Sierra Chem. Co.*, 59 Cal. 4th 407, 432, 173 Cal. Rptr. 3d. 689, 707 (Cal. 2014) (“If the required showing is made, unclean hands may be a complete defense to legal as well as equitable causes of action.”); *Len Stoler, Inc. v. Volkswagen Group of Am., Inc.*, 232 F. Supp. 3d 813, 830 n.28 (E.D. Va. 2017) (“[T]he greater weight of authority appears to conclude that the defense of unclean hands also obtains in cases at law.”); *Kerin v. Udolf*, 165 Conn. 264, 269 (Conn. 1973) (“It is . . . well settled that equitable defenses or claims may be raised in an action at law.”); *Bartlett v. Dunne*, 1989 WL 1110258, at *3 (R.I. Super. Nov. 10, 1989) (“While some cases have held that equitable dismissal should be available only when equitable relief is sought, this Court is of the opinion that given the merger of law and equity such limitation is not appropriate.”); *Buchanan Home & Auto Supply Co., Inc. v. Firestone Tire & Rubber Co.*, 544 F. Supp. 242, (D.S.C. 1981) (where retail tire dealer brought suit against manufacturer of tires for breach of contract and related causes of action, court applied the clean hands doctrine and dismissed the action, stating that “[c]ourt opinions and commentaries since the procedural merger of law and equity in 1938 have expressed the view that the clean hands doctrine embodies a general principle equally applicable to damage actions”); *Union Pac. R. Co. v. Chicago & N. W. Ry. Co.*, 226 F. Supp. 400, 410 (N.D. Ill. 1964) (“The clean hands maxim is not peculiar to equity, but expresses a general principle equally applicable to damage actions.”); *Urecal Corp. v. Masters*, 413 F. Supp. 873, 876 (N.D. Ill. 1976) (“In an unfair competition action like the case at bar, where equitable and legal claims are joined, the doctrine of ‘clean hands,’ if indicated by the facts, should preclude recovery on both claims.”); *Maltz v. Sax*, 134 F.2d 2, 5 (7th Cir. 1943) (“As to unclean hands: The maxims of equity are available as defenses in actions at law”); T. Leigh Anenson, *Treating Equity Like Law: A Post-Merger Justification of Unclean Hands*, 45 Am. Bus. L.J. 455, 509 (2008) (“Distinctions between legal and equitable defenses are dead. They were buried with the merger.”).



JURY INSTRUCTION NO. D____

ACCORD AND SATISFACTION AFFIRMATIVE DEFENSE

UHIC, UnitedHealthcare, UMR, Sierra, and Health Plan of Nevada allege that Fremont, Ruby Crest, and Team Physicians may not succeed on their claims due to the doctrine of accord and satisfaction. Under the doctrine of accord and satisfaction, UHIC, UnitedHealthcare, UMR, Sierra, and Health Plan of Nevada allege that Plaintiffs Fremont, Ruby Crest, and Team Physicians agreed to accept additional payments from UHIC, UnitedHealthcare, UMR, Sierra and Health Plan of Nevada in satisfaction of Plaintiffs' requests for additional payment on certain of the at-issue claims for reimbursement. In order to establish accord and satisfaction, UHIC, UnitedHealthcare, UMR, Sierra, and Health Plan of Nevada must prove:

- (1) A bona fide dispute over an unliquidated amount;
- (2) A payment tendered in full settlement of the entire dispute; and
- (3) An understanding by the creditor of the transaction as such, and acceptance of the payment.

If you find that Defendants UHIC, UnitedHealthcare, UMR, Sierra, and Health Plan of Nevada showed the above elements by a preponderance of the evidence, then you must find that the doctrine of accord and satisfaction precludes Plaintiffs Fremont, Ruby Crest, and Team Physicians from recovering damages from UHIC, UnitedHealthcare, UMR, Sierra, and Health Plan of Nevada for the claims where Plaintiffs accepted additional payments from Defendants in satisfaction of Plaintiffs' request for additional payment on those claims.

SOURCE/AUTHORITY:

Pierce Lathing Co. v. ISEC, Inc., 956 P.2d 93, 97, 114 Nev. 291, 297 (Nev. 1998); *Thompson v. Thompson*, 48 Cal. Rptr. 2d 882 (Cal. App. 1996); *Red Alarm, Inc. v. Waycrosse, Inc.*, 47 F.3d 999, 1002 (9th Cir. 1995).



JURY INSTRUCTION NO. D____

LACHES AFFIRMATIVE DEFENSE

UHIC, UnitedHealthcare, UMR, Sierra, and Health Plan of Nevada allege that Fremont, Ruby Crest, and Team Physicians may not succeed on their claims due to the doctrine of laches. The doctrine of laches is an equitable doctrine which may be invoked when delay by one party works to the disadvantage of the other, causing a change of circumstances which would make the grant of relief to the delaying party inequitable. The condition of the party asserting laches must become so changed that the party cannot be restored to its former state.

If you find that UHIC, UnitedHealthcare, UMR, Sierra, and Health Plan of Nevada showed the above elements by a preponderance of the evidence, then you must find that the doctrine of laches precludes Fremont, Ruby Crest, and Team Physicians from recovering damages from UHIC, UnitedHealthcare, UMR, Sierra, and Health Plan of Nevada.

SOURCE/AUTHORITY:

“Laches is an equitable doctrine which may be invoked when delay by one party works to the disadvantage of the other, causing a change of circumstances which would make the grant of relief to the delaying party inequitable.” *Carson City v. Price*, 113 Nev. 409, 412, 934 P.2d 1042, 1043 (1997) (internal quotation marks omitted). “The condition of the party asserting laches must become so changed that the party cannot be restored to its former state.” *Id.* (internal quotation marks omitted); *see also Moseley v. Eighth Judicial Dist. Court*, 124 Nev. 654, 659, 188 P.3d 1136, 1140 n. 6 (2008) (same).



JURY INSTRUCTION NO.D ____

SETOFF AND/OR RECOUPMENT AFFIRMATIVE DEFENSE

UHIC, UnitedHealthcare, UMR, Sierra, and Health Plan of Nevada allege that they are entitled to setoff and/or recoupment of sums with respect to certain claims for which Defendants have already made payment to Fremont, Ruby Crest and Team Physicians.

The right of setoff allows parties that owe mutual debts to each other to assert the amounts owed, subtract one from the other, and pay only the balance.

Recoupment authorizes the recovery of any damages sustained by UHIC, UnitedHealthcare, UMR, Sierra, and/or Health Plan of Nevada, which grow out of, or are connected with, the matters set forth in Fremont, Ruby Crest, and Team Physicians' Complaint.

SOURCE/AUTHORITY:

80 C.J.S. *Set-off & Counterclaim*, § 3 (2000) (setoff "allows parties that owe mutual debts to each other to assert amounts owed, subtract one from the other, and pay only the balance"); *Dakota Partners, L.L.P. v. Glopak, Inc.*, 634 N.W.2d 520, 525 (N.D. 2001); *Darr v. Muratore*, 8 F.3d 854, 860 (1st Cir. 1993); *Finish Line v. J.F. Pate & Associates Contractors, Inc.*, 90 So.3d 749, 754 (Ala. App. 2012); T. Waterman, *A Treatise on the Law of Set-Off, Recoupment and Counter Claim* § 2 at 3 (2d ed. 1872)); *Stern v. Sunset Road Oil Co.*, 47 Cal. App. 334 (Cal. App. 1920) ("A 'set-off' is a creation of statute while a 'recoupment' existed at common law; the former applies to different contracts, while the latter flows from the same contract which forms the foundation of plaintiff's claim.").



CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of November, 2021, a true and correct copy of the foregoing **DEFENDANTS' PROPOSED JURY INSTRUCTIONS (CONTESTED)** 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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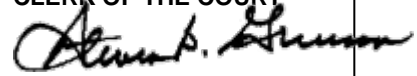
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DISTRICT COURT

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; DOES 1-10; ROE ENTITIES
11-20,

Defendants.

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

**JOINTLY SUBMITTED
JURY INSTRUCTIONS**

The parties submit the following joint jury instructions. The parties agree to the form of these instructions, while reserving the right to object to the submission of any instruction that is not supported by the evidence at trial.

McDONALD CARANO

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Each side will additionally submit contested instructions. The parties further reserve the right to supplement or modify their submissions, whether in the joint or contested groups.

DATED this 14th day of November, 2021.

DATED this 14th day of November, 2021.

AHMAD, ZAVITSANOS, ANAIPAKOS,
ALAVI & MENSING

WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC

By: /s/ Jane Langdell Robinson

By: /s/ Philip Legendy (w/permission)

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Attorneys for Defendants

General Instructions

Instruction No. ____

Members of the Jury:

It is now my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.

You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in these instructions.

NEV. J.I. 1.1 (2018).

Instruction No. ____

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

NEV. J.I. 1.2 (2018).

Instruction No. ____

The parties in this case are corporations. A corporation is entitled to the same fair and unprejudiced treatment as an individual would be under like circumstances, and you should decide the case with the same impartiality you would use in deciding a case between individuals.

NEV. J. I. 1.3 (2018) (modified).

Instruction No. ____

Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess.

A verdict may never be influenced by sympathy, prejudice or public decision. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

NEV. J. I. 1.5 (2018).

Instruction No. ____

If, during this trial, I have said or done anything which has suggested to you that I am inclined to favor the claims or position of any party, you will not be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are or are not worthy of belief, what facts are or are not established, or what inference should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

NEV. J. I. 1.6 (2018).

Instruction No. ____

You must decide all questions of fact in this case from the evidence received in this trial and not from any other source. You must not make any independent investigation of the facts or the law or consider or discuss facts as to which there is no evidence. This means, for example, that you must not on your own visit the scene, conduct experiments or consult reference works for additional information.

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Nev. J.I. 1.8 (2018)

Instruction No. ____

The credibility or believability of a witness should be determined by his or her manner upon the stand, his or her relationship to the parties, his or her fears, motives, interests or feelings, his or her opportunity to have observed the matter to which he or she testified, the reasonableness of his or her statements, and the strength or weakness of his or her recollections.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness, or any portion of his or her testimony which is not proved by other evidence.

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NEV. J.I. 1.9 (2018) (modified to add “or her” in last sentence for consistency).

Instruction No. ____

In determining whether any proposition has been proved, you should consider all evidence bearing on the question without regard to which party produced it.

NEV. J.I. 1.10 (2018).

Instruction No. ____

When you retire to consider your verdict, you must select one of your number to act as foreperson, who will preside over your deliberations and will be your spokesperson here in court.

During your deliberations, you will have all the exhibits which were admitted into evidence, these written instructions and forms of verdict, which have been prepared for your convenience.

In civil actions, three-fourths of the total number of jurors may find and return a verdict. This is a civil action. As soon as six or more of you have agreed upon a verdict, you shall have it signed and dated by your foreperson, and then return with it to this room.

Nev. J.I. 1.14 (2018) (modified to replace “spokesman” with “spokesperson” for consistency).

Instruction No. ____

If, during your deliberations, you should desire to be further informed on any point of law or hear again portions of the testimony, you must reduce your request to writing signed by the foreperson. The officer will then return you to court where the information sought will be given you in the presence of the parties or their attorneys. Remember, the court is not at liberty to supplement the evidence.

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NEV. J.I. 1.15 (2018).

Evidence Instructions

Instruction No. ____

A “preponderance of the evidence” means such evidence as, when considered and weighed against that opposed to it, has more convincing force and produces in your mind a belief that what is sought to be proved is more probably true than not true.

In determining whether a party has met this burden, you will consider all the evidence, whether introduced by the plaintiffs or defendants.

In this case, the standard of proof is the preponderance of evidence, unless I instruct you otherwise.

NEV. J.I. 2.1 (2018) (modified).

Instruction No. ____

The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted to or agreed by counsel.

There are two types of evidence: direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what the witness personally saw or heard or did. Circumstantial evidence is the proof of one or more facts from which you could find another fact. The law makes no distinction between the weight to be given either direct or circumstantial evidence. Therefore, all of the evidence in the case, including the circumstantial evidence, should be considered by you in arriving at your verdict.

Statements, arguments and opinions of counsel are not evidence in the case. However, if the attorneys stipulate (meaning to agree) to the existence of a fact, you must accept the stipulation of evidence and regard that fact as proved.

Questions are not evidence. Only the answer is evidence. You should consider a question only if it helps you understand the witness's answer. Do not assume that something is true just because a question suggests that it is.

You must also disregard any evidence to which an objection was sustained by the court and any evidence ordered stricken by the court. Anything you may have seen or heard outside the courtroom is not evidence and must also be disregarded.

If the court has instructed you that you must accept a fact as proven or draw a particular inference, you must do so.

If the court has instructed you regarding a presumption regarding evidence, then you must consider that presumption as well.

NEV. J.I. 2.3 (2018).

Instruction No. ____

During the trial, you received deposition testimony that was read from the deposition transcript or shown by video. A deposition is the testimony of a person taken before trial. At a deposition, the person took the same oath to tell the truth that would be taken in court and is questioned by the attorneys. You must consider the deposition testimony that was presented to you in the same way as you consider testimony given in court.

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NEV. J.I. 2.8 (2018).

Instruction No. ____

The lawyers and witnesses have shown you some charts and summaries to help explain the facts. Charts and summaries that have not been admitted as evidence are not evidence or proof of any facts.

Certain charts and summaries have been admitted into evidence. These charts and summaries are only as good as the underlying evidence that supports them. You should therefore give them only such weight as you think the underlying evidence deserves.

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NEV. J.I. 2.13 (2018); 9th Cir. J.I. 2.15.

Instructions Regarding Experts

Instruction No. ____

A person who has special knowledge, skill, experience, training or education in particular science, profession or occupation may give his or her opinion as an expert as to any matter in which he or she is skilled. In determining the weight to be given such opinion, you should consider the qualifications and credibility of the expert and the reasons given for his or her opinion. You are not bound by the expert's opinion. Give it the weight, if any, to which you deem it entitled.

Instruction No. ____

Expert witnesses have testified about their reliance upon information that has not been admitted into evidence. Reference by the expert witness to this material is allowed so that the expert witness may tell you what he or she relied upon to form his or her opinions. You may not consider the material as evidence in this case. Rather, you may only consider the material to determine what weight, if any, you will give to the expert's opinions.

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NEV. J.I. 3.2 (2018) (modified); NRS 50.285; NRS 50.305.

Instruction No. ____

Hypothetical questions have been asked of expert witnesses. In a hypothetical question, the expert witness is told to assume the truth of certain facts, and the expert witness is asked to give an opinion based upon those assumed facts. You must decide if all of the facts assumed in the hypothetical question have been established by the evidence. You can determine the effect of that assumption upon the value of the opinion.

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NEV. J.I. 3.3 (2018) (modified).

Contracts Instructions

Instruction No. ____

To succeed on a breach of contract claim, plaintiffs must show four elements:

1. The existence of a valid contract between the parties;
2. Plaintiffs' performance;
3. Defendants' material failure to perform; and
4. Damages resulting from the failure to perform.

Instruction No. ____

If parties to a contract have a dispute as to who owes what duties, the parties may later make a second agreement called an accord. If they do, the parties are bound by the accord.

To establish an accord and satisfaction, the parties asserting it must prove:

1. A good faith dispute under the original contract;
2. A tender of performance in full settlement of the entire dispute; and
3. Acceptance of the performance tendered with the understanding that it fully discharges all obligations arising from the transaction.

Conduct may imply such an understanding, but the parties asserting this defense must establish clearly that there was in fact and in reality a meeting of the minds of the parties on such an understanding that was accompanied by sufficient consideration to make the understanding a contract.

NEV. J.I. 13.33 (2018).

Instruction No. ____

Waiver is the voluntary and intentional relinquishment of a known right. In order to be effective, a waiver must occur with full knowledge of all material facts. A waiver may be implied from conduct that evidences an intention to waive the right, or from conduct that is inconsistent with any intention other than to waive the right. In order to establish a waiver, the intention to waive must clearly appear, and the party relying upon the waiver must have been misled to their prejudice.

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NEV. J.I. 13.38 (2018).

Instruction No. ____

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberations by the evidence as you understand it and remember it to be and by the law as given you in these instructions, and return a verdict which, according to your reason and candid judgment, is just and proper.

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NEV. J.I. 1.16 (2018).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Ahmad, Zavitsanos, Anaipakos, Alavi and Mensing, P.C. and on this 15th day of November, 2021, I caused a true and correct copy of the foregoing **JOINTLY SUBMITTED JURY INSTRUCTIONS** to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

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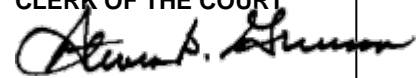
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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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; DOES 1-10; ROE ENTITIES
11-20,

Defendants.

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

**PLAINTIFFS' PROPOSED
JURY INSTRUCTIONS
(CONTESTED)**

Plaintiffs submit the attached proposed jury instructions. These instructions
do not include the jointly proposed instructions that the parties have agreed to as to

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form and submitted separately.

DATED this 15th day of November, 2021.

AHMAD ZAVITSANOS ANAIPAKOS ALAVI
& MENSING

By: /s/ Jane Langdell Robinson

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General Instructions

Instruction No. ____

The term “person,” as used in these instructions, includes corporations and other business entities.

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In re McGill’s Estate, 52 Nev. 35, 280 P. 321, 322 (1929).

Instruction No. ____

In these instructions and your verdict form, these terms have the following meanings:

“Fremont Emergency Services” means plaintiff Fremont Emergency Services (Mandavia), Ltd.

“Team Physicians” means plaintiff Team Physicians of Nevada-Madavia, P.C.

“Ruby Crest Emergency Medicine” means plaintiff Crum, Stefanko and Jones, Ltd. dba Ruby Crest Emergency Medicine.

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Evidence Instructions

Instruction No. ____

“Clear and convincing evidence” is that measure or degree of proof which will produce in your mind a firm belief or conviction as to the allegations sought to be established. It is an intermediate degree of proof, being more than a mere preponderance but not to the extent of such certainty as is required to prove an issue beyond a reasonable doubt. Proof by clear and convincing evidence is proof which persuades you that the truth of the contentions is highly likely.

In determining whether a party has met this burden, you will consider all the evidence, whether introduced by the plaintiffs or defendants.

NEV. J.I. 2.2 (2018) (modified by adding quotation marks around “clear and convincing” and by adding “all of evidence” sentence for consistency with instruction on preponderance of evidence).