Case Nos. 85525 & 85656

In the Supreme Court of Nevada

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

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

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

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

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

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

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

CERTIFICATE OF SERVICE

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

Electronic notification will be sent to the following:

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Attorneys for Amicus Curiae (case no. 85656)

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

The Honorable Nancy L. Allf
DISTRICT COURT JUDGE – DEPT. 27
200 Lewis Avenue
Las Vegas, Nevada 89155

Respondent (case no. 85656)

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John Zavitsanos
Jason S. McManis
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/s/ Jessie M. Helm
An Employee of Lewis Roca Rothgerber Christie LLP

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* Maine Bankruptcy
* Massachusetts Bankruptcy
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* North Carolina Western District
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[redacted]			
2594074	00PCL	07/27/2021	19438-3
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2594074	NYSDC	07/27/2021	19438-3

[redacted]

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152	0	$15.20
19	0	$1.90
		$19.10
73	0	$7.30
17	0	$1.70
17	0	$1.70
1	0	$0.10
3	0	$0.30
60	0	$6.00
1	0	$0.10
3	0	$0.30
75	0	$7.50
17	0	$1.70
131	0	$13.10
169	0	$16.90
30	0	$3.00
6	0	$0.60
1	0	$0.10
		$0.70
8	0	$0.80
28	0	$2.80
19	0	$1.90
35	0	$3.50
93	0	$9.30
3	0	$0.30
75	0	$7.50
6	0	$0.60
1	0	$0.10
33	0	$3.30
		$151.20
30	0	$3.00
39	0	$3.90
1	0	$0.10
30	0	$3.00
15	0	$1.50
62	0	$6.20
5	0	$0.50
29	0	$2.90

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1	0	$0.10
16	0	$1.60
151	0	$15.10
1	0	$0.10
265	0	$26.50
195	0	$19.50
11	0	$1.10
3	0	$0.30
60	0	$6.00
22	0	$2.20
29	0	$2.90
2	0	$0.20
5	0	$0.50
2	0	$0.20
7	0	$0.70
12	0	$1.20
1	0	$0.10
4	0	$0.40
455	0	$45.50
100	0	$10.00
3	0	$0.30
1	0	$0.10
5	0	$0.50
23	0	$2.30
12	0	$1.20
43	0	$4.30
60	0	$6.00
1	0	$0.10
2	0	$0.20
53	0	$5.30
15	0	$1.50
30	0	$3.00
2	0	$0.20
20	0	$2.00
8	0	$0.80
9	0	$0.90
2	0	$0.20
21	0	$2.10
4	0	$0.40
408	0	$40.80
5	0	$0.50
20	0	$2.00
15	0	$1.50
9	0	$0.90
4	0	$0.40
19	0	$1.90
2	0	$0.20
7	0	$0.70
8	0	$0.80
19	0	$1.90
90	0	$9.00
7	0	$0.70
7	0	$0.70
148	0	$14.80
9	0	$0.90

017004

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9	0	$0.90
49	0	$4.90

$270.20

017005

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billing@flashdata365.com

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1221 McKinney St #2500
Houston, Texas 77010

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INVOICE # 9204
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DUE DATE 10/17/2021
TERMS Net 30

CLIENT MATTER	REP	JOB DESCRIPTION
TMH010	55	Depo Transcripts

017006

ACTIVITY	QTY	RATE	AMOUNT
Blowbacks w/ Assembly	44,376	0.11	4,881.36T
Color 8.5x11	4,224	0.65	2,745.60T
Tabs	1,702	0.40	680.80T
Custom Tabs	192	1.00	192.00T
GBC Binding	338	2.50	845.00T

017006

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SUBTOTAL	9,344.76
TAX (8.25%)	770.94
TOTAL	10,115.70
BALANCE DUE	**$10,115.70**

Tax ID 82-2173147

017006

HOLO DISCOVERY

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INVOICE	12867
DATE	10/27/2021
TERMS	Net 30
DUE DATE	11/26/2021

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AZA Law
1221 McKinney, Suite 2500
Houston, TX 77010

ORDERED BY	CLIENT MATTER	REP
Myrna	TMH010	Jon

ACTIVITY	QTY	AMOUNT
Description: Binders		
4 Inch Binder	12	192.00T
Special Delivery	1	45.00
Las Vegas Strip (Vdara)		
Sales Tax		16.08

Total Due	$253.08
Payments/Credits	$0.00
Balance Due	$253.08

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133
1189

017007
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017007

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INVOICE	12865
DATE	10/27/2021
TERMS	Net 30
DUE DATE	11/26/2021

BILL TO

AZA Law
1221 McKinney, Suite 2500
Houston, TX 77010

ORDERED BY	CLIENT MATTER	REP
Myrna Flores	TMH010	Jon

ACTIVITY	QTY	AMOUNT
Description: Print documents		
B/W Printing - Letter Size	8,635	863.50T
Color Digital Printing - Letter Size	2,758	2,178.82T
4 Inch Binder	14	224.00T
Index Tabs - 100+	1,473	662.85T
Sales Tax		329.07

017008

017008

Project Number - 27555
Date Delivered - 10/19/2021

Total Due	$4,258.24
Payments/Credits	$0.00
Balance Due	$4,258.24

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134
1190

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INVOICE	12866
DATE	10/27/2021
TERMS	Net 30
DUE DATE	11/26/2021

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AZA Law
1221 McKinney, Suite 2500
Houston, TX 77010

RCVD: 10-27-21
ENTERED: 10-29-21

ORDERED BY	CLIENT MATTER	REP
Myrna Flores	TMH010	Jon

ACTIVITY	QTY	AMOUNT
Description: OCR PDF Exhibits and Combine		
E-Discovery Technician-Per Hour Download data and upload to processing workspace to OCR. Combine files as lump PDFs. Export and upload to share file link	3	525.00
OCR	29,305	586.10
Sales Tax		0.00

Date: 12-8-21
Check No: 61072
Amount: 1,111.10

Project Number - 27587
Date Delivered - 10/19/2021

Total Due	$1,111.10
Payments/Credits	$0.00
Balance Due	**$1,111.10**

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017009
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INVOICE	13021
DATE	11/19/2021
TERMS	Net 30
DUE DATE	12/19/2021

BILL TO

AZA Law
1221 McKinney, Suite 2500
Houston, TX 77010

ORDERED BY	CLIENT MATTER	REP
Ruth Deres	**TMH010**	Jon

ACTIVITY	QTY	AMOUNT
Description: Print and mount documents		
Color Oversize Board - 3x4	4	600.00T
Sales Tax		50.25

017010

017010

Project Number - 27774
Date Delivered - 11/8/21

Total Due	$650.25
Payments/Credits	$0.00
Balance Due	**$650.25**

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Invoice

INVOICE	13024
DATE	11/19/2021
TERMS	Net 30
DUE DATE	12/19/2021

TMH010

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1221 McKinney, Suite 2500
Houston, TX 77010

ORDERED BY	CLIENT MATTER	REP
Myrna Flores	Rebecca Paradise	Jon

ACTIVITY	QTY	AMOUNT
Description: Print and Comb Bind		
B/W Printing - Letter Size	655	65.50T
Ream of paper - Letter Size	5	50.00T
GBC/Spiral Binding and Covers	3	12.00T
Special Delivery to court	1	45.00
Sales Tax		10.68

017011

017011

Project Number - 27836
Date Delivered - 11/12/21

Total Due	$183.18
Payments/Credits	$0.00
Balance Due	$183.18

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017011

HOLO DISCOVERY

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702.333.4321

Invoice

INVOICE	13023
DATE	11/19/2021
TERMS	Net 30
DUE DATE	12/19/2021

TMH010

BILL TO

AZA Law
1221 McKinney, Suite 2500
Houston, TX 77010

ORDERED BY	CLIENT MATTER	REP
Ruth Deres	Fremont v. UHC	Jon

ACTIVITY	QTY	AMOUNT
Description: Print documents		
B/W Printing - Letter Size	1,072	107.20T
3 Inch Binder	2	26.00T
Index Tabs 1-99	42	14.70T
Index Tabs-Custom	4	3.00T
Sales Tax		12.64

Project Number - 27850
Date Delivered - 11/16/21

Total Due	$163.54
Payments/Credits	$0.00
Balance Due	$163.54

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017012
017012

017012

HOLO DISCOVERY

HOLO Discovery
3016 West Charleston Blvd
Suite 170
Las Vegas, NV 89102
702.333.4321

Invoice

INVOICE	13020
DATE	11/19/2021
TERMS	Net 30
DUE DATE	12/19/2021

BILL TO

AZA Law
1221 McKinney, Suite 2500
Houston, TX 77010

ORDERED BY	CLIENT MATTER	REP
Myrna Flores	TMH010	Jon

ACTIVITY	QTY	AMOUNT
Description: Print Documents		
B/W Printing - Letter Size	5,145	514.50T
Color Digital Printing - Letter Size	2,450	1,935.50T
2 Inch Binder	1	10.00T
4 Inch Binder	10	160.00T
Index Tabs 1-99	99	34.65T
Index Tabs-Custom A-Z	1	0.35T
Index Tabs - 100+	427	192.15T
Sales Tax		238.45

Project Number - 27728
Date Delivered - 11/3/21

Total Due	$3,085.60
Payments/Credits	$0.00
Balance Due	$3,085.60

Thank you for your business. Please make checks payable to HOLO Discovery.
Tax ID: 81-2158838

017013
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017013

HOLO Discovery
3016 West Charleston Blvd
Suite 170
Las Vegas, NV 89102
702.333.4321

Invoice

INVOICE	13022
DATE	11/19/2021
TERMS	Net 30
DUE DATE	12/19/2021

TMH010

BILL TO

AZA Law
1221 McKinney, Suite 2500
Houston, TX 77010

ORDERED BY	CLIENT MATTER	REP
Ruth Deres	Fremont v. UHC	Jon

ACTIVITY	QTY	AMOUNT
Description: Print documents		
B/W Printing - Letter Size	1,482	148.20T
Color Digital Printing - Letter Size	153	120.87T
1.5 Inch Binder	3	27.00T
Sales Tax		24.80

017014

017014

Project Number - 27788
Date Delivered - 11/9/21

Total Due	$320.87
Payments/Credits	$0.00
Balance Due	$320.87

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Tax ID: 81-2158838

017014

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888-541-3547
invoice@flipds.com

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TMH010

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Alavi & Mensing LLP
1221 McKinney St Suite 2500
Houston, TX 77010 USA

INVOICE # 4772
DATE 11/25/2021
DUE DATE 12/25/2021
TERMS Net 30

017015

DESCRIPTION	QTY	RATE	AMOUNT
B&W Digital Prints - Letter/Legal	1,970	0.08	157.60T
Color Digital Printing - Letter/Legal	56	0.55	30.80T
Alpha / Numeric Tabs	21	0.25	5.25T
Redwelds	1	2.00	2.00T
GBC Binding	18	2.50	45.00T

017015

Contact: Christina Tobar
CM# TMH010

Services for October

SUBTOTAL	240.65
TAX (8.25%)	19.85
TOTAL	260.50
BALANCE DUE	**$260.50**

Tax ID: 81-4084406
Thank You For Your Business

017015

FLIP Document Services
1411 Laird Street
Houston, TX 77008
888-541-3547
invoice@flipds.com

FLIP | Document Services

TMH0 10

INVOICE

BILL TO
Ahmad, Zavitsanos, Anaipakos,
Alavi & Mensing LLP
1221 McKinney St Suite 2500
Houston, TX 77010 USA

INVOICE # 4738
DATE 11/30/2021
DUE DATE 12/30/2021
TERMS Net 30

DESCRIPTION	QTY	RATE	AMOUNT
B&W Digital Prints - Letter/Legal	7,092	0.08	567.36T
Alpha / Numeric Tabs	510	0.25	127.50T
Custom Made Tabs	12	0.50	6.00T
3" Binders	6	15.00	90.00T

017016
017016

Contact: Myrna Flores
CM# TMH010

Services for
September 2021

SUBTOTAL	790.86
TAX (8.25%)	65.25
TOTAL	856.11
BALANCE DUE	**$856.11**

Tax ID: 81-4084406
Thank You For Your Business

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TMH010

INVOICE

BILL TO
Ahmad, Zavitsanos, Anaipakos,
Alavi & Mensing LLP
1221 McKinney St Suite 2500
Houston, TX 77010 USA

INVOICE # 4771
DATE 11/25/2021
DUE DATE 12/25/2021
TERMS Net 30

DESCRIPTION	QTY	RATE	AMOUNT
B&W Digital Prints - Letter/Legal	7,889	0.08	631.12T
Alpha / Numeric Tabs	399	0.25	99.75T
3" Binders	6	15.00	90.00T

017017

017017

Contact: Michelle Rivers
CM# TMH010

Services for October

SUBTOTAL	820.87
TAX (8.25%)	67.72
TOTAL	888.59
BALANCE DUE	**$888.59**

Tax ID: 81-4084406
Thank You For Your Business

017017

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1411 Laird Street
Houston, TX 77008
888-541-3547
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TMH010

INVOICE

BILL TO
Ahmad, Zavitsanos, Anaipakos,
Alavi & Mensing LLP
1221 McKinney St Suite 2500
Houston, TX 77010 USA

INVOICE # 4768
DATE 11/25/2021
DUE DATE 12/25/2021
TERMS Net 30

017018

DESCRIPTION	QTY	RATE	AMOUNT
B&W Digital Prints - Letter/Legal	4,350	0.08	348.00T
Color Digital Printing - Letter/Legal	804	0.55	442.20T
Alpha / Numeric Tabs	222	0.25	55.50T
2" Binders	6	10.00	60.00T

017018

Contact: Angela Keniston
CM# TMH010

Services for October

SUBTOTAL	905.70
TAX (8.25%)	74.72
TOTAL	980.42
BALANCE DUE	**$980.42**

Tax ID: 81-4084406
Thank You For Your Business

017018

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FLIP Document Services
1411 Laird Street
Houston, TX 77008
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invoice@flipds.com

FLIP | Document Services

INVOICE

BILL TO
Ahmad, Zavitsanos, Anaipakos,
Alavi & Mensing LLP
1221 McKinney St Suite 2500
Houston, TX 77010 USA

INVOICE # 4739
DATE 11/30/2021
DUE DATE 12/30/2021
TERMS Net 30

DESCRIPTION	QTY	RATE	AMOUNT
B&W Digital Prints - Letter/Legal	5,530	0.08	442.40T
Color Digital Printing - Letter/Legal	2,594	0.55	1,426.70T
Alpha / Numeric Tabs	658	0.25	164.50T
Custom Made Tabs	6	0.50	3.00T
GBC Binding	6	2.50	15.00T
1" Binders	6	8.00	48.00T
3" Binders	5	15.00	75.00T
OCR - Searchable Text	5,542	0.02	110.84T
Electronic Bates Labeling	5,542	0.01	55.42T
Tech Time - Merging PDF, Exhibit Stamping	6	35.00	210.00T

Contact: Ruth Deres
CM# TMH010

Services for
September 2021

SUBTOTAL	2,550.86
TAX (8.25%)	210.45
TOTAL	2,761.31
BALANCE DUE	**$2,761.31**

Tax ID: 81-4084406
Thank You For Your Business

017019
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FLIP Document Services
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TMH010

INVOICE

BILL TO
Ahmad, Zavitsanos, Anaipakos,
Alavi & Mensing LLP
1221 McKinney St Suite 2500
Houston, TX 77010 USA

INVOICE # 4769
DATE 11/25/2021
DUE DATE 12/25/2021
TERMS Net 30

017020

DESCRIPTION	QTY	RATE	AMOUNT
B&W Digital Prints - Letter/Legal	9,014	0.08	721.12T
Color Digital Printing - Letter/Legal	2,688	0.55	1,478.40T
Redwelds	3	2.00	6.00T
Tech Time- Exhibit Stamping and Merging PDFs with Bookmarks	4	35.00	140.00T
Alpha / Numeric Tabs	186	0.25	46.50T
GBC Binding	36	2.50	90.00T
Tech Time - Exhibit Stamping	6	35.00	210.00T
Electronic Bates Labeling	8,326	0.01	83.26T
OCR - Searchable Text	8,326	0.02	166.52T

017020

Contact: Ruth Deres
CM# TNH010

Services for October

SUBTOTAL	2,941.80
TAX (8.25%)	242.70
TOTAL	3,184.50
BALANCE DUE	**$3,184.50**

Tax ID: 81-4084406
Thank You For Your Business

FLIP Document Services
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Houston, TX 77008
888-541-3547
invoice@flipds.com

TMH010

INVOICE

BILL TO
Ahmad, Zavitsanos, Anaipakos,
Alavi & Mensing LLP
1221 McKinney St Suite 2500
Houston, TX 77010 USA

INVOICE # 4766
DATE 11/25/2021
DUE DATE 12/25/2021
TERMS Net 30

DESCRIPTION	QTY	RATE	AMOUNT
B&W Digital Prints - Letter/Legal	8,534	0.08	682.72T
Color Digital Printing - Letter/Legal	7,624	0.55	4,193.20T
Alpha / Numeric Tabs	1,800	0.25	450.00T
3" Binders	12	15.00	180.00T
Tech Time- Exhibit Stamping and Merging PDFs with Bookmark	6	35.00	210.00T
OCR - Searchable Text	1,222	0.02	24.44T
Electronic Bates Labeling	1,222	0.01	12.22T

Contact: Myrna Flores
CM# TMH010

Services for October

SUBTOTAL	5,752.58
TAX (8.25%)	474.59
TOTAL	6,227.17
BALANCE DUE	**$6,227.17**

Tax ID: 81-4084406
Thank You For Your Business

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FLIP Document Services
1411 Laird Street
Houston, TX 77008
888-541-3547
invoice@flipds.com

FLIP | Document Services

TMH010

INVOICE

RCVD: 11-28-21
ENTERED: 11-30-21

BILL TO
Ahmad, Zavitsanos, Anaipakos,
Alavi & Mensing LLP
1221 McKinney St Suite 2500
Houston, TX 77010 USA

INVOICE # 4772
DATE 11/25/2021
DUE DATE 12/25/2021
TERMS Net 30

DESCRIPTION	QTY	RATE	AMOUNT
B&W Digital Prints - Letter/Legal	1,970	0.08	157.60T
Color Digital Printing - Letter/Legal	56	0.55	30.80T
Alpha / Numeric Tabs	21	0.25	5.25T
Redwelds	1	2.00	2.00T
GBC Binding	18	2.50	45.00T

Contact: Christina Tobar
CM# TMH010

Services for October

SUBTOTAL	240.65
TAX (8.25%)	19.85
TOTAL	260.50
BALANCE DUE	**$260.50**

Date: 12-9-21
Check No: 61086
Amount: 260.50

Tax ID: 81-4084406
Thank You For Your Business

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FLIP Document Services
1411 Laird Street
Houston, TX 77008
888-541-3547
invoice@flipds.com

FLIP | Document Services

TMH010

INVOICE

RCVD: 11-28-21
ENTERED: 11-30-21

BILL TO
Ahmad, Zavitsanos, Anaipakos,
Alavi & Mensing LLP
1221 McKinney St Suite 2500
Houston, TX 77010 USA

INVOICE # 4771
DATE 11/25/2021
DUE DATE 12/25/2021
TERMS Net 30

DESCRIPTION	QTY	RATE	AMOUNT
B&W Digital Prints - Letter/Legal	7,889	0.08	631.12T
Alpha / Numeric Tabs	399	0.25	99.75T
3" Binders	6	15.00	90.00T

017023
017023

Contact: Michelle Rivers
CM# TMH010

Services for October

SUBTOTAL	820.87
TAX (8.25%)	67.72
TOTAL	888.59
BALANCE DUE	**$888.59**

Date: 12-9-21
Check No: 61086
Amount: 888.59

Tax ID: 81-4084406
Thank You For Your Business

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FLIP Document Services
1411 Laird Street
Houston, TX 77008
888-541-3547
invoice@flipds.com

FLIP | Document Services

TMH010

RCVD: 11-28-21
ENTERED: 11-30-21

INVOICE

BILL TO
Ahmad, Zavitsanos, Anaipakos,
Alavi & Mensing LLP
1221 McKinney St Suite 2500
Houston, TX 77010 USA

INVOICE # 4769
DATE 11/25/2021
DUE DATE 12/25/2021
TERMS Net 30

DESCRIPTION	QTY	RATE	AMOUNT
B&W Digital Prints - Letter/Legal	9,014	0.08	721.12T
Color Digital Printing - Letter/Legal	2,688	0.55	1,478.40T
Redwelds	3	2.00	6.00T
Tech Time- Exhibit Stamping and Merging PDFs with Bookmarks	4	35.00	140.00T
Alpha / Numeric Tabs	186	0.25	46.50T
GBC Binding	36	2.50	90.00T
Tech Time - Exhibit Stamping	6	35.00	210.00T
Electronic Bates Labeling	8,326	0.01	83.26T
OCR - Searchable Text	8,326	0.02	166.52T

Contact: Ruth Deres
CM# TNH010

Services for October

SUBTOTAL	2,941.80
TAX (8.25%)	242.70
TOTAL	3,184.50
BALANCE DUE	**$3,184.50**

Date: 12-9-21
Check No: 61086
Amount: 3,184.50

Tax ID: 81-4084406
Thank You For Your Business

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FLIP Document Services
1411 Laird Street
Houston, TX 77008
888-541-3547
invoice@flipds.com

FLIP | Document Services

TMH010

INVOICE

RCVD: 11-28-21
ENTERED: 11-30-21

BILL TO
Ahmad, Zavitsanos, Anaipakos,
Alavi & Mensing LLP
1221 McKinney St Suite 2500
Houston, TX 77010 USA

INVOICE # 4768
DATE 11/25/2021
DUE DATE 12/25/2021
TERMS Net 30

DESCRIPTION	QTY	RATE	AMOUNT
B&W Digital Prints - Letter/Legal	4,350	0.08	348.00T
Color Digital Printing - Letter/Legal	804	0.55	442.20T
Alpha / Numeric Tabs	222	0.25	55.50T
2" Binders	6	10.00	60.00T

Contact: Angela Keniston
CM# TMH010

Services for October

SUBTOTAL	905.70
TAX (8.25%)	74.72
TOTAL	980.42
BALANCE DUE	**$980.42**

Date: 12-9-21
Check No: 61086
Amount: 980.42

Tax ID: 81-4084406
Thank You For Your Business

017025
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FLIP Document Services
1411 Laird Street
Houston, TX 77008
888-541-3547
invoice@flipds.com

FLIP | Document Services

TMH010

INVOICE

RCVD: 11-28-21
ENTERED: 11-30-21

BILL TO
Ahmad, Zavitsanos, Anaipakos,
Alavi & Mensing LLP
1221 McKinney St Suite 2500
Houston, TX 77010 USA

INVOICE # 4766
DATE 11/25/2021
DUE DATE 12/25/2021
TERMS Net 30

DESCRIPTION	QTY	RATE	AMOUNT
B&W Digital Prints - Letter/Legal	8,534	0.08	682.72T
Color Digital Printing - Letter/Legal	7,624	0.55	4,193.20T
Alpha / Numeric Tabs	1,800	0.25	450.00T
3" Binders	12	15.00	180.00T
Tech Time- Exhibit Stamping and Merging PDFs with Bookmark	6	35.00	210.00T
OCR - Searchable Text	1,222	0.02	24.44T
Electronic Bates Labeling	1,222	0.01	12.22T

Contact: Myrna Flores
CM# TMH010

Services for October

SUBTOTAL	5,752.58
TAX (8.25%)	474.59
TOTAL	6,227.17
BALANCE DUE	**$6,227.17**

Date: 12-9-21
Check No: 61086
Amount: 6,227.17

Tax ID: 81-4084406
Thank You For Your Business

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FLIP Document Services
1411 Laird Street
Houston, TX 77008
888-541-3547
invoice@flipds.com

FLIP | Document Services

TMH010

RCVD: 11-28-21
ENTERED: 11-30-21

INVOICE

BILL TO
Ahmad, Zavitsanos, Anaipakos,
Alavi & Mensing LLP
1221 McKinney St Suite 2500
Houston, TX 77010 USA

INVOICE # 4738
DATE 11/30/2021
DUE DATE 12/30/2021
TERMS Net 30

DESCRIPTION	QTY	RATE	AMOUNT
B&W Digital Prints - Letter/Legal	7,092	0.08	567.36T
Alpha / Numeric Tabs	510	0.25	127.50T
Custom Made Tabs	12	0.50	6.00T
3" Binders	6	15.00	90.00T

Contact: Myrna Flores
CM# TMH010

Services for
September 2021

SUBTOTAL	790.86
TAX (8.25%)	65.25
TOTAL	856.11
BALANCE DUE	**$856.11**

Date: 12-9-21
Check No: 61088
Amount: 856.11

Tax ID: 81-4084406
Thank You For Your Business

017027
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TMH010

FLIP Document Services
1411 Laird Street
Houston, TX 77008
888-541-3547
invoice@flipds.com

FLIP | Document Services

INVOICE

RCVD: 11-28-21
ENTERED: 11-30-21

BILL TO
Ahmad, Zavitsanos, Anaipakos,
Alavi & Mensing LLP
1221 McKinney St Suite 2500
Houston, TX 77010 USA

INVOICE # 4739
DATE 11/30/2021
DUE DATE 12/30/2021
TERMS Net 30

DESCRIPTION	QTY	RATE	AMOUNT
B&W Digital Prints - Letter/Legal	5,530	0.08	442.40T
Color Digital Printing - Letter/Legal	2,594	0.55	1,426.70T
Alpha / Numeric Tabs	658	0.25	164.50T
Custom Made Tabs	6	0.50	3.00T
GBC Binding	6	2.50	15.00T
1" Binders	6	8.00	48.00T
3" Binders	5	15.00	75.00T
OCR - Searchable Text	5,542	0.02	110.84T
Electronic Bates Labeling	5,542	0.01	55.42T
Tech Time - Merging PDF, Exhibit Stamping	6	35.00	210.00T

Contact: Ruth Deres
CM# TMH010

Services for
September 2021

SUBTOTAL	2,550.86
TAX (8.25%)	210.45
TOTAL	2,761.31
BALANCE DUE	**$2,761.31**

Date: 12-9-21
Check No: 61088
Amount: 2,761.31

Tax ID: 81-4084406
Thank You For Your Business

017028
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TmH010

HOLO DISCOVERY

HOLO Discovery
3016 West Charleston Blvd
Suite 170
Las Vegas, NV 89102
702.333.4321

Invoice

INVOICE	13244
DATE	12/21/2021
TERMS	Net 30
DUE DATE	1/20/2022

RCVD: 12-21-21
ENTERED:

BILL TO

AZA Law
1221 McKinney, Suite 2500
Houston, TX 77010

ORDERED BY	CLIENT MATTER	REP
Myrna Flores	Fremont v. Unitedhealth	Jon

ACTIVITY	QTY	AMOUNT
CLIENT MATTER: FREMONT EMERGENCY SERVICES vs. UNITEDHEALTH GROUP, INC.		
Description: Deliver 50 boxes		
Box	50	150.00T
Special Delivery - Vdara Hotel	2	90.00
Sales Tax		12.56

Project Number - 27916
Date Delivered - 11/23/21

Total Due	$252.56
Payments/Credits	$0.00
Balance Due	**$252.56**

Thank you for your business. Please make checks payable to HOLO Discovery.
Tax ID: 81-2158838

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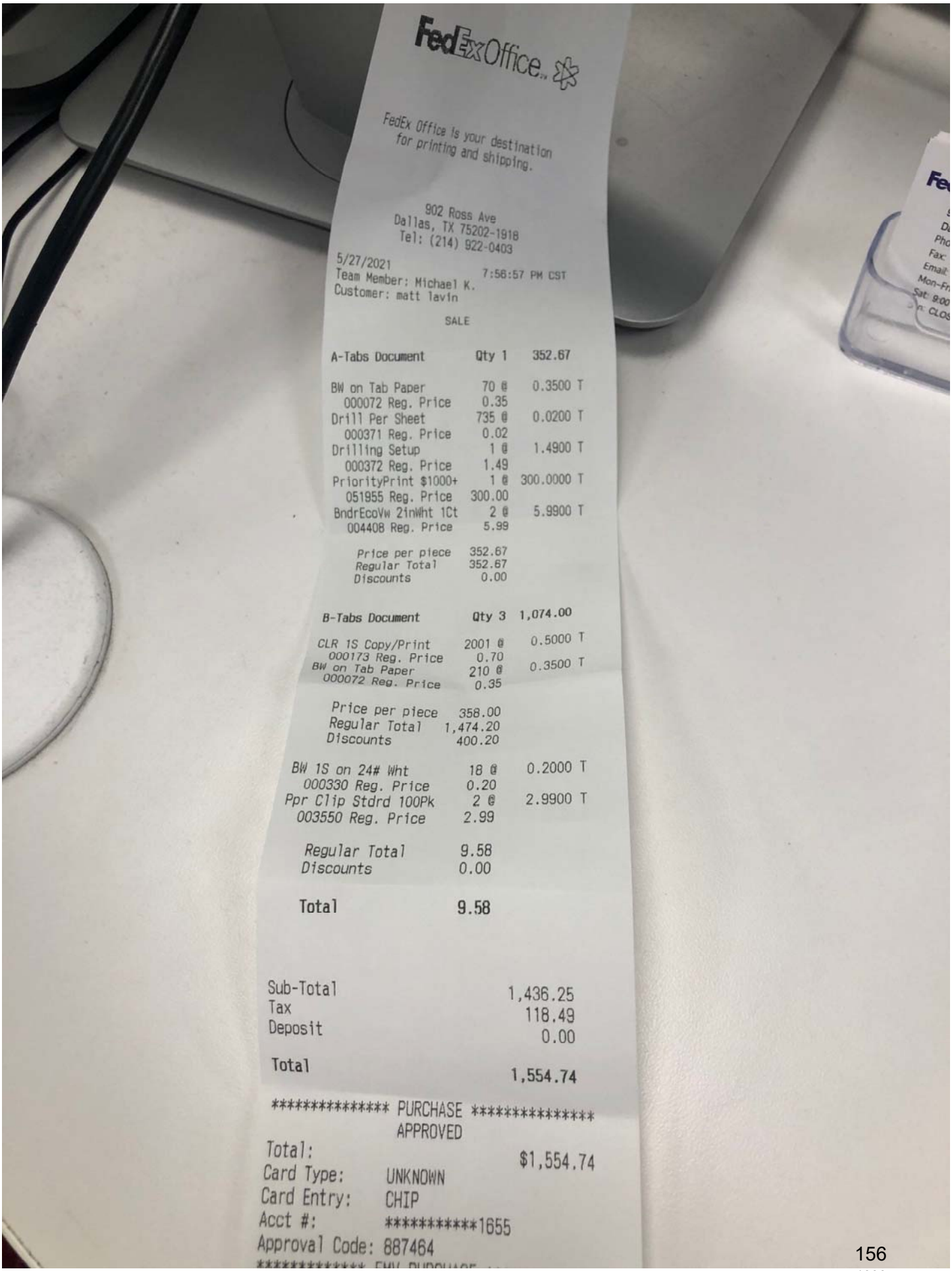

FedEx Office

FedEx Office is your destination
for printing and shipping.

902 Ross Ave
Dallas, TX 75202-1918
Tel: (214) 922-0403

5/27/2021 7:56:57 PM CST
Team Member: Michael K.
Customer: matt lavin

SALE

A-Tabs Document	Qty 1	352.67
BW on Tab Paper	70 @	0.3500 T
000072 Reg. Price	0.35	
Drill Per Sheet	735 @	0.0200 T
000371 Reg. Price	0.02	
Drilling Setup	1 @	1.4900 T
000372 Reg. Price	1.49	
PriorityPrint $1000+	1 @	300.0000 T
051955 Reg. Price	300.00	
BndrEcoVw 2inWht 1Ct	2 @	5.9900 T
004408 Reg. Price	5.99	
Price per piece	352.67	
Regular Total	352.67	
Discounts	0.00	
B-Tabs Document	Qty 3	1,074.00
CLR 1S Copy/Print	2001 @	0.5000 T
000173 Reg. Price	0.70	
BW on Tab Paper	210 @	0.3500 T
000072 Reg. Price	0.35	
Price per piece	358.00	
Regular Total	1,474.20	
Discounts	400.20	
BW 1S on 24# Wht	18 @	0.2000 T
000330 Reg. Price	0.20	
Ppr Clip Stdrd 100Pk	2 @	2.9900 T
003550 Reg. Price	2.99	
Regular Total	9.58	
Discounts	0.00	
Total	9.58	

Sub-Total	1,436.25
Tax	118.49
Deposit	0.00
Total	1,554.74

********** PURCHASE **********
APPROVED

Total:	$1,554.74
Card Type:	UNKNOWN
Card Entry:	CHIP
Acct #:	**********1655
Approval Code:	887464

********** EMV PURCHASE ...

017030
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FedEx Office

5962 W Northwest Hwy
Dallas, TX 75225-3202
Tel: (214) 361-2121

Order Date: 06/14/2021 Branch: 0178
Order Time: 14:08:00 Register: 6
Pickup Date: 06/14/2021
Pickup Time: 23:00
Team Member: Michael R.

017802YB01

Customer: Matt Lavine

Project Name:	
bw 3 hole drill	473.33
1 @ 646.73	
CLR 1S Copy/Print	867 @ 0.70
BW on Tab Paper	60 @ 0.35
Drill Per Sheet	867 @ 0.02
Drilling Setup	1 @ 1.49
Project Name:	
bw 3 hole drill	867.00
2 @ 606.90	
CLR 1S Copy/Print	1734 @ 0.70
Project Name:	
SD	311.98
1 @ 311.98	
BndrEcoVw 2inWht 1Ct	2 @ 5.99
PriorityPrint $1000+	1 @ 300.00
Deposit	0.00
Sub-Total	2172.51
Discount	520.20
Tax	136.32
Total Amount	1788.63

017802YB01

This is not a receipt
All prices shown are estimates

Thank you for visiting

FedEx Office
Make It. Print It. Pack It. Ship It.
fedex.com/office

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Business Center Services

DATE	QUANTITY	AMOUNT	DESCRIPTION	REFERENCE
6/14/2021	53	$53.00	Admin/Secretarial - Variable	Copying- Documents
6/14/2021	712	$0.00	B&W Prints per page	
6/14/2021	460	$345.00	Color Copies per page	
6/14/2021	782	$586.50	Color Copies per page	
6/14/2021	2067	$1,550.25	Color Prints per page	
6/14/2021	20	$20.00	Admin/Secretarial - Variable	FedEx Packages
Sum:		**$2,554.75**		

FedEx

017032

DATE	QUANTITY	AMOUNT	DESCRIPTION	REFERENCE
5/25/2021	1	$6.18	FedEx - residential/fuel charges	THE CLARK LAW FIRM
5/25/2021	1	$170.49	FedEx-First Overnight/International	THE CLARK LAW FIRM
Sum:		**$176.67**		

017032

Fees

	AMOUNT	DESCRIPTION	REFERENCE
1		Restoration Fee	
1		Restoration Fee	
1		Late Fee	
Sum:			

CARR WORKPLACES

Napoli Shkolnik

400 Broadhollow Rd
Suite 305

Melville, NY 11747

Preferred Offices Properties LLC
PBC Tysons, LLC
1750 Tysons Blvd Suite 1500
Tysons , VA 22102

Invoice Date:	7/28/2021
Due Date:	8/1/2021
Invoice Number:	026-12357
Balance Forward:	$3,262.17
Payments/Credits:	$0.00
Current Invoice Amount	$7,338.65
Ending Balance:	**$10,600.82**

Pay online now

YOUR INVOICE

017033

CURRENT CHARGES	
Monthly Office Charge	$2,235.79
Virtual Services	$67.90
Parking	$135.00
Business Center Services	$3,482.25
FedEx	$530.21
Fees	$670.76
Tax @ 6%	$216.74
Invoice Total	**$7,338.65**

017033

Introducing triple referrals by Carr Workplaces. We will triple the payout to our clients from July through September on all private office and virtual office referrals submitted with a one-year minimum term length.

Contact your center team to learn more.

Business Center Services

017034

DATE	QUANTITY	AMOUNT	DESCRIPTION	REFERENCE
7/14/2021	485	$0.00	B&W Prints per page	
7/14/2021	1548	$1,161.00	Color Copies per page	
7/14/2021	3095	$2,321.25	Color Prints per page	
7/14/2021	54	$0.00	B&W Copies per page	
Sum:		**$3,482.25**		

FedEx

DATE	QUANTITY	AMOUNT	DESCRIPTION	REFERENCE
6/11/2021	1	$21.80	FedEx - residential/fuel charges	Matt Lavin TX
6/11/2021	1	$23.06	FedEx - residential/fuel charges	Matt Lavin TX
6/11/2021	1	$162.89	FedEx-First Overnight/International	Matt Lavin TX
6/11/2021	1	$128.09	FedEx-First Overnight/International	Matt Lavin TX
6/25/2021	1	$24.58	FedEx - residential/fuel charges	Matt Lavin
6/25/2021	1	$169.79	FedEx-First Overnight/International	Matt Lavin
Sum:		**$530.21**		

017034

017034

Fees

DATE	QUANTITY	AMOUNT	DESCRIPTION	REFERENCE
7/6/2021	1		Late Fee	
Sum:				

DATE	QUANTITY	AMOUNT	DESCRIPTION	REFERENCE
8/17/2020	1	$16.00	Parking - Validations	
8/19/2020	1	$16.00	Parking - Validations	
8/20/2020	1	$16.00	Parking - Validations	
8/25/2020	1	$16.00	Parking - Validations	
10/1/2020	1	$135.00	Parking - Contracted	10/1/2020 - 10/31/2020
10/1/2020	1	$135.00	Parking - Contracted	10/1/2020 - 10/31/2020
10/1/2020	1	$135.00	Parking - Contracted	10/1/2020 - 10/31/2020
Sum:		**$469.00**		

IT Services

DATE	QUANTITY	AMOUNT	DESCRIPTION	REFERENCE
10/1/2020	1	$50.00	Additional Person - Internet	10/1/2020 - 10/31/2020
Sum:		**$50.00**		

017035

017035

Facilities Services

DATE	QUANTITY	AMOUNT	DESCRIPTION	REFERENCE
8/20/2020	1	$5.00	Additional Key	Office 1572
Sum:		**$5.00**		

Business Center Services

DATE	QUANTITY	AMOUNT	DESCRIPTION	REFERENCE
9/15/2020	186	$0.00	B&W Prints per page	
9/15/2020	358	$268.50	Color Prints per page	
9/15/2020	4	$0.00	Scanning per page	
Sum:		**$268.50**		

Telecommunications

DATE	QUANTITY	AMOUNT	DESCRIPTION	REFERENCE
10/1/2020	1	$50.00	Additional Person - Telephone	10/1/2020 - 10/31/2020

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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' OPPOSITION TO PLAINTIFFS' MOTION FOR ATTORNEYS' FEES

Hearing Date: May 11, 2022
Hearing Time: 9:30 a.m.

Case Number: A-19-792978-B

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

Defendants.

Defendants UnitedHealth Group, Inc., UnitedHealthcare Insurance Company ("UHIC"), United HealthCare Services, Inc. ("UHS", and together with UHIC, "UHC"), UMR, Inc. ("UMR"), Oxford Health Plans, Inc. ("Oxford"), Sierra Health and Life Insurance Co., Inc. ("SHL"), Sierra Health-Care Options, Inc. ("SHO"), and Health Plan of Nevada, Inc. ("HPN") (collectively "Defendants") hereby submit their Opposition to TeamHealth Plaintiffs' Motion for Attorneys' Fees.

This Opposition is made and based upon the following Memorandum of Points and Authorities, the pleadings and papers on file herein, and any argument presented at the time of hearing on this matter.

Dated this 20th day of April, 2022.

/s/ Colby L. Balkenbush

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

By their Motion, TeamHealth Plaintiffs[1] ask this Court to award a windfall in attorneys' fees—nearly **thirteen million dollars**. While Nevada law and NRS 683A.0879(5) provide that *reasonable* attorney's fees may be awarded to a prevailing party, TeamHealth Plaintiffs' demand is unconscionable and unprecedented.

TeamHealth Plaintiffs' invoices feature all of the hallmarks of excessive billing: block-billing, inflated rates, duplicative time entries due to the involvement of four separate law firms, excessive time, and vague entries. The defects with TeamHealth Plaintiffs' counsel's time entries are countless. This Court should deny TeamHealth Plaintiffs' Motion for Attorneys' Fees outright because the fees requested are unreasonably high. Alternatively, taking into account the exorbitant rates and other defects detailed herein, this Court should apply an across the board seventy percent (70%) reduction to the $12,683,044.41 in fees sought by TeamHealth Plaintiffs.[2] Under the circumstances, this would be reasonable, generous, and supported by the *Brunzell* factors.

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II. LEGAL ARGUMENT

Courts must only award "reasonable" attorney fees. *See O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. 550, 557-58, 429 P.3d 664, 670 (Nev. App. 2018). TeamHealth Plaintiffs allege that their counsel billed nearly thirteen million dollars in attorneys' fees, across four separate law firms. While their counsel provided an affidavit stating that the amount is "believed to be reasonable," the affidavit does not state the basis for that contention, or otherwise attest that the rates are commensurate with the "***prevailing***" rates billed in Nevada for similar services. The distinction between a rate the client may have "*reasonably*" agreed to as part of an arms-length transaction and the "*prevailing*" rate in the local community is a critical one for purposes of

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

[2] A 70% reduction would amount to an award of no more than $3,804,913.32 in attorney fees.

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Plaintiffs' Motion. While Plaintiffs were free to agree to pay their attorneys an above-market rate, when it comes to a fee-shifting motion, Plaintiffs may not recover more than the prevailing rate in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.

Indeed, the rates billed by Plaintiffs' Texas, New York, and Florida law firms are not comparable to the rates typically billed by Nevada attorneys on similar matters, as demonstrated by the fee award cases discussed below and by the Declaration of Matthew T. Dushoff attached as **Exhibit 1**.[3] The rates of McDonald Carano are also elevated beyond the prevailing Nevada rates. For these reasons, and because the time is otherwise inflated, duplicative, and outright excessive, the Court should significantly reduce the fee award sought by TeamHealth Plaintiffs.

A. The attorney fees sought by TeamHealth Plaintiffs must be significantly reduced because they are unreasonable

The accepted standard in establishing a reasonable hourly rate is the "rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation." *Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973, 980 (9th Cir. 2008) ("Here, however, the district court erred by not identifying the relevant community, and by not explaining what was the prevailing hourly rate in that community for similar services by lawyers of reasonably comparable skill, experience and reputation."). Nevada federal courts, as well as the Ninth Circuit, have held that "[a]ffidavits of the [movant's] attorney and other attorneys regarding prevailing fees in the community, and rate determinations in other cases, particularly those setting a rate for the [movant's] attorney, are satisfactory evidence of the prevailing market rate." *Harper v. Nevada Prop. 1, LLC*, 2021 WL 3418350 (D. Nev. Aug. 5, 2021) citing *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990). "The Court may also rely on its own familiarity with the rates in the community to analyze those sought in the pending case." *Id.* citing *Ingram v. Oroudjian*, 647 F.3d 925, 928 (9th Cir. 2011). TeamHealth Plaintiffs have not provided

[3] Mr. Dushoff did not receive any compensation for drafting the attached declaration.

any evidence to support that the rates sought in their motion are typical for the Las Vegas community.

To determine the amount of attorney fees to award, courts often use a "lodestar" or a contingency calculation method. *See Hsu v. County of Clark*, 123 Nev. 625, 636, 173 P.3d 724, 732 (2007); *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864, 124 P.3d 530, 548 (2005). A contingency calculation is not at issue here. The "lodestar" method involves multiplying "the number of hours reasonably spent on the case by a reasonable hourly rate." *Herbst v. Humana Health Ins. of Nevada, Inc.*, 105 Nev. 586, 590, 781 P.2d 762, 764 (1989). In doing so, courts are not confined to "billing records or hourly statements." *See O'Connell*, 134 Nev. at 558, 429 P.3d at 671. Pursuant to the *Brunzell* decision, district courts should consider the following factors:

> (1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the important missing word? of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived.

Brunzell v. Golden Gate Nat. Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). The party moving for attorney fees must carry the burden of showing the reasonableness of the fees sought. *See Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986). Here, the attorney fees sought by TeamHealth Plaintiffs are unreasonable and exceed what has been found reasonable by courts in Nevada.

1. Plaintiffs may not recover attorneys' fees billed at rates that exceed the prevailing rate in Las Vegas

Defendants do not dispute that the attorneys from Nevada, Texas, New York, Washington D.C. and Florida hired by Plaintiffs to work on this case are skilled and experienced litigators with good reputations in their respective legal communities. And Plaintiffs were within their rights to pay their attorneys at hourly rates far above the prevailing hourly rate in the Las Vegas community for skilled commercial litigators. However, the case law is clear that, having made such a decision,

Plaintiffs may not then shift the burden of paying these above market hourly rates to Defendants via their Motion. Plaintiffs may not recover the non-local rates of their attorneys even if the rates charged by Plaintiffs' out-of-state law firms are the prevailing rates in large cities like New York and Washington, D.C.

The *Indyne* case is directly on point. There, the defendants hired attorneys from Washington, D.C. with special expertise to litigate a case in Orlando, Florida. These Washington, D.C. attorneys charged hourly rates far in excess of the prevailing Orlando rates and the court declined to allow a recovery beyond the prevailing rate in Orlando, stating:

> The Court finds Defendants' proposed rates to be excessive compared for commercial litigation in Orlando. The rates claimed for the out of state lawyers may well be reasonable for copyright actions (or, as Defendants argue, "government contract cases") in Washington, D.C. or other larger cities, but they are not in keeping with rates in the relevant community of Orlando. The general rule is that the "relevant market" for purposes of determining the reasonable hourly rate for an attorney's services is "the place where the case is filed. If a fee applicant desires to recover the non-local rates of an attorney who is not from the place in which the case was filed, he must show a lack of attorneys practicing in that place who are willing and able to handle his claims.

Indyne, Inc. v. Abacus Tech. Corp., No. 611CV137ORL22DAB, 2013 WL 11312471, at *19 (M.D. Fla. Dec. 6, 2013), report and recommendation adopted as modified, No. 6:11-CV-137-ORL-22, 2014 WL 1400658 (M.D. Fla. Feb. 25, 2014), aff'd, 587 F. App'x 552 (11th Cir. 2014) ("Like any litigants, Defendants were free within their means to employ whichever and however many attorneys they wish and to give them free rein in devoting resources in defending an action. When seeking to shift the cost of such a defense to a losing adversary, however, those choices are subject to scrutiny, and the fee to be shifted may be more limited than the amount reasonably billed to and accepted by a client.").

Other cases are also in accord. *Am. C.L. Union of Georgia v. Barnes*, 168 F.3d 423, 437 (11th Cir. 1999) ("If a fee applicant desires to recover the non-local rates of an attorney who is not from the place in which the case was filed, he must show a lack of attorneys practicing in that place who are willing and able to handle his claims."); *Brooks v. Georgia State Board of Elections*, 997 F.2d 857, 869 (11th Cir. 1993) (upholding decision to award non-local rates based on the

district court's finding that there were no local attorneys who could have handled the case); *American Charities for Reasonable Fundraising Regulation, Inc. v. Pinellas County*, 278 F.Supp.2d 1301, 1310 n.4 (M.D.Fla.2003); *Essex Builders Group, Inc. v. Amerisure Ins. Co.*, 604CV1838ORL22JGG, 2007 WL 9624720, at *7 (M.D. Fla. 2007) ("The Court finds that use of multiple law firms resulted in duplication of effort and excessive billings. As the redundant time entries are so numerous so as to make an itemization impractical, the Court will deduct an additional 30% from the fees sought.").

Therefore, if Defendants show, through affidavits and local case law on typical fee awards and hourly rates, that the rates charged by Plaintiffs' counsel are in excess of the "prevailing rate" in Las Vegas, this Court must reduce any fee award to the prevailing rate.

2. The rates charged by Plaintiffs' counsel must be reduced because they exceed the prevailing rate for complex commercial litigation in Las Vegas

Courts in Nevada, in recent years, have provided guidance for prevailing and reasonable rates. The following collected cases demonstrate the range of reasonableness for local practitioners:

- *First 100, LLC v. Just*, No. A-14-705993-B, 2020 WL 7681259, at *2 (Nev. Dist. Ct. July 29, 2020) (Finding rates for partner, which began at $295 and ended at $495, and for another partner, which began at $195 per hour and ended at $395 per hour, to be reasonable. Prior to opening Maier Gutierrez, the firm's partners previously worked for large law firms such as Greenberg Traurig and Beckley Singleton.);
- *Chemeon Surface Tech., LLC v. Metalast Int'l, Inc.*, 2017 WL 2434296, at *1 (D. Nev. June 5, 2017) ("The court therefore surveys recent orders awarding attorney's fees and finds that the following are reasonable hourly rates: $375 for a partner; $250 for an associate; and $125 for a paralegal.");
- *Courtier v. Arteaga*, No. A-20-809367-C, 2022 WL 1058106, at *3 (Nev. Dist. Ct. Feb. 17, 2022) ("finding attorney's hourly rate of $450 to be reasonable in the Southern Nevada community," and noting that a "$600 hourly rate . . . is on the high end for attorneys in Southern Nevada, [but] within the range for experienced attorneys," and noting that where

hours are billed "as 'Review file' or 'Trial Prep' . . . this makes it difficult for the Court to determine if the time listed is reasonable to the task involved");

- *World Class, LLC v. Drucker*, No. A-17-763063-C, 2020 WL 11039123, at *6 (Nev. Dist. Ct. July 23, 2020) (Finding $250 reasonable for associate, and $350 reasonable for partner given the lawyers' experience and stature in the community.);
- *Nakamura v. Buskirk*, No. A-14-707990-C, 2019 WL 6843141, at *5 (Nev. Dist. Ct. Oct. 31, 2019) (Finding billing rates of $300, and later $350 per hour, to be reasonable in a contract dispute, and acknowledging that the attorneys had "over 38 years of practice" and that "the individual billing line items are uniformly descriptive [and] the time taken by counsel and her staff is commensurate with the described tasks. . . .");
- *Crusher Designs, LLC v. Atlas Copco Powercrusher GmbH*, 2015 WL 6163443, *2 (D. Nev. Oct. 20, 2015) ("Rate determinations in other cases in the District of Nevada have found hourly rates as much as $450 for partners and $250 for an experienced associate to be the prevailing market rate in this forum.");
- *Blackbird Realty and Management Inc. v. Bank of George*, No. A-17-750245-C, 2020 WL 13111706, at *2 (Nev. Dist. Ct. Jan. 10, 2020) (Finding "rate charged for the paralegal of $205 per hour is over market, and reduc[ing] the rate to $150 per hour").

These recent orders demonstrate that the rates billed in this case are high, or outright unreasonable, for Southern Nevada.

In addition, the Declaration of Matthew T. Dushoff, attached hereto as **Exhibit 1**, demonstrates that the prevailing rate in complex commercial cases such as this one is (1) $475/hour for partners with 15 or more years of experience, (2) $400/hour for partners with less than 15 years of experience and (3) between $275-$375 for associates depending on their experience. **Exhibit 1** at ¶ 10. Mr. Dushoff further opines that "Partner rates above $475/hr and associate rates above $275-$375/hr are **very uncommon in Las Vegas** and should not be considered the prevailing or reasonable rate for commercial litigation/health care litigation." *Id.* at ¶ 11 (emphasis added). Mr. Dushoff is an experienced Las Vegas litigator with no interest in this litigation who has tried numerous cases to verdict in multi-million dollar disputes such as this one. Given that Plaintiffs

have failed to present any evidence of the prevailing rate for similar matters in Las Vegas, the only evidence before this Court of the appropriate prevailing rates are the above cited local cases and Mr. Dushoff's Declaration.[4]

The Nevada Supreme Court has recently instructed district courts that they must conduct an individual analysis to determine whether the hourly rates charged by each biller are reasonable. In *LVMPD v. Yeghiazarian,* the Court exemplified the fact that the district court only offered findings regarding one attorney's billed rate and failed to evaluate whether the other attorneys' and paralegals' rates were appropriate. *LVMPD v. Yeghiazarian*, 129 Nev. 760, 770, 312 P.3d 503, 510 (2013). So, the "the attorney fees award" was vacated and the district court was instructed to conduct "further analysis of the claims for attorney fees" on remand. *Id.* Here, a review of the rates charged by associates, partners, and paralegals in this litigation demonstrates that the rates are not reasonable.

a. The associate rates billed are not reasonable for the community

Here, the associate rates charged by TeamHealth Plaintiffs' counsel must be reduced. As above, and per the attached Declaration of Matthew T. Dushoff, in Nevada, $375 has been determined to be the high end of a "reasonable" hourly rate for associate time. Plaintiffs are seeking to recover the following rates for associate attorneys:

- $475 an hour for the work performed by Erin Griebel, an associate with Lash & Goldberg. Ms. Griebel's hourly rate should be reduced to $375. The fees sought by Plaintiffs feature 432.1 hours of entries from Ms. Griebel. As a result of this rate reduction, the fees sought by Plaintiffs **should be reduced from $205,247 to $162,038.**
- $550 an hour for the work performed by Aaron Modiano, an associate with Napoli Shkolnik. Mr. Modiano's hourly rate should be reduced to $375. The fees sought by

[4] The rates deemed the prevailing rate in Las Vegas in the relevant local case law on the issue are *lower* than the rates Mr. Dushoff opines are prevailing. Nonetheless, Defendants request that the Court use the rates set forth in Mr. Dushoff's Declaration as the prevailing local rates when determining the fee award to Plaintiffs.

Plaintiffs feature 578 hours of entries from Mr. Modiano. As a result of this rate reduction, the fees sought by Plaintiffs **should be reduced from $317,900 to $216,750**.

- $450 an hour for the work performed by Wendy Mitchell, an associate with Napoli Shkolnik. Mr. Mitchell's hourly rate should be reduced to $375. The fees sought by Plaintiffs feature 49.9 hours of entries from Ms. Mitchell. As a result of this rate reduction, the fees sought by Plaintiffs **should be reduced from $22,455 to $18,712.50**.
- $350 and $450 an hour for the work performed by Frank Kiley, an associate with Napoli Shkolnik. The fees sought by Plaintiffs feature 699.8 hours of entries from Mr. Kiley. For those hours billed at the rate of $450/hourly Mr. Kiley's rate should be reduced to $375.
- $475 an hour for the work performed by Jason McManis, an associate with Ahmad, Zavitsanos & Anaipakos.[5] Mr. McManis' hourly rate should be reduced to $375, in accordance with local rates. Mr. McManis' total time billed is not readily ascertainable from the billing records provided, but should be reduced to $375 an hour, commensurate with prevailing local rates.
- Other associates billed at rates that were incrementally higher than the $375 ceiling rate for the Las Vegas community. For example, Amanda Perach[6] billed at a rate of $400 hourly while working as an associate. Those hours should likewise be adjusted to a reduced rate of no more than $375 per hour.

b. The partner rates billed are not reasonable for the community

The partner rates charged by TeamHealth Plaintiffs' counsel should likewise be reduced. As above, $475.00 an hour has been determined to be the high end of the reasonable spectrum for

[5] While Mr. McManis' profile page notes that he is a partner with Ahmad, Zavitsanos & Anaipakos, he was not promoted to partner until after the trial concluded, on February 9, 2022. Thus, all of Mr. McManis's billed time prior to February 9, 2022 should be capped at $375/hour. *See* https://azalaw.com/flores-and-mcmanis-named-aza-partners/.

[6] Ms. Perach was promoted to partner at McDonald Carano effective January 1, 2020. Prior to that she was an associate and thus all time billed prior to January 1, 2020 should be capped at the prevailing associate rate of $375/hour. *See* https://www.mcdonaldcarano.com/news/mcdonald-carano-promotes-two-to-partner/#:~:text=January%2014%2C%202020%E2%80%93McDonald%20Carano,Managing%20Partner%20of%20McDonald%20Carano.

partner rates and anything beyond that is "very uncommon in Las Vegas." **Exhibit 1** at ¶ 11. TeamHealth Plaintiffs are seeking to recover the following exorbitant rates for partners:

- $650 an hour for the work performed by Pat Lundvall, a partner with McDonald Carano. Ms. Lundvall's hourly rate should be reduced to $475, in accordance with prevailing local rates. The fees sought by TeamHealth Plaintiffs feature 2,420 hours of entries from Ms. Lundvall. As a result of this rate reduction, the fees sought by TeamHealth Plaintiffs for Ms. Lundvall **should be reduced from $1,573.000 to $1,149,000**.
- $595 and $625 an hour for the work performed by Justin Fineberg, a partner with Lash & Goldberg from Miami. Mr. Fineberg's hourly rate should be reduced to $475, in accordance with local rates. The fees sought by TeamHealth Plaintiffs feature 1,330.6 hours of entries from Mr. Fineberg. As a result of this rate reduction, the fees sought by TeamHealth Plaintiffs for Mr. Fineberg **should be reduced from $792,385 to $632,035.**
- $675 an hour for the work performed by Martin Goldberg, a partner with Lash & Goldberg from Miami. Mr. Goldberg's hourly rate should be reduced to $475, in accordance with local rates. The fees sought by TeamHealth Plaintiffs feature 49.5 hours of entries from Mr. Goldberg. As a result of this rate reduction, the fees sought by TeamHealth Plaintiffs for Mr. Goldberg **should be reduced from $33,412.50 to $23,512.50**.
- $675 an hour for the work performed by Alan Lash, a partner with Lash & Goldberg from Miami. Mr. Lash's hourly rate should be reduced to $475, in accordance with local rates. The fees sought by TeamHealth Plaintiffs feature 69.9 hours of entries from Mr. Lash. As a result of this rate reduction, the fees sought by TeamHealth Plaintiffs for Mr. Lash **should be reduced from $47,182.50 to $33,202.50**.
- $750 an hour for the work performed by Matthew Lavin, a partner with Napoli Shkolnik from Washington, D.C. Mr. Lavin's hourly rate should be reduced to $475, in accordance with local rates. The fees sought by TeamHealth Plaintiffs feature 581.6 hours of entries from Mr. Lavin. As a result of this rate reduction, the fees sought by TeamHealth Plaintiffs for Mr. Lavin **should be reduced from $436,200 to $276,260**.

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- $750 an hour for the work performed by John Zavitsanos, a partner with Ahmad, Zavitsanos & Anaipakos from Houston. Mr. Zavitsanos's hourly rate should be reduced to $475, in accordance with local rates. Mr. Zavitsanos' total time billed is not readily ascertainable from the billing records provided, but should be reduced to $475 an hour, commensurate with prevailing local rates.
- $595 an hour for the work performed by Kevin Leyendecker, a partner with Ahmad, Zavitsanos & Anaipakos from Houston. Mr. Leyendecker's hourly rate should be reduced to $475, in accordance with local rates. Mr. Leyendecker's total time billed is not readily ascertainable from the billing records provided, but should be reduced to $475 an hour, commensurate with prevailing local rates.
- $595 an hour for the work performed by Jane Robinson, a partner with Ahmad, Zavitsanos & Anaipakos from Houston. Ms. Robinson's hourly rate should be reduced to $475, in accordance with local rates. Ms. Robinson's total time billed is not readily ascertainable from the billing records provided, but should be reduced to $475 an hour, commensurate with prevailing local rates.
- Other partners billed at rates that were incrementally higher than the $475 ceiling rate for the Las Vegas community, for example, Rachel LeBlanc, David Ruffner, and Jonathan Siegelaub with Lash & Goldberg from Miami billed at $515 an hour, $495 an hour, and $485 an hour, respectively. Those rates are not addressed in detail here, but should also be reduced, commensurate with the prevailing rate.

c. The paralegal rates billed are not reasonable for the community

The paralegal rates charged by TeamHealth Plaintiffs' counsel should likewise be reduced. While Nevada courts have determined that paralegal fees may be reimbursed "so long as they are billed at a lower rate," TeamHealth Plaintiffs are here seeking to recover nearly $200 an hour for paralegal time. In Nevada, it has been determined that $150 an hour is the ceiling rate for paralegals; the rates sought here should be reduced:

- $195 an hour for the work performed by Jeffrey Stafford, a paralegal with Lash & Goldgerg. Mr. Stafford's hourly rate should be reduced to $150, in accordance with local

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rates. The fees sought by TeamHealth Plaintiffs feature 574.1 hours of entries from Mr. Stafford. As a result of this rate reduction, the fees sought by TeamHealth Plaintiffs for Mr. Stafford **should be reduced from $111,949.50 to $86,115.**

- $185 an hour for the work performed by Karen Surowiec, a paralegal with McDonald Carano. Ms. Surowiec's hourly rate should be reduced to $150, in accordance with local rates. The fees sought by TeamHealth Plaintiffs feature 681.9 hours of entries from Ms. Surowiec. As a result of this rate reduction, the fees sought by TeamHealth Plaintiffs for Ms. Surowiec **should be reduced from $126,151.50 to $102,285.**
- Other paralegals were billed at rates that were higher than the $125 ceiling rate for the Las Vegas community. For example, Ruth Deres, a paralegal with Ahmad, Zavitsanos & Anaipakos, billed at $185 an hour. Ms. Deres' total time billed could not be readily determined from the billing records provided, but should also be reduced, commensurate with the prevailing rate.

2. The hours billed by TeamHealth Plaintiffs' counsel must be reduced.

The reduction of TeamHealth Plaintiffs' bills to adjust for reasonable rates does not resolve the myriad issues in TeamHealth Plaintiffs' invoices. In determining the amount of attorney fees to award, courts should also reduce hours due to block-billing, overstaffing, duplication of efforts, excessive time spent on certain tasks, the filing of non-permitted briefs, and vague work descriptions. *See Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir. 2007); *Marrocco v. Hill*, 291 F.R.D. 586, 588 (D. Nev. 2013); *Chalmers*, 796 F.2d at 1210; *McKesson Corp. v. Islamic Republic of Iran*, 935 F. Supp. 2d 34, 45 (D.D.C. 2013), supplemented (Aug. 2, 2013), vacated in part, 753 F.3d 239 (D.C. Cir. 2014); *Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S. Ct. 1933, 1939-40, 76 L. Ed. 2d 40 (1983) ("Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary . . . ."). For these reasons, the hours charged by Plaintiffs' counsel must be reduced.

a. The hours should be reduced for block-billing.

Block-billing is the practice of lumping together multiple work descriptions under one time entry. *Welch*, 480 F.3d at 948. Block-billing makes it impossible to determine how much time

was spent on a certain activity, which prevents a court from being able to determine if the time spent was reasonable. *Id.* Courts have recognized that block-billing generally increases time by 10 to 30 percent. *Id.* (citing a study by the California State Bar's Committee on Mandatory Fee Arbitration). As a result, courts routinely reduce time for block-billing by 20 to 30 percent, if not more. *Id.* (applying an across-the-board reduction of 20 percent for block-billing); *see Banas v. Volcano Corp.*, 47 F. Supp. 3d 957, 968 (N.D. Cal. 2014) (rebuking block-billing practices and reducing hours by 20 percent); *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 188 F. Supp. 3d 333, 345 (S.D.N.Y. 2016) (applying a 30 percent reduction for block-billing); *Christian Research Inst. v. Alnor*, 165 Cal. App. 4th 1315, 1326, 81 Cal. Rptr. 3d 866, 874 (2008) ("An attorney's chief asset in submitting a fee request is his or her credibility, and where vague, blockbilled time entries inflated with noncompensable hours destroy an attorney's credibility with the trial court, we have no power on appeal to restore it.").

Indeed, a Texas Federal Bankruptcy Court has previously drastically reduced a fee request by Plaintiffs' Houston firm Ahmad, Zavitsanos & Anaipako due to rampant block billing and inadequate descriptions in time entries. In *In Re Mud King Products, Inc.*, Ahmad, Zavitsanos & Anaipako requested a fee award of $898,147.12 and the federal court reduced the fee award to $320,893 specifically because of Plaintiffs' counsel's poor billing practices. *In re Mud King Prod., Inc.*, 525 B.R. 43, 57 (Bankr. S.D. Tex. 2015). The results should be the same here.

There are scores of instances of block-billing in TeamHealth Plaintiffs' time entries. For example, there are numerous instances in McDonald Carano's billing wherein attorneys bill several hours of time for purported email exchanges[7]:

> **Pat Lundvall 02/26/2021 10.0 hours billed for** "Multiple emails with Kristen Gallagher and Amanda Perach re; emails with Carol Owen and team re ; review and analyze ; prepare and appear for weekly call; emails with Justin Fineberg and team re ; review and analyze ; emails with Kristen Gallagher and Amanda Perach re ; multiple emails with Amanda Perach, Eddie Ocasio, Kent Bristow and Kristen Gallagher re ; emails with Kristen Gallagher and Amanda Perach re ; email with Beau Nelson and team re transcript of proceedings 2/22/21; review and analyze ;

[7] There are instances of redacted text in these billing entries which is removed for the purpose of reducing the length of the entries.

emails with Kent Bristow and team re ; emails with Kristen Gallagher, Scott Phillips, Jessica Scouten, Daniel Evans and Amanda Perach re ; multiple emails with Kristen Gallagher and Amanda Perach re ; emails with Amanda Perach, Brittany Llewellyn, Natasha Fedder, Colby Balkenbush, Lee Roberts and Kristen Gallagher re follow-up re objection to ESI identification; email with Marianne Carter and team re Notice of Taking the Videotaped Deposition of Mark Kline, Notice of Taking the Videotaped Deposition of Leif Murphy, Notice of Taking the Videotaped Deposition of Kent Bristow, Notice of Taking the Videotaped Deposition of Kathleen Jonas, Notice of Taking the Videotaped Deposition of Jason Heuberger, Notice of Taking the Videotaped Deposition of Carol Owen, Notice of Taking the Videotaped Deposition of Rena Harris, Notice of Taking the Videotaped Deposition of Fremont Emergency Services Pursuant to NRCP 30(b)(6), Notice of Taking the Videotaped Deposition of Ruby Crest Emergency Medicine Pursuant to NRCP 30(b)(6) and Notice of Taking the Videotaped Deposition of Team Physicians Of Nevada-Mandavia, P.C.'s Corporate Representative Pursuant to NRCP 30(b)(6); review and analyze ; emails with Brittany Llewellyn, Natasha Fedder, Colby Balkenbush, Lee Roberts, Kristen Gallagher and Amanda Perach re compromise regarding United's request to extend discovery and trial date; emails with Kent Bristow and team re United NDA and proposal; review and analyze email with Beau Nelson and team re transcript of proceedings 2/25/21; review and analyze ; multiple emails with Eddie Ocasio, Kristen Gallagher, Carol Owen, Brent Davis, Kent Bristow and Amanda Perach re ; emails with Matt Lavin and team re , ; emails with Kent Bristow and team re ; review and analyze ; multiple emails with Carol Owen and team re; emails with Mara Satterthwaite and all counsel re status reports; teleconference with Kristen Gallagher and Amanda Perach re; prepare and appear for conference call with team re; emails with Brittany Llewellyn, Natasha Fedder, Colby Balkenbush, Lee Roberts, Kristen Gallagher and Amanda Perach re Dan Rosenthal's amended deposition notice and availability re Rebecca Paradise and Angie Nierman; emails with Colby Balkenbush, Natasha Fedder, Brittany Llewellyn, Lee Roberts, Kristen Gallagher and Amanda Perach re United's counter-proposal re stipulation and order re claims data matching; review and analyze ; emails with Kristen Gallagher, Carol Owen and Amanda Perach re ; emails with Colby Balkenbush, Natasha Fedder, Brittany Llewellyn, Lee Roberts, Kristen Gallagher and Amanda Perach re United's objections to Rule 30(b)(6) notice to HPN and Oxford and availability for meet/confer re same and re deposition of Carol Owen; email with Marianne Carter and team re Amended Notice of Taking the Videotaped Deposition of Dan Rosenthal; review and analyze as requested by Carol Owen"

Amanda Perach 09/29/2021 13.6 hours billed for "Attend [redacted] meeting with litigation team; finalize oppositions to motions in limine and attendant motions to seal; exchange numerous emails and calls with trial team re same"

There are also countless instances in Ahmad, Zavitsanos & Anaipakos attorney billing wherein excessive amounts of time are block-billed, for a handful of examples:

Kevin Leyendecker 08/23/2021 11.9 hours billed for "Studying and summarizing the Scherr and Frantz depositions. Participate in call with Dr. Crane. Working with Louis to [redacted]"

At Mr. Leyendecker's hourly rate, this amounted to **$7,080.50**.

John Zavitsanos 08/06/2021 7.2 hours billed for "Review of United's Motion concerning the documents around the Yale report. Revised partial response to United Objection to Plaintiff's proposed orders affirming RR 2, 3 and 5. Participate in Zoom call regarding [redacted]. Working on [redacted].

At Mr. Zavitsanos' hourly rate, this amounted to **$5,400.00.**

Jason McManis 08/12/2021 9.7 hours billed for "Prepare for [redacted] Lead [redacted] Work with experts to obtain work files."

At Mr. McManis' hourly rate, this amounted to **$4,607.50**.

Michael Killingsworth 07/12/2021 10.1 hours billed for "Review and analyze deposition of Leif Murphy. Draft timeline of events. Team meeting to get [redacted]. Analysis of [redacted]."

At Mr. Killingsworth's hourly rate, this amounted to **$3,232.00.**

Joseph Ahmad 08/19/2021 7.1 hours billed for "Attention to rebuttal expert issues and attend conference call re [redacted]. Attention to defendant's deposition notices.

At Mr. Ahmad's hourly rate, this amounted to **$5,325.00**.

Louis Liao 08/28/2021 9.5 hours billed for "Various tasks relating to [redacted]. Call with AZA team about [redacted]. Continue analyzing data [redacted]. Communications with K. Leyendecker about the [redacted]. Comment and edit draft [redacted] S. Phillips."

At Mr. Liao's hourly rate, these "various tasks" amounted to **$3,040.00**.

Lash and Goldberg attorneys also block-billed their time in this litigation, the following are representative examples:

Rachel LeBlanc 05/03/2021 11.1 hours billed for "Attend status call with Special Master and report rulings on Coyote Springs and deposition limits; Continue review of Jolene Bradley documents in preparation for deposition; Continue review strategy for document review and organization for Plaintiffs" corporate representatives" depositions."

At Ms. LeBlanc's hourly rate, this amounted to **$5,716.50**.

> **Justin Fineberg 05/19/2021 13.7 hours billed for** "Continue to prepare for upcoming depositions, including preparation for defense of Leif Murphy; prepare for and attend deposition of Rebecca Paradise; continue to prepare for deposition of Dan Schumacher; prepare for and attend telephone conference with client regarding case status, strategy and discovery issues."

At Mr. Fineberg's hourly rate, this amounted to **$8,151.50**.

> **Emily Pincow 05/03/2021 10.8 hours billed for** "Review J. Bradley documents for deposition; analyze documents circulated for case themes and depositions; strategy regarding L. Dealy deposition; review documents on student resource claims for L. Dealy deposition; analyze correspondence regarding updates on conference and rulings."

At Ms. Pincow's hourly rate, this amounted to **$5,130.00.**

Finally, there are numerous examples of Napoli Shkolnik attorneys block-billing time:

> **Aaron Modiano 06/04/2021 9.8 hours billed for** "review of document production; MPI deposition prep."

At Mr. Modiano's hourly rate, this amounted to **$5,390.00.**

> **Matthew Lavin 05/30/2021 5.8 hours billed for** "Review United production; Work on MPI subpoenas and NY State Court OSC; confer w/A. Modiano."

At Mr. Lavin's hourly rate, this amounted to **$4,350.00.**

Additionally, there are block-billing entries that do not include *any* descriptions such that the reasonableness of the time spent on the task is not able to be determined. For example:

> **Kristen Gallagher 10.3 hours billed for** "Attention to discovery matters [redacted]"
>
> **Kristen Gallagher 9.7 hours billed for** "Attention to discovery matters [redacted]"
>
> **Kristen Gallagher 9.8 hours billed for** "Attention to discovery matters [redacted]"
>
> **Kristen Gallagher 8.2 hours billed for** "Attention to discovery matters [redacted]"
>
> **Kevin Leyendecker 9.3 hours billed for** "Participate in [redacted] Working [redacted]"
>
> **Michael Killingsworth 12.3 hours billed for** "Attend [redacted]"

There are also thousands of attorney hours contained in Napoli Shkolnik invoices that state nothing more than "document review." There is no indication of what was reviewed or the number of pages reviewed.

Paralegals for each firm have also block-billed numerous entries. For example:

> **Lynette Peter 11/20/2020 3.2 hours billed for** "Communicate with Lexitas regarding service of notice of intent to serve subpoena. Contact court regarding filing of petition and case number. Review of file-stamped petition. Contact clerk regarding court assigned. Revisions to notice of service of subpoena, subpoena, letter to court and filing letter. File documents. Send courtesy copy of documents to National Care's counsel and Defendants. Work with process server on serving National Care with documents."
>
> **Ruth Deres 08/12/2021 10 hours billed for** "Development and administration. Attended [redacted]."
>
> **Ruth Deres 08/11/2021 12.5 hours billed for** "Development and administration. [redacted]."

It is not at all clear from these entries how much time was spent on a certain activity, which prevents a review for reasonableness. For these reasons, a comprehensive 70% reduction in the total bill is necessary.

b. The hours should be reduced for overstaffing and duplication of efforts

Attorneys engage in overstaffing where too many attorneys performed legal work, or where attorneys performed unnecessary legal work. *See Marrocco*, 291 F.R.D. at 589 (reducing attorney fees after finding overstaffing because "having two partners and a senior associate work[ ] on a relatively straightforward discovery motion create[s] unnecessary duplication of efforts"); *see also Walker v. N. Las Vegas Police Dep't*, 2016 WL 3536172, at *3 (D. Nev. June 27, 2016) (finding that plaintiffs overstaffed a motion to compel by dedicating 47.7 hours to the motion, and "by having work performed by three different attorneys and a paralegal"); *Aevoe Corp. v. AE Tech. Co.*, 2013 WL 5324787, at *5-6 (D. Nev. Sept. 20, 2013) (finding billing excessive when five attorneys worked on a motion to compel); *Rose v. Bank of Am. Corp.*, 2014 WL 4273358, at *10, 13 (N.D. Cal. Aug. 29, 2014) (reducing $8 million in attorney fees to $2.4 million when counsel completed redundant work as a part of the litigation strategy, billed roughly 65 percent of the time using attorneys with higher rates, and had multiple attorneys present during settlement negotiations and mediation).

The amount of hours sought by TeamHealth Plaintiffs should be reduced for overstaffing and redundant work. TeamHealth Plaintiffs' counsel billed for the presence of several attorneys

at deposition preparation meetings,[8] depositions,[9] hearings,[10] and other varied appearances. TeamHealth Plaintiffs' counsel also performed duplicative work in reviewing documents and drafting motions.[11] TeamHealth Plaintiffs' counsels' invoices are replete with these instances of overstaffing and duplicative work. For one particularly egregious example, on September 15, 2021, John Zavitsanos (6.2 block-billed), Jane Robinson (7.2 block-billed), Jason McManis (0.5), Pat Lundvall (5.8 block-billed), Kristen Gallagher (9.7 block-billed), Amanda Perach (4.9 block-billed), Rachel LeBlanc (6.8 block-billed), Justin Fineberg (1.4 block-billed), and Jonathan Siegelaub (0.6)—**nine attorneys**—billed for attending a hearing on United's Motion for Order to Show Cause. Pat Lundvall was the only attorney who argued on behalf of TeamHealth Plaintiffs, and the hearing lasted a total of forty-six (46) minutes. *See* Transcript of September 15, 2021 proceedings, **Exhibit 2**. There are numerous other instances of several attorneys attending and billing for hearings where they did not actually speak, let alone argue the issues before the Court.

Moreover, TeamHealth Plaintiffs have not provided any justification for why it was necessary to assign four different law firms from four different states to prosecute this litigation. TeamHealth Plaintiffs seek to recover attorney fees incurred by the following firms: McDonald Carano (Nevada based), Ahmad, Zavitsanos & Anaipakos (Texas based), Lash & Goldberg (Florida based) and Napoli Shkolnik (Washington DC / California based). The involvement of these four different firms undoubtedly greatly increased the amount of duplicative work. For

[8] For example, on September 16, 2021, three partners and an associate, Jason McManis (6.3), Louis Liao (4.7), Kevin Leyendecker (3.1), and Joseph Ahmad (5.5), participated in a deposition preparation session with Scott Phillips. John Zavitsanos also billed time that day for preparation of [redacted], which could have potentially been for the preparation session with Scott Phillips as well.

[9] On March 23, 2021, for instance, attorneys Rachel LeBlanc (12.7), Justin Fineberg (14.2), Martin Goldberg (2.9), Alan Lash (2.4), Jonathan Siegelaub (3.0), Kristen Gallagher (10.9), and paralegal Jeffrey Stafford (11.8) all attended the deposition of Dan Rosenthal.

[10] See example in body text.

[11] For one example, on September 20, 2021, Michael Killingsworth billed 6.8 hours to "Draft and edit Motion to Strike Deal King," and Jason McManis block-billed 13.4 hours to "Review and revise motion to strike portions of Deal and King reports." On September 21, 2021, Amanda Perach block-billed 6.1 hours of time to "review and revise motion to strike portions of expert reports of Deal and King," Jason McManis block-billed 8.1 hours to "Work on draft of motion to strike portions of Deal and King reports," and Louis Liao billed 4.7 hours to "Revise Motion to Strike Bruce Deal and Karen King."

example, attorneys from Lash & Goldberg defended nearly all of the depositions taken by Defendants. Yet, Lash & Goldberg played no visible role at trial. Thus, the attorneys at Ahmad, Zavitsanos & Anaipakos, who tried this case for Plaintiffs, necessarily had to review all the depositions which their firm did not attend. Similarly, the attorneys at Ahmad, Zavitsanos & Anaipakos did not file their pro hac petitions until August 4, 2021. Thus, they necessarily had to review prior work that had been done by McDonald Carano and Lash & Goldberg, before their involvement. As another example, Napoli Shkolnik appears to have reviewed a significant number of the documents produced in this matter. Yet, they played no visible role at trial. Certainly, TeamHealth Plaintiffs were free to elect to have one firm conduct written discovery and motion work (McDonald Carano), one firm review documents (Napoli Shkolnik), one firm conduct depositions (Lash & Goldberg) and have another firm present the case at trial (Ahmad, Zavitsanos & Anaipakos). However, under *Brunzell*, they are not free to foist the significant duplicative costs created by such a decision onto Defendants. Because is it impossible to determine what the fees incurred would have been if TeamHealth Plaintiffs had hired a single firm to handle this matter from start to finish, much less separate out every single duplicative charge, a seventy percent (70%) across the board reduction of TeamHealth Plaintiffs' requested fee award is appropriate.

c. The hours should be reduced for excessive time.

The amount of hours sought by TeamHealth Plaintiffs must also be reduced for excessive time spent on tasks. For instance:

- On September 12, 2021, Louis Liao billed **17.5 hours** in a single entry for "Continued attention to expert deposition issues for Bruce Deal. Discuss the [redacted] with Joe Ahmad. Continue revising outline for Deal deposition based on discussions. Continue reviewing documents cited in United's expert disclosures for Bruce Deal. Research court documents in [redacted]";
- On May 30 and 31 of 2020, Pat Lundvall billed **11 hours** "prepar[ing] for hearing on motion to dismiss." Kristen Gallagher, however, was the attorney who handled the hearing, and ultimately billed **12.3 hours** of her own time on June 5 and June 9, 2020, preparing for and attending the hearing on the motion to dismiss.

- On September 1, 2021, Kevin Leyendecker billed **9.8 hours** for "Studying 346 pages of rebuttal reports submitted by United and preparing notes and outline for use in upcoming deposition";
- On the date of March 22, 2021 alone, five (5) timekeepers with Lash & Goldberg[12] billed a collective **38.2 hours** to prepare for the deposition of Dan Rosenthal.

Instead of reducing items on an entry-by-entry basis, because all of the time spent by TeamHealth Plaintiffs' counsel appears excessive, a seventy percent (70%) reduction across the board is warranted.

d. The hours should be reduced for inadequate documentation and descriptions.

The amount of hours sought by TeamHealth Plaintiffs should be reduced for inadequate documentation and vague descriptions. *See McKesson*, 935 F. Supp. 2d at 45 (reducing the amount of hours sought in an attorney fees motion because the time entries contained vague and generalized descriptions such as "work on appeal brief"). For example, as was detailed above, there are numerous block-billed entries for "attention to discovery matters" with no further description of the task performed. The billing is replete with other vague and inadequate descriptions, for example:

- 10/12/2021 entry by Louis Liao for **9 hours** for "Unknown [redacted] Revis [redacted]. Review trial exhibits."
- 9/18/2021 entry by Kevin Leyendecker for **4.9 hours** for "Reading and responding to a flurry of emails throughout the day on a variety [redacted] . . . ."
- 2/18/2021 entry by Kristen Gallagher for **10.5 hours** for "Attention to discovery [redacted]."
- 8/26/2021 entry by John Zavitsanos for **6.6 hours** to "prepare for trial."

[12] Attorneys Alan D. Lash, Justin C. Fineberg, Rachel H. LeBlanc, Virginia L. Boies, and paralegal Jeffrey L. Stafford.

Because these vague descriptions pervade the entire invoice, a seventy percent (70%) reduction across the board is warranted.

B. The Court should reduce the amount of attorney fees sought by Plaintiffs as they are only entitled to recover attorneys' fees for prosecuting their Nevada Prompt Pay Act claim, not their other state law claims

The sole basis for Plaintiffs' request for attorneys' fees is the fact that Plaintiffs prevailed on their Nevada Prompt Pay statute claim. Specifically, NRS 683A.0879(5) states that "a court shall award costs and reasonable attorneys' fees to the prevailing party in an action brought pursuant to this section." (emphasis added). However, Plaintiffs are also not entitled to recover fees incurred prosecuting claims that they dismissed on the eve of trial and therefore did not prevail on, particularly if the dropped claims were not closely related to Plaintiffs' Prompt Pay claim.

Plaintiffs' First Amended Complaint, filed on January 7, 2020 dictated the scope of discovery and the nature of this case until, on the eve of trial, Plaintiffs filed a Second Amended Complaint that dropped four of their claims and drastically reduced the issues in dispute. Plaintiffs' First Amended Complaint was 46 pages long and included eight claims for relief: (1) Breach of Implied-in-Fact Contract, (2) Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing, (3) Unjust Enrichment, (4) Violation of NRS 686A.020 and 686A.310, (5) Violation of Nevada Prompt Pay Statutes and Regulations, (6) Violation of Consumer Fraud and Deceptive Trade Practices Act (7) Declaratory Judgment and (8) a Nevada RICO conspiracy claim. Plaintiffs' RICO claim, in particular, caused a massive amount of discovery related to its conspiracy allegations (i.e. that United, MultiPlan, DataiSight and others were engaged in a massive conspiracy to pay Plaintiffs unreasonably low rates) that would have otherwise been completely unnecessary.

After expending an enormous amount of resources prosecuting these eight claims, Plaintiffs filed a Second Amended Complaint on October 7, 2021 (3 weeks before trial) that abandoned four of their prior claims: (1) Tortious breach of the Implied Covenant of Good Faith and Fair Dealing, (2) Violation of Consumer Fraud and Deceptive Trade Practices Act (3)

Declaratory Judgment and (4) a Nevada RICO conspiracy claim. Further, Plaintiffs excised all RICO conspiracy allegations from their new complaint resulting in it being reduced from 46 pages to just 17 pages. Therefore, an additional reduction in any fee award to Plaintiffs is appropriate to account for the time billed by Plaintiffs' counsel solely prosecuting the RICO claim, a claim on which Plaintiffs did not prevail.

C. This Court should apply a seventy percent (70%) reduction to the amount of attorney fees sought by Plaintiffs.

Courts may apply an overall across the board reduction of fees sought by a motion for attorney fees. *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 982 (9th Cir. 2008). Such a reduction must be supported with clear and concise reasons. *Id.*; *see Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 865, 124 P.3d 530, 549 (2005) (providing that courts are not limited to any one specific approach in calculating a reasonable amount of fees). To avoid reversal, a district court need only consider the *Brunzell* factors and the award must be supported by substantial evidence. *MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, 134 Nev. 235, 245, 416 P.3d 249, 259 (2018) (citing *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015)).

Here, a seventy percent (70%) reduction to the $12,683,044.41 in fees sought by TeamHealth Plaintiffs is warranted. Indeed, a more severe reduction could easily be justified. As detailed above, there are countless issues with the amount of hours charged by TeamHealth Plaintiffs' counsel, which make it impossible to decipher the amount of time spent by counsel on certain tasks. The amount is staggering and is indicative of the type of bill padding criticized in *Christian Research Inst. v. Alnor*, 165 Cal. App. 4th 1315, 1326, 81 Cal. Rptr. 3d 866, 874 (2008). TeamHealth Plaintiffs have evidently treated their Motion for Attorney Fees as a negotiation, starting with a high number and hoping to land somewhere in the middle. Yet, even a fifty percent (50%) reduction would be unjust, as that would still equate to more than $6 million in fees, which is more than two (2) times the total compensatory damages awarded to Plaintiffs. A seventy percent (70%) reduction would equate to an award of approximately $3,804,913.32, which constitutes a reasonable and generous amount of attorney fees considering the "the work actually performed." *Brunzell*, 85 Nev. at 349, 455 P.2d at 33 (third factor).

IV. CONCLUSION

Based on the foregoing, TeamHealth Plaintiffs' Motion for Attorney Fees should be denied in full. However, if the Court is inclined to grant TeamHealth Plaintiffs' Motion for Attorneys' fees, TeamHealth Plaintiffs should be required to reduce their hourly rates to a reasonable rate, and/or the Court should apply a wholesale reduction of seventy percent (70%) to the invoice to account for the innumerable instances of excessive time, block-billing, duplicative billing, and vague entries.

Dated this 20th day of April, 2022.

/s/ Colby L. Balkenbush

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of April, 2022, a true and correct copy of the foregoing **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR ATTORNEYS' FEES** 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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EXHIBIT 1

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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

Case No.: A-19-792978-B

Dept. No.: 27

DECLARATION OF MATTHEW T. DUSHOFF

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.

I, MATTHEW T. DUSHOFF, declare as follows:

1. My name is Matthew T. Dushoff. I am over the age of eighteen, am competent to make this declaration, and have personal knowledge of the facts set forth herein.

2. I am a licensed Nevada attorney and a partner at the Las Vegas law firm of Saltzman Mugan Dushoff. My firm biography is attached as **Exhibit A** to this Declaration.

3. I have been practicing law for 32 years and have over 17 years of experience handling complex commercial litigation. Further, a significant portion this experience has involved health care litigation in Las Vegas. I regularly represent hospitals, provider groups, doctors, health management companies, medical billing companies, and national medical associations in high stakes litigation involving requests for multi-million dollar awards.

4. I also have significant trial experience handling health care litigation and commercial litigation generally. A representative sample of this experience is set forth below.

5. I was lead counsel for University Medical Center in its successful defense of a doctor's civil rights claim in federal court. The doctor sought over $32 million in damages and the jury came back with a complete defense verdict for my client.

6. I was lead counsel in the complex business litigation matter entitled FortuNet, Inc. v. Himelfarb, et al. I successfully obtained a multi-million-dollar verdict for my client and the court also awarded my client its attorney's fees.

7. I was lead counsel on the nationally recognized case of Urbanski v. Jones and obtained a jury verdict for my clients, Mr. and Mrs. Urbanski, in excess of $13.5 million against NFL football player Adam "Pacman" Jones.

8. A majority of my practice involves complex litigation issues in the health care industry including, but not limited to, partner disputes, anti-kickback issues, Stark Law issues,

licensing, hospital privileges and the application of the Health Care Quality Improvement Act ("HCQIA").

9. In addition to my significant experience handling health care litigation, I have also published an article regarding the enforcement of non-competes involving doctors in Nevada and I have been chosen to lecture on national health care issues at the American Health Lawyers Association National Convention this June.

10. Based on my experience handling numerous commercial and health care related disputes in Las Vegas, including trying numerous cases to verdict, I believe the prevailing hourly rates in the Las Vegas community for work performed by attorneys on complex commercial health care disputes are as follows. The below prevailing rates assume the attorneys have a high level of skill and an impeccable reputation in the Las Vegas legal community:

a. For partners with over 15 years of experience: $475/hr

b. For partners with less than 15 years of experience: $400/hr

c. For associates: $275 - $375/hr depending upon their experience.

11. Partner rates above $475/hour and associate rates above $275 - $375/hr are very uncommon in Las Vegas and should not be considered the prevailing or reasonable rate for commercial litigation/health care litigation.

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

Executed: April 20, 2022.

MATTHEW T. DUSHOFF

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Exhibit A

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(Firm Biography)

Matthew T. Dushoff

SHAREHOLDER

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FOCUS PRACTICE AREAS

Administrative and Regulatory Law
Liquor Law and Privilege Licensing
Litigation and Appeals
Healthcare Industry Litigation

ADDITIONAL PRACTICE AREAS

Complex Civil Litigation
Administrative Law/Licensing

Matthew T. Dushoff is a litigator. He practices primarily in the areas of **commercial litigation**, **administrative law**, **liquor licensing**, real estate, and

criminal law before all state and federal courts in Nevada.

Mr. Dushoff was lead counsel on the nationally recognized case of Urbanski v. Jones. Mr. Dushoff successfully obtained a jury verdict for Mr. and Mrs. Urbanski in excess of $13,500,000 against NFL football player Adam "Pacman" Jones.

Mr. Dushoff was lead counsel for Himelfarb & Associates ("Himelfarb") in the complex business litigation matter entitled FortuNet, Inc. v. Himelfarb, et al. FortuNet is a licensed gaming equipment manufacturer, distributor, and operator that is the leader in the manufacturing and distribution of electronic bingo throughout the United States and Canada. Mr. Dushoff successfully obtained a multi-million dollar jury verdict for Himelfarb. The court also awarded Himelfarb his attorney's fees from FortuNet.

Mr. Dushoff was lead counsel for University Medical Center in its successful defense of Dr. Tate's civil rights' claim in federal court in the matter entitled Tate v. University Medical Center. Dr. Tate sought over $32,000,000 in damages. The jury came back with a complete defense verdict.

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Mr. Dushoff was lead counsel for Levi Jones in the wrongful foreclosure action against the law firm of Alessi and Koenig in the case entitled Jones v. Allessi and Koenig, et al. Obtained a unanimous jury verdict, punitive damages against Alessi and Koenig, and attorney's fees.

Health Care Law

Mr. Dushoff has an extensive practice in **health care law**. He currently represents University Medical Center in both health care-related issues and privilege issues involving physicians. Mr. Dushoff also represents individual doctors in fair hearing matters as well as representing medical practices in health care issues ranging from medical billing to business litigation. Mr. Dushoff has also acted as a fair hearing officer for hospitals in doctor privilege cases. Mr. Dushoff is well versed in state and federal laws involving healthcare including HCQIA and HIPAA compliance matters.

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Professional or Trade Affiliations:

- Member, Nevada State Bar
- Member, New York State Bar
- American Bar Association
- Member, ABA Health Law Division
- Member, American Health Lawyers Association

Honors & Awards:

- **Mountain State Super Lawyer** 2017, 2018, 2019, 2020 and 2021
- Named Top 100 Trial Lawyers in America by the **National Trial Lawyers Association**

Publications & Articles:

- "**Practicing Administrative Law Before a Municipality**" – Nevada Lawyer magazine – May 2021
- "**Patients v. Profits: Balancing Competing Interests in Physician Non-compete Agreements**" By Matthew T. Dushoff, Esq. and Bridget Kelly, Esq. *(This article was originally published in the in COMMUNIQUÉ, the official publication of the Clark County Bar Association (Mar. 2021))*
- Judgment Day, The Practice of Administrative Law in Nevada, Nevada Lawyer, July 2011

Speaking Engagements:

- Police Officer Standards and Training Constitutional Law Professor
- Professor of Criminal Law, University of Phoenix
- Speaker, International Anti-Counterfeiting Coalition's Annual Conference

- Speaker/Lecturer, CCSN's Domestic Violence Seminar
- Lecturer, Nevada Coalition Against Sexual Violence's Annual Conference
- Keynote Speaker, Teen Crime Prevention Seminar
- Keynote Speaker, National Worker's Compensation Fraud Conference
- Keynote Speaker, Nevada Employers' Association Annual Meeting
- Keynote Speaker, Clark County Teen Pregnancy Conference
- Keynote Speaker, Nevada's Affordable Housing Conference
- Keynote Speaker, SART/SANE Sexual Assault Training Conference
- Keynote Speaker, Centennial High School Honors Program
- Lecturer, Annual American Prepaid Legal Institute Conference
- CLE Instructor, Practice of Administrative Law in Nevada, October 2015

Representative Experience:

- Mr. Dushoff was previously a deputy attorney general for the Nevada Office of the Attorney General where he represented agencies in a wide variety of cases involving commercial litigation and administrative law. He has represented the Nevada Taxicab Authority, Nevada Labor Commission, Nevada Department of Motor Vehicles, the Nevada Real Estate Division, and the Employee Management Relations Board. He has experience in a vast array of administrative law issues as well as issues involving the regulation of the mortgage and lending business, and liquor licensing issues involving suppliers, wholesalers, and retailers in Nevada. Mr. Dushoff was a public defender in New York City. He has considerable experience as a trial attorney in complex civil and criminal trial matters.

Community Involvement:

- Nevada Coalition Against Sexual Violence – Past President
- Rape Crisis Center – Past Board Member
- Candlelighters for Childhood Cancer – Past Board Member/Chief Financial Officer

Admitted to Practice:

- State of Nevada
- State of New York

Education:

- University of Arizona, James E. Rogers College of Law, Juris Doctor, 1990
- University of Arizona, Bachelor of Science (Marketing), cum laude, 1987

EXHIBIT 2

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EXHIBIT 2

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE
WEDNESDAY, SEPTEMBER 15, 2021

RECORDER'S PARTIAL TRANSCRIPT OF PROCEEDINGS
RE: MOTIONS HEARING
(Via Blue Jeans)

APPEARANCES:

For Plaintiff(s): PATRICIA K. LUNDVALL, ESQ. (in person)
KRISTEN T. GALLAGHER, ESQ.
AMANDA PERACH, ESQ.
JOHN ZAVITSANOS, ESQ.

For Defendant(s): COLBY L. BALKENBUSH, ESQ.
DANIEL F. POLSENBERG, ESQ.

ABRAHAM G. SMITH, ESQ.

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

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LAS VEGAS, NEVADA, WEDNESDAY, SEPTEMBER 15, 2021

[Proceeding commenced at 1:01 p.m.]

THE COURT: Calling the case of Fremont versus United. Let's take appearances, please, starting first with the plaintiff.

MS. LUNDVALL: Good afternoon, Your Honor. This is Pat Lundvall. I'm in the courtroom, with McDonald Carano, appearing on behalf of plaintiffs, the Health Care Providers.

THE COURT: Thank you.

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

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

MR. ZAVITSANOS: John Zavitsanos, also on behalf of the Health Care Providers.

THE COURT: And for the defendants, please?

MR. SMITH: Good afternoon, Your Honor. Abe Smith, Dan Polsenberg, and it looks like Colby Balkenbush.

THE COURT: Okay. Very good.

So, Defendants, this was your motion for an Order to Show Cause.

MR. SMITH: Yes, Your Honor. And I'm sensitive to your comments at your -- at the last hearing, where you indicated that you were not inclined to grant the motion. If Your Honor has any particular direction you would like me to take the argument, I'd be

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happy to address your concerns at the outset. But otherwise, I can just -- I can start with the motion.

THE COURT: Go ahead, please. I don't want you to feel that you've been cut off. And I do keep an open mind, even when I form impressions.

MR. SMITH: Okay. And I certainly don't feel cut off. I just want to make sure that in the course of my argument, I'm hitting on the points that may have given Your Honor pause in deciding whether to award sanctions are not. But I'll proceed.

So, Your Honor, as you know, we were back here on July 29th on Report Recommendation No. 5, which was challenging the attorneys' eyes only designation to serve documents relating to a study that was published regarding surprisability.

United had designated those materials attorneys' eyes only, but the issue went before the Special Master who recommended that the designation be removed. Your Honor formally pronounced that you would be overruling the designation as well.

But the question was -- but the issue was put to the parties for a written order. Your Honor asked the plaintiffs to prepare a written order. And, again, according to your department's guidelines, we were not to file competing orders, but rather we would submit objections to the plaintiff's order.

In other words, it was contemplated that there would be an additional procedure beyond simply the Court's announcement of

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the oral ruling.

Plaintiffs admitted in their opposition that they did disclose these attorneys' eyes only designated materials before the entry of a written order -- At least a week before.

Plaintiffs still haven't come clean about when exactly they first disclosed the materials beyond counsel in this case, which would, of course, violate the attorneys' only -- attorneys' eyes only designation. So we still don't know whether that was, you know, right within minutes of this Court's oral pronouncement or whether it was on August 2nd. We know it was no later than August 2nd, because we received an e-mail from a reporter from The Intercept, saying that she already had these materials in hand. At that point, of course, it was too late. It was already in the public domain. There was no jurisdiction over The Intercept, so at that point the damage had been done.

In opposition, the plaintiffs dig in, rather than conceding a mistake or saying, Oh, we -- you know, we understood the order differently, but, you know, as a good faith mistake, they --- they've asserted that this was all United's faults. They advance an assertive interpretation of the Court's protective order that instead of bringing it in harmony with Nevada law would actually contradict Nevada law and would prematurely strip confidentiality into private parties of any effective public review.

So let me start with the interpretation of the order. The order -- in Section 9 of the protective order, the Court and the

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parties -- the language that the Court and the parties agreed to is clear that if a party designates a document as attorneys' eyes only, or if a party contends that a document that was not designated attorneys' eyes only should have been so designated, the document at issue shall be treated as attorneys' eyes only under this protective order until, A, the parties reach a written agreement, or, B, the Court issues an order ruling on the designation. And then later in that same paragraph, it emphasizes that the protection afforded by this protective order shall continue until the Court makes a decision on the motion.

Now, the question that is really the issue in this motion is what is the definition of order. Nevada law already supplies the answer to that question. Nevada law clearly requires a written order on substantive issues in order for it to be an effective order. We have the *Rust* case, we have the *J.M.R.* case, both of which state that -- and the *Nalder* case that state that the Court's oral pronouncement from the bench, the Clerk's minute order, and even in unfiled written order, are ineffective for any purpose.

In the opposition, the plaintiffs try to claim that this is somehow limited to judgments under Rule 50(a) rather than orders on motions in the case. *J.M.R.* addressed that argument specifically and says, No, the language in the *Rust* case is broader than just judgments. And it indicates we did not intend to limit the *Rust* holding -- the judgment pronouncements.

And in fact, that's true both in that case and in the Nalder

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case, where the orders that issue -- the oral rulings at issue were not judgments. In the one case, it was an order to release a child from psychiatric care; in the other case it was an oral stay. In both of those cases, the Supreme Court did not have a problem applying this general rule to the orders at issue. The question was just whether those orders came within one of the narrow exceptions, but the general rule that orders must be written in order to be valid.

So it was against this background of Nevada law that the practitioners in this state can and do understand that the parties drafted this protective order and this Court entered the protective order.

In other words, when the Court says that the confidentiality continues until the Court issues in order, that already, by definition under Nevada law, means a written order, not oral pronouncement, which, as Nevada law would hold, is ineffective for any purpose.

That's in contrast to a -- the parties written agreement. Right? So there's -- A would be the parties' written agreement; B is the Court issues an order.

Under Nevada law, there's no presumption that an agreement has to be written in order to be valid. There are such things as valid oral agreements. So that's why the parties specify that there would be a written agreement.

But again, Nevada law already supplies the definition of an order so there was no similar need to specify that it be a written

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order.

So I think the *expressio unius* argument that the plaintiffs are making really falls flat. That's for a case when there really would be ambiguity without the modifier of written or oral. In this case, there is no ambiguity because Nevada law already supplies that definition.

And let me just go a bit further about the absurdity of their definition of order really referring to just an oral ruling. This creates a boundary drawing problem. If the parties were to -- if the Court were to make an oral pronouncement overruling the confidentiality designation, it's not clear whether in that case the party could just have their finger above the send button, ready to send these confidential documents to the world, as soon as this Court, you know, says the word overrule, without perhaps even waiting for, as the plaintiffs would request -- are suggesting the defendants had to do, some kind of oral stay motion or the like. It's not clear whether that would be a violation of the Court's protective order.

And it can't be that the parties would be allowed to sow, if they had any opportunity for appellate review, just by, you know, immediately rushing from this Court's oral pronouncement, especially when that pronouncement in this case was not -- did not specify that it had an immediate effect. Rather it asked the parties to go draft a written order.

The only clear line that creates certainty for the parties that the older materials remained confidential is the entry of a

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written order.

Now, the plaintiffs say, well -- they largely try to ignore that piece of the protective order. Instead they rely on the later language in the protective order that says, the protection shall continue until the Court makes a decision on the motion.

According to plaintiffs, this means, Ah-Ha, because it says decision, that must mean that you can have an oral ruling and that's enough. But that doesn't make any sense. Rather than reading the two provisions in harmony with one another and in harmony with the background of Nevada law, they're saying, Well, actually, this term decision shows that you can override Nevada law and disregard the ordinary meaning of the word order and have it extended to oral pronouncements.

That, I think, would have the perverse effect at making a decision on confidentiality unreviewable -- effectively unreviewable by the Supreme Court, because the Supreme Court, of course, cannot review on the merits an oral decision. It requires the entry of a written order in order to be able to rule on the at issue -- issue of confidentiality or privilege or the like.

Plaintiffs also accused United of saying that, well, if you're going to say that this was a violation of the protective order, essentially that would render the Court's oral ruling meaningless. And I think we have a disagreement on what sort of meaning we're supposed to ascribe to these proceedings.

We're not saying that the [indiscernible] are meaningless.

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We just don't agree that they have the specific effect of disregarding a protective order that the parties entered into and had the immediate effect of removing [indiscernible] at the hearing. Rather, we understand it to have the meaning that every oral ruling has within the judicial district, which is it defines the parameters for an eventual written order.

Of course, we're not saying that we could go in [indiscernible] an order that would be completely at odds with the Court's oral ruling and expect the Court to sign it, rather the [indiscernible] show that -- say that you would need to propose an order that's in line with the Court's oral ruling. But that doesn't mean that the oral ruling itself has the effect of removing confidentiality at the moment that it's pronounced.

And just to be clear, it wasn't clear from the plaintiff's opposition whether they're actually arguing whether this case would fall within one of the narrow exceptions. But to be clear, it does not. Although they refer to the protective order as a type of case management order, a decision that overrules a privilege or confidentiality designation effectively removing parties' substantive rights to keep information out of the public domain, that's a substantive ruling.

It's not a case management order of the type that the cases talk about. They're talking about, you know, resetting a hearing date, rescheduling trial, reassigning the case to a new department. I don't think that could be accomplished, perhaps even

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ex parte, without jeopardizing the parties' substantial rights. But to be clear, certainly an issue of privilege or confidentiality cannot simply be treated as an issue that does not require a written order.

Lastly, let me talk briefly about the issue of what the appropriate sanction is and the prejudice from the plaintiff's violation. I think the plaintiffs are trying to shift the timeline a little bit. They say, well, you know, they didn't file the motion until the case had -- or the information had already gone out in a public article. But to be clear, it was already too late. By August 2nd, which was actually before -- earlier in the day then we got even the proposed written orders from plaintiff, the plaintiffs had already disclosed this information outside the counsel-only bubble that the information should've remained in, and it had extended to parties beyond on the jurisdiction of this Court. So it was already too late by August 2nd to claw back -- to claw back these materials. It was in the public domain. And, frankly, at that point, it didn't make sense for United to try to make [indiscernible] of trying to withdraw the documents that are clearly already [indiscernible].

Plaintiffs then accused defendants of not seeking an oral stay. And they refer -- of course, there's is no -- there is no published case law requiring such a thing. They instead refer to unpublished district court orders.

But if you look at those cases, they're talking about a stay that goes beyond [indiscernible] in the *Wynn* case, the [indiscernible] case, that was a stay pending a writ petition, and the parties agreed

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that the stay would extend for 14 days, and it was not tied to the entry of a written order.

In the *Goldentree* case, again, we don't have much context on that because the plaintiffs didn't provide any. But there -- it appears, again, that the stay was requested to extend through the resolution of a writ [indiscernible]. Again, that's not tied to the entry of a written order.

Here, all we're saying is that without a stay, we perhaps wouldn't have been able to expect protection to continue beyond the entry of a written order, but there was no reason to expect that the protection would evaporate before the entry of a written order, absent a stay, because the protective order already provided that confidentiality that it would continue through the entry of an order.

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And again, they question -- the plaintiffs question our sincerity in whether we actually would have filed a writ petition or not. I don't think I need to get into our privileged attorney-client conversations, but I did submit a declaration that, yes, we were seriously considering this. And then it became clear that the plaintiffs had eviscerated the object of such a writ petition by disclosing these materials to third parties, to the press.

So it was our right to seek a public review. There's no question that the Supreme Court would've taken a case like this seriously. The plaintiffs never argued that the -- that the designation was so frivolous that it could just be disregarded out of hand. I don't think this Court treated it as frivolous. Of course, there was a written

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confidentiality agreement that the Court had to override between United and Mr. Cooper. The Court decided that it was worth overriding it in overruling our objection to the Report Recommendation No. 5. But that doesn't mean that we didn't have a good faith argument.

And certainly the Supreme Court would have taken a look at -- a hard look at this, even if it ultimately decided that no -- there was no confidentiality. The Court -- even if the Supreme Court were eventually to agree with this, this Court -- that doesn't remedy the initial violation, our right to seek appellate review, and the fact that the confident -- that the protective order was [indiscernible] in this case afforded us precisely that action.

Does Your Honor have any questions for me?

THE COURT: I don't. Thank you. Did that conclude your argument?

MR. SMITH: It did, Your Honor.

THE COURT: All right. Let's hear the opposition, please.

MS. LUNDVALL: Thank you, Your Honor. Pat Lundvall, from McDonald Carano, again on behalf of the plaintiff, the Health Care Providers. I appreciate the opportunity to allow the parties to make their record. Since United has made theirs in full, I intend to make ours in full as well.

One of the things that the -- United does not do is it does not afford the Court any framework for the analysis on the motion that they had brought. This is a motion for an Order to Show Cause

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to find that we are in contempt, and in particular, find counsel in contempt.

What the Court must do, well, for that framework or for that analysis, before you can make such a finding, is, No. 1, you have to identify what the order is that's at issue; and, No. 2, you have to confirm that the order that was allegedly violated is clear and unambiguous.

And that's the decision in *Division of Child and Family Services versus 8th Judicial District Court.* It's a 2004 decision from the Nevada Supreme Court.

No question about the fact that the order that is at issue is the stipulated protective order. That stipulated protected order was a written agreement that was negotiated extensively by the parties before it was submitted to the Court then for consideration as a written order.

Paragraph 9 is the operative paragraph for the specific legal issue that's before you, and you need to, in fact, apply the classic contract interpretation analysis to paragraph 5 in order to determine, first, what parties -- what duties the parties had under the stipulated protective order, so as to determine then whether or not that there was some type of a breach of those duties.

Before I turn to paragraph 9, I would like to give some context, though, to this dispute and the protective order and the use of the protective order, or more appropriately the abuse of the protective order that has been practiced by United in this case.

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One of the things that is at issue is the documents that they had designated as attorneys' eyes only. Paragraph 2 of the protective order defined when a party in good faith may designate documents as attorneys' eyes only.

In this case, that definition turned on whether or not that the documents contained either a trade secret or that they were so sensitive that it would significantly harm the business of the party who had produced the documents.

And if you take a look then in this case -- I want to give the Court a few statistics. There have been 61,023 items that have been produced by United during the course of discovery. Of those 61,000, almost 40,000 have been designated as attorneys' eyes only. That's almost 63 percent of the documents. In addition, they have designated 15,744 as being held confidential protected and an additional 5,000 as being confidential. There is only 1,772 documents that United hasn't applied some form of confidentiality to. But the bulk of their confidentiality designations have been attorneys' eyes only.

So the issue becomes is whether or not that the documents that were at issue were properly designated in the first place.

Now, one of the things that I will tell you, you've got to first look then at the business of what United is, to determine whether or not that these Yale study documents could be a trade secret. There's absolutely no contention that has been made by

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United that these documents are trade secrets.

Number 2 is that they would have to demonstrate that the disclosure of these documents has significantly harmed their basic business.

So what is their basic business? It's the sale and administration of health insurance claims.

Has there been any contention made in this motion for order to show cause that would suggest that somehow that the disclosure of these documents has significantly harmed their basic business? Absolutely not. It is a concession and it is an admission that they overdesignated in the first place. And both Special Master Wall, as well as this Court, was proper in stripping away the designation of attorneys' eyes only to the documents.

I think the second point that is most important, and it underscores the fact that the stipulated protective order is a case management order -- and allow me to underscore this if you can for a bit. It allows the parties some protection for confidentiality during discovery, but it affords no protections during trial.

I think it's important to note that these documents were in our possession. They were relevant. They were discoverable. And United had an obligation and a duty then to turn these over to us. And so the stipulated protective order only identifies the time frame in which those documents made [indiscernible] or must be maintained as confidentiality.

Now, these documents, I think, are important to look at in

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this context. These documents [indiscernible] were the Yale study documents are clearly going to be exhibits at the time of trial. These documents underscore and illustrate the intentionality of the harm that United -- and the efforts that United took to intentionally harm the plaintiffs at issue in this case. They will demonstrate, then, the attempt that has been made by United -- and that goes directly then to the claims that have been asserted in this case. They will be exhibits at time of trial. And so, therefore, it was simply a matter of time before these documents would be made public.

And the simple reason that these documents will be made public, because you can't ask jurors sitting in the box to sign a confidentiality order. So to the extent that the parties have claims and litigation over those claims, the documents then that are relevant to those claims will be presented then to the jury.

When you examine and look at the timing aspect of this stipulated protective order, it underscores the fact that this issue before you is nearly identical to the oral order that was at issue in *Bahena versus Goodyear*, that the Nevada Supreme Court found to be enforceable. And because there was a violation of that oral order, counsel were sanctioned then as a result of that. And so our case then falls square within the scope then of *Bahena versus Goodyear* in demonstrating and underscoring the fact that this was a case management order.

I also think that the -- there's another point that underscores the fact that this is a case management issue, and not a

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substantive issue as Mr. Smith contends. They cited to this Court three cases claiming that the Nevada Supreme Court will bend over backwards to try to maintain the confidentiality of documents, and, therefore, they would have taken this case seriously or maybe writ seriously and likely afforded it writ review.

Each and every one of the cases that they cited dealt with documents that had not been produced in the case. In the *Columbia versus Healthcare* case, what was at issue was work product and peer review privilege. The opposing party did not have those documents. What was at issue was whether or not those documents had to be produced. In *Wardleigh,* what was at issue was a work product and an attorney-client privilege. What was at issue in *Schlatter* was a doctor-patient privilege. In each one of those cases, the opposing party did not have possession of the documents.

In our case, in stark contrast, we have possession of the documents. United had produced those documents to us. And it was only a matter of how long that those documents would enjoy some form of confidentiality.

So when you take a look then at the concession that was contained within their moving papers both, in their opening brief, as well as in the reply brief, they concede the case management orders -- oral case management orders are enforceable. And that's exactly how the parties have treated any of the Court's oral orders dealing with case management issues.

In a bit, I'll give the Court a few examples then of that. But

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let me turn specifically then to Paragraph No. 9 of the stipulated protective order. Paragraph No. 9, in two separate places, does not require a written order or a written decision. Instead, what United wishes the Court to do is to imply or to engraft or to put in and to insert, claiming that there was some failure on behalf of the parties then to include that.

But this is not the interpretation that is supposed to be afforded to the stipulated protective order, which is an agreement, and it violates then not only the plain meaning but the plain language then of the stipulated protective order.

Paragraph A -- Paragraph 9, Subsection A, expressly required a written agreement or an order. It doesn't say a written order. It says, A written agreement or an order.

And I'm going to use the language specifically: The Court issues an order ruling on the designation.

On July 29th, when we were before this Court, you issued an order ruling on the designation. You adopted the Report and Recommendation from Special Master Wall, and that Report and Recommendation stripped away any confidentiality designation.

When you go on to a little bit later within the Paragraph No. 9, you see a second reference. That second reference -- and once again I'm going to quote -- The protection afforded by this protective order shall continue until the Court makes a decision on the motion. Not a written decision, not issues a written decision, not issues a written order, but makes a decision on the motion. And the

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Court did exactly that then on July 29th. On July 29th then, under the plain language of the stipulated protective order, the -- any form as to the timing of the confidentiality protection was stripped away.

Now, as one way, I think, of testing whether or not that their interpretation that we believe is clear and unambiguous from the stipulated protective order, you can look to the parties' conduct in this case as to whether or not that we have waited until notice of injury of a written order before we begin to take action on the different tasks that were at hand as a result of the Court's oral rulings made at hearings.

And one of the things I think you could look at is bookends. The very first hearing that the Court held was on the motion to dismiss. And immediately after the hearing on the motion to dismiss, we were contacted and we began meet and confers on none other than the stipulated protective order, negotiated an e-mail protocol, et cetera, without waiting for written notice of entry of your order.

And the most recent example was just last week, the Court made an oral ruling on the issue of Dr. Frantz' deposition and whether or not Dr. Frantz' deposition then needed to be taken or whether or not that his previous testimony was sufficient then for his designation as a nonretained expert.

Immediately after issuance by the Court of your oral order, we were contacted then by United to begin scheduling. And I could give the Court umpteen examples of everything in between, as to the

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parties not waiting until notice of entry of a written order before acting upon the oral order.

One thing that I think is important to look at too is that when you look at or when you examine the motion that was filed by United in this case, they suggested that the purpose underlined, waiting until that there was notice of entry of order of a written order was that somehow it allows the Court the opportunity to change your mind between the hearing at which an oral decision or an oral pronouncement or an oral ruling is made and when, in fact, that the written order is issued.

We pointed out in our opposition that your guidelines absolutely prohibit that. Your guidelines made clear that the written order is supposed to match the oral order and that the parties have no opportunity then to argue for a different result or a different conclusion.

Noticeably, the reply brief that was filed by United didn't touch that argument. They were completely silent in response to that argument.

The next point I'd like to make for purposes of the record is this: United failed to protect itself from whatever that they claimed is a harm or a prejudice. And this is where I think a little bit of their argument, I'm going to label, as being specious.

We had a hearing on May 10th before Judge Wall -- before Special Master Wall. At that hearing -- there is a transcript of it -- we made clear, abundantly clear, that we were going to use if, in fact,

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the Yale study documents were stripped of their confidentiality in an effort to address then the regulatory issues that were ongoing in Washington, DC. We made that abundantly clear at that hearing.

The publication then -- the article that published these documents, was not issued until August 10. That's three months. Three months United had an opportunity to consider whether or not that it was going to take a writ, to consider what actions that it may need to take to protect itself. Three months to determine what course of action that it may need to take.

And in my opinion, it is best practice to -- if you've got an important issue for which that you perceive or you believe that you're going to need to take a writ, then you make an oral motion for stay.

On July 29th, we came prepared to address an oral motion for stay, but no oral motion for stay was made. And, therefore, when the Court issued its order, it issued an order ruling on the designation and the language of the stipulated protective order. And when it made its decision, that's when the designation fell away, and that's when then that it no longer enjoyed any protection.

The other thing I think that is worth bearing, as to the good faith in which this claim of prejudice is made, is this: Under the papers that were filed by United, they were contacted on August 2nd by the reporter. Only the reporter was known to United as having those documents.

But three days later, after being contacted and knowing

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that, in fact, that the reporter had these documents, only then did they come forward and ask in the form of a draft order for there to be some type of a different date by which then the confidentiality be stripped away. And the Court rejected that. And there was no mention whatsoever in that submission that, in fact, that at that point in time that they were taking any actions then or taking any efforts then to protect themselves.

And when you look at the motion and look at the relief that they have requested, the only sanction that they sought was the form of a monetary sanction. And the monetary sanction that they asked for was in the form of an award of attorney's fees in having to bring the motion for an Order to Show Cause. In other words, any of the harm or the prejudice that they contend was self-inflicted.

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Now, I know that I've probably given a little overkill to our presentation and to making a record in this case, but I will confess, I don't think I've ever been accused of being in contempt of a court order. And so I appreciate the Court's indulgence in allowing it.

In summary, we believe that the Court made a decision, and you announced your decision and your order ruling on the designation on July 29th on a case management issue. That decision then stripped away any of the confidentiality protections that were for the documents that were at issue under plain language and plain meaning interpretation of the protective order. We believe that the stipulated protective order was clear in our favor.

But to the extent that there is considered a construed and

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ambiguity in that order, then, in fact, an ambiguous order cannot be the foundation for a finding of contempt. And, therefore, we would ask the Court then, unless you have further questions, to deny the motion for orders to show cause.

THE COURT: Thank you.

And, Mr. Smith, if you will confine your argument to five minutes, please, in reply.

MR. SMITH: Thank you, Your Honor.

I don't mean to make this personal against Ms. Lundvall. I don't think we ever accused her personally of being the one that shared the attorneys' eyes only materials with the press. Well, frankly, plaintiffs haven't told us that, although we would like to know.

What I do take personally, though, is the argument that the declaration that I submitted is somehow specious, which is the term we heard today, and that we weren't, in fact, considering a writ petition.

As Your Honor knows, there are a lot of factors that go into whether a party might file a writ petition, and those factors change depending on a number of issues, including the proximity to trial date, the likelihood that the petition will be heard, et cetera. So it's not fair to say that we had three months to decide whether to file a writ petition, when, in fact, we had to go through the process of having the issue heard by this court first.

And certainly -- and actually Ms. Lundvall brings up -- she

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perhaps inadvertently brings up a good point, which is at the hearing, our client wasn't present. So of course our client wouldn't have known the outcome, and we needed to consult with our client to be able to decide what course to take in the wake of that hearing. And again, we haven't heard whether, in fact, the send button was pushed moments after that hearing.

Let me also address the contention that because we sought a more limited sanction that that somehow constitutes a concession that this was a minor violation. It was not a minor violation. We were trying to be charitable in trying to narrowly tailor the sanction.

But to be clear, this is of -- this is a willful violation of a protective order, the kind of willful violation of a discovery order that in a case like *Johnny Ribeiro* would merit dismissal of the complaint. Just because we haven't asked the Court to take that extreme measure doesn't mean that the harm was not extensive and that the contempt was not extreme.

Let me also address what I think was perhaps an inadvertent misstatement. Ms. Lundvall refers to our interpretation of the order requiring that there be notice of entry in an order. We never said that there needed to be notice of entry within the meaning of, you know, of some of the deadlines for filing postjudgment motions in an appeal.

Instead, what we said is there needed to be issued an order.

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Ms. Lundvall says, oh, well, the Court, in fact, entered -- sorry -- issued the order at the hearing. No. Let me pull from the transcript of the hearing.

The Court said, With regard to Report No. 5, the same thing. I agree with Judge Wall that the attorneys' eyes only was not necessary in this case, and I did review the supplement with regard to the price billing and manipulated data. And I agree with Dave Wall, with regard to all his conclusions. Next sentence, So the plaintiff to prepare the order. There was no order written, or otherwise, at the hearing. And in fact, it was clear that there needed to be a written order for the objection to be finally and effectively overruled.

We've got a bunch of arguments that, for the first time today, that were not addressed in the opposition, including a new argument that actually the protective order -- or rather that the protections within the protective order could be overruled orally because that was a case management order. We did not -- that was not clearly argued in the opposition. But, regardless, there is an abundance of support for the proposition that in order to overrule, any privilege or confidentiality designation needs to be written in order to be effective under Nevada law.

They also bring up the *Bahena* with, of course, no context for that case. That case involved a party being compelled to sit for a deposition by a date certain. That date certain fell within the objection period to the Special Master recommendation. So in order

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to be in compliance with the Special Master's ruling, there needed to be a stay of that order before the deposition took place.

We don't have anything like that here. This is not any affirmative action that United needed to take. United wasn't in contempt. I mean, we're kind of flipping the script in a sense. But United would not have been in contempt for simply leaving the *status quo*.

And I resent the comparison that somehow we're entitled to less protection simply because we produce these materials in discovery. I think, if anything, that weighs in favor of being more careful with both parties' confidentiality. At least in the *Columbia* case, the parties had not turned over the hospital incident reports. But here, we had given our confidential information to the plaintiffs on the understanding that it would be accorded exactly the protection that is entitled to under the protective order.

My last point, I don't think that the analysis for whether there's been a violation of the protection order has anything to do with the substantive analysis of whether this Court correctly overruled -- overruled our objection to the Report and Recommendation No. 5. In fact, it's in that instance when the Court disagrees with us on the underlying substance that those protections become especially important, and the Court needs to be especially mindful and the parties need to be mindful of protecting the other side's opportunity for appellate review.

Of course, this Court agreed. You know, this Court is the

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one that issued -- ultimately issued the written order overruling our objection. But that doesn't mean that that's a license to override our opportunity to seek appellate review.

I don't think that this is -- and neither party argued that there was ambiguity in the [indiscernible]. It was clear, it required the issuance of an order under Nevada law that needs a written order.

Your Honor should grant the motion. Thank you.

THE COURT: Okay. Thank you, both.

This is the defendant's motion for an Order to Show Cause why Plaintiffs Should Not Be Held in Contempt and Sanctioned for Violating Protective Order.

While I understand the technical argument advanced by the defendant, the motion will be denied because I can't make the findings that would be required to grant the Order to Show Cause.

I think the plaintiffs had the right to rely on the oral record done on July 29, 2021, at the hearing, where I overruled the defendant's objections and affirmed and adopted the recommendations of the Special Master.

So for those reasons, the motion will be denied.

The plaintiff may prepare an order consistent with your brief and your arguments today in as much detail as you deem appropriate.

Defendants, if you object to the form of the proposed order, please file an objection, and I'll take it from there.

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Any questions?

MR. SMITH: Your Honor, can I just ask one clarification?

Are you finding that the oral ruling overruling the confidentiality designation -- that that constitutes a case management order as Ms. Lundvall --

THE COURT: That is correct.

MR. SMITH: Okay.

THE COURT: That is correct.

MR. SMITH: [Indiscernible.]

THE COURT: Okay. Anything else to take up today?

MS. LUNDVALL: Not today, Your Honor, from the plaintiffs.

THE COURT: Very good. Thank you, everybody. Stay safe and healthy.

MR. POLSENBERG: Thank you, Your Honor.

[Proceeding concluded at 1:47 p.m.]

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

Katherine McNally

Katherine McNally
Independent Transcriber CERT**D-323
AZ-Accurate Transcription Service, LLC

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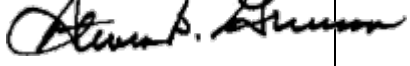

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

THURSDAY, APRIL 21, 2022

TRANSCRIPT OF PROCEEDINGS

RE: MOTIONS HEARING

SEE PAGE 2 FOR APPEARANCES

SEE PAGE 3 FOR MATTERS

RECORDED BY: VELVET WOOD, COURT RECORDER
TRANSCRIBED BY: KATHERINE MCNALLY, TRANSCRIBER

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A P P E A R A N C E S

FOR PLAINTIFF(S):

LOUIS LIAO, ESQ.
JOHN ZAVITSANOS, ESQ.
JANE ROBINSON, ESQ.

FOR DEFENDANT(S) HEALTH PLAN OF NEVADA INC.:

D. LEE ROBERTS, JR., ESQ.
JEFFREY E. GORDON, ESQ.
DANIEL F. POLSENBERG, ESQ.
ABRAHAM G. SMITH, ESQ.

FOR DEFENDANT(S) MULTIPLAN INC.:

CRAIG CAESAR, ESQ.
MICHAEL INFUSO, ESQ.
ERROL J. KING, JR., ESQ.

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LAS VEGAS, CLARK COUNTY, NEVADA

THURSDAY, APRIL 21, 2022 1:11 p.m.

* * * * *

THE COURT: All right. Let's call the case of Fremont Emergency Services versus United.

Let's start with the appearances from the plaintiff, then the defendant, and then MultiPlan.

MR. LIAO: Good afternoon, Your Honor. This is Louis Liao from AZA for plaintiffs.

And we have John Zavitsanos and Jane Robinson on as well.

THE COURT: Thank you.

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

THE COURT: Thank you.

MR. GORDON: [Indiscernible] on behalf of the defendants.

THE COURT: You're going to have to repeat that, please. It didn't come through.

MR. GORDON: Jeff Gordon, for the defendants.

THE COURT: Thank you.

Other appearances for the defendant?

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

THE COURT: Thank you. Do we have counsel for

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MultiPlan on the phone.

MR. CAESAR: Yes. This is Craig Caesar, from Phelps Dunbar.

THE COURT: And is your local counsel with you?

MR. INFUSO: Mike Infuso, on behalf of MultiPlan.

THE COURT: Okay. Thank you.

MR. KING: Errol King, on behalf of MultiPlan as well.

THE COURT: I'm sorry. You'll have to repeat that.

MR. KING: Yeah. I'm sorry. Errol King, on behalf of MultiPlan.

THE COURT: Thank you.

Is that everyone?

Okay. So the reason I set this on such short notice is I learned yesterday that Judy Chappel was -- received a request for trial transcripts.

The person making the request for a trial transcript was Nia Wiley, from Phelps Dunbar. And I just needed to bring that to everyone's attention.

And so I need a response from MultiPlan with regard to how that came about.

And then I'll give the plaintiff, then the defendant, a chance to respond.

MR. CAESAR: Yes, Your Honor. This is Mr. Caesar.

And it came about simply because we were interested, on behalf of our client, in determining the availability of

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the trial transcripts.

Obviously, we had -- Mr. King and I had been in the courtroom when Mr. Crandell testified. And I have obviously participated in hearings before you. So I just wanted to -- as you are aware, we're already enrolled in the case as counsel for MultiPlan, although MultiPlan is not a party.

When the request was -- the paralegal was looking to see if transcripts were available, when she reached out and contacted, I guess, the court recorder, we found out that the transcripts were not available, that they -- I gather, of course, they are still under seal.

And as far as we were concerned, that was the end of the inquiry.

But after that, we received the information from Your Honor that you wanted to have a further discussion about that.

In the meantime, I think you were in trial yesterday. But I reached out to your chambers to simply say that, understanding that the transcripts weren't available, we were withdrawing the request and thought that was the -- would be the end of the matter.

So again, Mr. King and myself have signed the attestations required in the protective order that's in place in the case. So we're fully aware of the nature of the need to protect information. And certainly we're not trying to

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circumvent anything.

The question that arose was simply the paralegal reached out to the court recorder to find out whether the transcript was available. And upon learning that the transcripts were not available, because obviously they're still under seal and will be presumptively through the whatever further post-trial proceedings and otherwise take place, that was the end of the inquiry as far as we were concerned.

THE COURT: Thank you.

Who is the spokesperson for the plaintiff?

MR. LIAO: This is Louis Liao, for the plaintiffs.

So plaintiffs were under the impression that the trial testimony was not under seal. So this is a public trial, and I don't think that there was a Motion to Seal during the trial.

And so we wouldn't be opposed to MultiPlan receiving the transcripts.

THE COURT: All right. Thank you.

Who is the spokesperson for United parties?

Okay. Somebody will need to unmute.

MR. ROBERTS: Yes. If Mr. Gordon's connection is working, I'll let him address this. But if not, I'm happy to address it.

MR. GORDON: Hard for me to tell if we have a video

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[indiscernible].

But our understanding was the transcripts and exhibits are all under seal, and the Court had already told MultiPlan that the transcripts are not available, they're under seal.

And Mr. Caesar has withdrawn the request. And I see no reason to change the current status of remaining not available under seal, until all the other proceedings have been sorted out [indiscernible] before the Court. And [indiscernible] but if there's anything to add directly.

THE COURT: So where are the parties on the agreement to -- on redactions so that the transcripts can be available for people?

MR. LIAO: So I was under the impression that the redactions would be a separate issue because those are documents. And they're in hearing on the briefing, on the sealing briefing. I think both MultiPlan and United noted that the trial testimony was at a level of detail that was not a concern. They didn't move to seal that trial testimony. And the subject of their briefing were the documents.

So in terms of where we are, I think Mr. McManis is more familiar with the back and forth and meet and confers on this issue. But I understand that we're working through the redactions.

THE COURT: Good enough.

MS. ROBINSON: Actually, I'm just going to jump in,

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this is Jane Robinson. Mr. McManis had a conflict and was not available at this time.

But I believe that the parties have submitted to the Court a document that summarizes their remaining disagreements. And I hope that somebody from defendants, if I'm wrong on that, will correct me.

MR. GORDON: Your Honor, the part of our hearings forms [indiscernible] I may have cut you off [indiscernible].

THE COURT: Mr. Gordon, you have such a bad connection.

MR. GORDON: I'm going to actually -- there is a terrible connection. I apologize.

We have -- I think Ms. Robinson is correct, there are motions that the parties have worked on that we have submitted to the Court in business court. And that's the status of it until we get further direction from the Court. Until we get further direction from the Court, and until there's the rest of the [indiscernible] proceedings -- with respect to those proceedings, the defendant's position is that remain taken [indiscernible].

THE COURT: And I'll go ahead and take a look at that.

Now, the last thing I would bring up with you guys is that you have --

MR. GORDON: [Indiscernible].

THE COURT: I'm sorry, Mr. Gordon. I interrupted you.

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MR. GORDON: [Indiscernible] remain the Court as the court ordered or instructed to the court recorder to [indiscernible]. And since MultiPlan has withdrawn that request, [indiscernible] the status quo until the judge makes further orders.

THE COURT: Okay. Good enough.

So the last thing I want to bring up is that you all have motions set on May 11th and May 26th, just on the regular motions calendar.

And if you're going to need more than 10 minutes -- we've set four things every half hour.

If you're going to need more than ten minutes, I'm going to ask you to get a special setting.

I am due to start a five-week jury trial on May 9th, so -- and I'm in a trial now that's supposed to go until the 5th or 6th of May.

So if you're going to need more time, please work together and work with my office.

MR. ZAVITSANOS: Your Honor, this is John Zavitsanos.

May I ask, Did you say for the first of those two settings, which I think deals with the issue of attorney's fees, did you say Your Honor that you've allocated 30 minutes.

THE COURT: No. I set four hearings every half hour.

MR. ZAVITSANOS: Oh, I see. Okay.

THE COURT: Just how we stagger our calendar.

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MR. POLSENBERG: Yeah. So 10 minutes, John.

THE COURT: So if you are going to need more than 10 minutes on the Motions for Fees and the Motion to Retax, please work together.

And then the things on 5/26 are again Motion for Judgment, Motion for New Trial, and a [indiscernible]. So again if you need more time, please get with my office. I'm happy to find the time for you.

MR. ZAVITSANOS: So Your Honor, the one --

This is John Zavitsanos, again, speaking for the plaintiffs.

The one that is -- I guess of all the things that you have mentioned, the one that is paramount for us is the two motions regarding fees and costs.

And I suspect -- well, I don't want to speak for the defendant, but I suspect -- for the defendants, but I suspect they're going to have more than 10 minutes.

THE COURT: Good enough.

MR. POLSENBERG: And I think, John, Dan Polsenberg, this is also true for the Motion for New Trial, motion to alter -- to amend the other postjudgment motions.

So we probably need to move both those settings.

THE COURT: Yeah. I'm just asking you to cooperate with each other, so that you get the time you need.

MR. POLSENBERG: We'll do that, Your Honor.

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THE COURT: Thank you.

Anything else to bring up today?

MR. POLSENBERG: No. But great job on the Bench Bar meeting.

THE COURT: We worked on that for four months, so thank you.

All right, guys. Stay safe and healthy until I see you next.

[Proceeding concluded at 1:22 p.m.]

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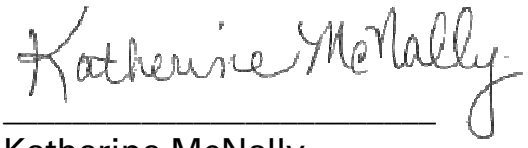
ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

NOTICE OF POSTING *SUPERSEDEAS* BOND

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.

Please take notice that defendants have posted the attached *supersedeas* bond to stay execution of the judgment pending resolution of the appeal in the Supreme Court of Nevada, *United HealthCare Ins. Co. v. Fremont Emergency Servs. (Mandavia), Ltd.*, Case No. 84558. (Exhibit A.)

Dated this 29th day of April, 2022.

/s/ Abraham G. Smith

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of April, 2022, a true and correct copy of the foregoing "Notice of Posting *Supersedeas* Bond" was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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/s/ Cynthia Kelley
An employee of LEWIS ROCA ROTHGERBER CHRISTIE

EXHIBIT A

017117

017117

EXHIBIT A

Appeal Bond

Travelers Casualty and Surety Company of America
One Tower Square, Hartford, CT 06183

STATE OF NEVADA
IN THE EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF CLARK

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

Plaintiff(s)

v.

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

Defendant(s)

Bond No. **107590101**

Index or Cause No. A-19-792978-B

017118

017118

KNOW ALL MEN BY THESE PRESENTS, that we **United Healthcare Insurance Company, et al.**, as Principal, and **Travelers Casualty and Surety Company of America**, a corporation organized under the laws of the State of Connecticut and authorized to do business in the State of **Nevada**, as Surety, are held and firmly bound unto **Fremont Emergency Services (Mandavia), LTD., et al.**, as Obligee, in the maximum aggregate penal sum of **Fifty Million and 00/100** Dollars (**$50,000,000.00**) for which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal will be timely appealing to the **Nevada Supreme Court** from a judgment entered on the **9th** day of **March**, **2022**, and,

WHEREAS, the Principal hereby posts this bond in order to stay execution of the judgment pending determination of such appeal,

NOW, THEREFORE, the condition of this obligation is such that if the Principal shall prosecute its appeal to effect and: (a) satisfy the judgment in full, together with costs and interest, if the appeal is finally dismissed, or if the judgment is finally affirmed by the appellate court; or (b) satisfy in full such judgment as modified by the appellate court, together with costs and interest; or (c), if the judgment is reversed or vacated in its entirety, then the above obligation is to be void, otherwise to remain in full force and effect; provided, however, the maximum liability of the Surety hereunder shall not exceed the maximum aggregate penal sum set forth above.

(8/19 ed.)

Written notice of claim on this surety bond shall be sent to the following:

Travelers Casualty and Surety Company of America
Attn: Commercial Surety Claim
One Tower Square
Hartford, CT 06183
bsiclaims@travelers.com

SIGNED, SEALED AND DATED this **5th** day of **April**, **2022**.

United Healthcare Insurance Company, et al.

By: _____
, Principal

Travelers Casualty and Surety Company of America

By: Susan A. Welsh
Susan A. Welsh, Attorney-in-Fact

017119

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(8/19 ed.)

ACKNOWLEDGEMENT BY SURETY

STATE OF ILLINOIS
COUNTY OF KANE

On this 5th day of April, 2022 before me, K Hannigan, a Notary Public, within and for said County and State, personally appeared Susan A. Welsh to me personally known to be the Attorney-in-Fact of and for Travelers Casualty and Surety Company of America and acknowledged that she executed the said instrument as the free act and deed of said Company.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the aforesaid County, the day and year in this certificate first above written.

017120

Notary Public in the State of Illinois
County of Kane

017120

OFFICIAL SEAL
K HANNIGAN
NOTARY PUBLIC, STATE OF ILLINOIS
KANE COUNTY
MY COMMISSION EXPIRES 10/23/2025

TRAVELERS

Travelers Casualty and Surety Company of America
Travelers Casualty and Surety Company
St. Paul Fire and Marine Insurance Company

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS: That Travelers Casualty and Surety Company of America, Travelers Casualty and Surety Company, and St. Paul Fire and Marine Insurance Company are corporations duly organized under the laws of the State of Connecticut (herein collectively called the "Companies"), and that the Companies do hereby make, constitute and appoint **Susan A. Welsh** of **CHICAGO**, **Illinois**, their true and lawful Attorney(s)-in-Fact to sign, execute, seal and acknowledge any and all bonds, recognizances, conditional undertakings and other writings obligatory in the nature thereof on behalf of the Companies in their business of guaranteeing the fidelity of persons, guaranteeing the performance of contracts and executing or guaranteeing bonds and undertakings required or permitted in any actions or proceedings allowed by law.

IN WITNESS WHEREOF, the Companies have caused this instrument to be signed, and their corporate seals to be hereto affixed, this **21st** day of **April, 2021**.

State of Connecticut

City of Hartford ss.

By: _____
Robert L. Raney, Senior Vice President

On this the **21st** day of **April, 2021**, before me personally appeared **Robert L. Raney**, who acknowledged himself to be the Senior Vice President of each of the Companies, and that he, as such, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing on behalf of said Companies by himself as a duly authorized officer.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

My Commission expires the **30th** day of **June, 2026**

_____
Anna P. Nowik, Notary Public

This Power of Attorney is granted under and by the authority of the following resolutions adopted by the Boards of Directors of each of the Companies, which resolutions are now in full force and effect, reading as follows:

RESOLVED, that the Chairman, the President, any Vice Chairman, any Executive Vice President, any Senior Vice President, any Vice President, any Second Vice President, the Treasurer, any Assistant Treasurer, the Corporate Secretary or any Assistant Secretary may appoint Attorneys-in-Fact and Agents to act for and on behalf of the Company and may give such appointee such authority as his or her certificate of authority may prescribe to sign with the Company's name and seal with the Company's seal bonds, recognizances, contracts of indemnity, and other writings obligatory in the nature of a bond, recognizance, or conditional undertaking, and any of said officers or the Board of Directors at any time may remove any such appointee and revoke the power given him or her; and it is

FURTHER RESOLVED, that the Chairman, the President, any Vice Chairman, any Executive Vice President, any Senior Vice President or any Vice President may delegate all or any part of the foregoing authority to one or more officers or employees of this Company, provided that each such delegation is in writing and a copy thereof is filed in the office of the Secretary; and it is

FURTHER RESOLVED, that any bond, recognizance, contract of indemnity, or writing obligatory in the nature of a bond, recognizance, or conditional undertaking shall be valid and binding upon the Company when (a) signed by the President, any Vice Chairman, any Executive Vice President, any Senior Vice President or any Vice President, any Second Vice President, the Treasurer, any Assistant Treasurer, the Corporate Secretary or any Assistant Secretary and duly attested and sealed with the Company's seal by a Secretary or Assistant Secretary; or (b) duly executed (under seal, if required) by one or more Attorneys-in-Fact and Agents pursuant to the power prescribed in his or her certificate or their certificates of authority or by one or more Company officers pursuant to a written delegation of authority; and it is

FURTHER RESOLVED, that the signature of each of the following officers: President, any Executive Vice President, any Senior Vice President, any Vice President, any Assistant Vice President, any Secretary, any Assistant Secretary, and the seal of the Company may be affixed by facsimile to any Power of Attorney or to any certificate relating thereto appointing Resident Vice Presidents, Resident Assistant Secretaries or Attorneys-in-Fact for purposes only of executing and attesting bonds and undertakings and other writings obligatory in the nature thereof, and any such Power of Attorney or certificate bearing such facsimile signature or facsimile seal shall be valid and binding upon the Company and any such power so executed and certified by such facsimile signature and facsimile seal shall be valid and binding on the Company in the future with respect to any bond or understanding to which it is attached.

I, **Kevin E. Hughes**, the undersigned, Assistant Secretary of each of the Companies, do hereby certify that the above and foregoing is a true and correct copy of the Power of Attorney executed by said Companies, which remains in full force and effect.

Dated this 5 day of April, 2022

_____
Kevin E. Hughes, Assistant Secretary

To verify the authenticity of this Power of Attorney, please call us at 1-800-421-3880.
Please refer to the above-named Attorney(s)-in-Fact and the details of the bond to which this Power of Attorney is attached.

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CLERK OF THE COURT

RPLY

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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

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

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO RETAX COSTS

017122

WEINBERG WHEELER HUDGINS GUNN & DIAL
017122

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.

Defendants UnitedHealthcare Insurance Company ("UHIC"), United HealthCare Services, Inc. ("UHS"), UMR, Inc. ("UMR"), Sierra Health and Life Insurance Co., Inc. ("SHL"), and Health Plan of Nevada, Inc. ("HPN") (collectively "Defendants"), by and through their attorneys, hereby submit this Reply in support of their Motion to Retax Costs.

This Motion is made and based upon NRS 18.110(4), all papers and pleading on file herein, and the Memorandum of Points and Authorities attached hereto.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

In response to Defendants' Motion, TeamHealth Plaintiffs[1] reduced their costs request from $1,093,530.73 to $1,081,101.84 (a $12,428.89 reduction) by removing certain first class tickets and gourmet dining bills that TeamHealth Plaintiffs tried to pass on to Defendants in the Verified Memorandum of Costs. Such a token reduction is not even close to sufficient here. The Court needs to take a hatchet to Plaintiffs' proposed cost award, not a scalpel.

Before, during and after trial, TeamHealth Plaintiffs' out-of-state partners and TeamHealth executives stayed at the Vdara in "one bedroom penthouse suite[s] with fountain views"[2] for approximately $464/night per room.[3] MGM describes the rooms as follows:

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

[2] *See e.g.*, Exhibit 2 to TeamHealth Plaintiffs' Verified Memorandum of Costs, Volume 8 at bates nos. 1775-1778 (showing upgrade to penthouse with fountain view).

[3] Exhibit 2 to Plaintiffs' Verified Memorandum of Costs, Volume 8 at bates nos. 1677-1778.

> Elevated in both height and sophistication, our 885 square foot One Bedroom Penthouse Suite offers a sanctuary in the middle of the Las Vegas Strip. Once you enter your suite you will see that the space is a perfect blend of modern design and luxurious amenities. Pamper yourself or entertain your guests, this is truly a stay you will never forget.[4]

TeamHealth Plaintiffs' seek to pass on nearly two months of luxury hotel costs to Defendants when they undisputedly could have stayed at a hotel like the Golden Nugget (which is a 5 minute walk from the courthouse rather than a 16 minute drive) for $145-$206/night. Moreover, it is undisputed that TeamHealth Plaintiffs had their associates and paralegals stay in standard rooms at the Vdara for $272/night.

These facts beg the question of what is TeamHealth Plaintiffs' argument as to why it was "reasonable and necessary," the test under NRS 18.005(17), for their partners and executives to stay in luxury fountain view penthouses on the Las Vegas Strip during trial when standard Vdara rooms were clearly available? And what is their explanation for attorney Kevin Leyendecker attempting to pass on over $1,200 in Aria Salon charges to Defendants?

TeamHealth Plaintiffs' token concension should be seen for what it is, an attempt to distract from other even more egregious attempts to pass on unreasonable and unnecessary costs. As detailed more fully below, TeamHealth Plaintiffs' Opposition largely fails to engage with the arguments raised in Defendants' Motion because there is no justification for their bloated cost request. Defendants' Motion should be granted and the cost request reduced by at least 50%.

II. TeamHealth Plaintiffs' Luxury Lodging Costs Are Egregious, Unreasonable and Unnecessary and Must be Disallowed or Substantially Reduced

A. TeamHealth Plaintiffs' "Good for the Goose, Good for the Gander" Argument Has No Application to an Analysis of Whether Lodging Costs Were Reasonably and Necessarily Incurred

Defendants' Motion pointed out that TeamHealth Plaintiffs were inappropriately seeking to pass on the cost of TeamHealth Plaintiffs' luxury hotel accommodations and first class plane tickets to Defendants. Plaintiffs responded by withdrawing their request for the first class tickets but insisting that the amount spent on luxury lodging for trial was reasonable. TeamHealth

[4] https://vdara.mgmresorts.com/en/hotel/one-bedroom-penthouse.html.

Plaintiffs make no argument as to why the local Las Vegas attorneys at McDonald Carano were incapable of trying this case or why an entire team of out-of-state counsel had to be flown in and lodged in luxury for nearly two months. TeamHealth Plaintiffs only argument is an inapplicable "good for the goose, good for the gander" argument. Namely, Defendants' out-of-state counsel stayed at the JW Marriott which TeamHealth Plaintiffs contend has similar rates to the Vdara and is also a luxury hotel. As an initial matter, evidence of where Defendants' out-of-state counsel stayed is completely irrelevant as Defendants have not moved to pass those costs onto TeamHealth Plaintiffs. However, if it was relevant, it would support a substantial reduction of Plaintiffs' lodging costs. Defendants' negotiated a corporate rate discount and partners, associates, paralegals and client representatives all paid for standard rooms without special fountain views. The room rate paid was consistent with the average nightly rate at the Golden Nugget, a hotel close to the courthouse where out-of-town counsel often stay. In any case, even if Defendants' counsel had hypothetically stayed at a hotel charging $1,000/night per room when rooms closer to the courthouse were available for $100/night, this would not somehow make it justifiable for TeamHealth Plaintiffs to stay in a luxury hotel and pass on the costs to Defendants. The sole issue under NRS 18.005(17) is whether TeamHealth Plaintiffs' lodging costs were "reasonable *and necessary*," something they cannot demonstrate.

B. TeamHealth Plaintiffs Undisputedly Incurred Luxury Hotel Costs for Their Lodging During Trial. These Costs Are Not Recoverable Absent Evidence There Was No Other Reasonable Option

Luxury hotel costs are not recoverable by a prevailing party unless that party submits evidence demonstrating that the luxury hotel was necessary due to its proximity to the courthouse and ability to accommodate a large trial team. *Withrow v. Stryker Sales Corp.*, No. CV 16-544 DSF (PLAX), 2018 WL 5858609, at *5 (C.D. Cal. Mar. 27, 2018) ("Attorneys are entitled to recover their reasonable expenses that would typically be billed to paying clients. This includes expenses such as travel, meals, mediation, and photocopying, **but would not permit unreasonable costs, such as first-class airplane tickets or luxury hotel accommodations**.") (emphasis added); *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1372 (N.D. Cal. 1996)

("This Court is greatly concerned about the excessive costs requested as reimbursement expenses by plaintiffs' counsel. It is highly unlikely that the class members intended to reimburse counsel for first class airplane tickets, **luxury hotel accommodations**, and gourmet dinner meetings.") (emphasis added); *HRPT Properties Tr. v. Lingle*, 775 F. Supp. 2d 1225, 1242 (D. Haw. 2011) ("Plaintiffs' request for reimbursement of first-class airfare and **luxury hotel accommodations** is unreasonable. Plaintiffs offer no sufficient explanation for why first-class airfare and luxury hotel accommodations were necessary and/or reasonable…**Again, it is one thing to charge a client for these expenses and another to seek recovery from the losing party**, particularly where, as here, the request is unreasonable and excessive.") (emphasis added).

The only instances where a court has allowed recovery of luxury hotel accommodations is where there was no other more reasonably priced alternative available to house counsel. *Long v. Nationwide Legal File & Serve, Inc.*, No. 12-CV-03578-LHK, 2014 WL 3809401, at *13 (N.D. Cal. July 23, 2014) (allowing award of costs of luxury hotel where it was only a half mile away from the deposition site and the attorneys shared a room); *Wit v. United Behav. Health*, No. 14-CV-02346-JCS, 2022 WL 45057, at *21 (N.D. Cal. Jan. 5, 2022) (allowing award of costs of luxury hotel where plaintiffs submitted a declaration stating the hotel was the only one close to the courthouse that could accommodate the needs of plaintiffs' trial team).

Here, the luxury lodging costs TeamHealth Plaintiffs are seeking to pass on to Defendants are egregious and completely unjustified and reasonable alternatives closer to the courthouse were available to accommodate their team. TeamHealth Plaintiffs incurred $204,026.23 in room charges at the Vdara for lodging during trial.[5] Plaintiffs housed AZA partners and TeamHealth executives in luxury one-bedroom penthouses with views of the Bellagio fountains[6] at a cost of $464/night per room.[7] In contrast, AZA associates and paralegals were housed in standard Vdara

[5] Exhibit 2 to Plaintiffs' Verified Memorandum of Costs, Volume 8 at bates no. 1761.

[6] Exhibit 2 to Plaintiffs' Verified Memorandum of Costs, Volume 8 at bates no. 1775-1778 (showing upgrade to "1 bedroom penthouse with fountain view.").

[7] John Zavitsanos, Kevin Leyendecker, Joe Ahmad, Jane Robinson, (AZA partners), Justin Fineberg (Lash & Goldberg partner), Phil McSween (TeamHealth general counsel), Carol Owen (chief counsel for

rooms without the fountain view at a cost of $272/night per room.[8] Why were standard rooms acceptable for associates and paralegals but not for AZA partners and TeamHealth executives? Mr. McManis was recently promoted to partner. Does his promotion mean that it is now reasonable for him to be housed in a luxury one-bedroom penthouse with views of the Bellagio fountains at a cost of $464/night? Did Justin Fineberg's "1 bedroom penthouse with fountain view" somehow increase his trial preparedness more than staying in a standard Vdara room would have? Indeed, despite his luxury accommodations Mr. Fineberg never examined a single witness at trial or played any visible role. Can TeamHealth Plaintiffs contend with a straight face that these luxury accommodations were actually "reasonable and necessary" under NRS 18.005(17)? What about the $1,298 in Aria salon services for AZA partner Kevin Leyendecker?[9] Were luxury manicures, pedicures and haircuts necessary for trial preparedness? What is TeamHealth Plaintiffs' explanation for why these were reasonable and necessary costs for trial preparation? TeamHealth Plaintiffs' request for lodging reimbursement is egregious and merits a substantial reduction.

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C. TeamHealth Plaintiffs' Luxury Hotel Costs Are Unreasonable In Light of Much More Economical Options Closer to the Courthouse Such as the Golden Nugget

Out-of-town counsel trying cases in Las Vegas often stay at the Golden Nugget which is just 0.3 miles from the Regional Justice Center. According to Google Maps the Golden Nugget is

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commercial litigation at TeamHealth), Kent Bristow (TeamHealth vice-president), and Leif Murphy (TeamHealth CEO), all stayed in suites at the Vdara with a rate of $464/night. Exhibit 2 to Plaintiffs' Verified Memorandum of Costs, Volume 8 at bates nos. 1677-1682 (Joe Ahmad); 1682-1688 (Kent Bristow); 1704-1710 (Kevin Leyendecker); 1722 (Leif Murphy); 1722-1729 (Carol Owen); 1734-1739 (Jane Robinson); 1755-1761 (John Zavitsanos); 1688-1692 (Justin Fineberg room charge showing initial charges at $272/night); bates no. 1775-1778 (showing Justin Fineberg upgrade to penthouse with fountain view).

[8] Exhibit 2 to Plaintiffs' Verified Memorandum of Costs, Volume 8 at bates nos. 1692-1697 (Myrna Flores, paralegal); 1710-1716 (Louis Liao, associate); 1716-1721 (Jason McManis, associate); 1698-1704 (Michael Killingsworth, associate); 1683-1688 (Ruth Deres, paralegal).

[9] Exhibit 2 to Plaintiffs' Verified Memorandum of Costs, Volume 8 at bates no. 1783-1784 (showing over $1,200 in Aria salon charges to Kevin Leyendecker's room number).

017127

a 5 minute walk from the courthouse or a 4 minute drive.[10] In contrast, the Vdara, located on the Las Vegas Strip, is 6.3 miles from the courthouse and a 16 minute drive.[11] Moreover, rooms at the Golden Nugget were priced much more reasonably than the Vdara with rates varying from $145/night (Nov. 1 – Nov. 25, 2022)[12] to $206/night (Oct. 18-31, 2022), including taxes and resort fees.[13] The Golden Nugget also has 2,419 hotel rooms—more than sufficient to house TeamHealth Plaintiffs' large trial team.

Again, absent TeamHealth Plaintiffs presenting evidence via a declaration or some other method that it was necessary for their counsel to stay in luxury accommodations far away from the courthouse on the Las Vegas Strip, the Court must disallow this request for costs. TeamHealth Plaintiffs' only argument is that Defendants' counsel also stayed in luxury accommodations which has no relevance to the standard under NRS 18.005(17). Therefore, Defendants request that TeamHealth Plaintiffs' lodging costs be either (1) disallowed completely (since Plaintiffs have not explained why local counsel McDonald Carano could not competently try this case) or (2) reduced to the rate that would have been charged for a stay at the Golden Nugget over the same time period, which would amount to an approximately 50% reduction to the $204,026.23 in room charges at the Vdara.

III. TeamHealth Plaintiffs' Opposition Largely Fails to Address Defendants' Arguments as to Why TeamHealth Plaintiffs' Expert Costs Should be Reduced to $1,500

Defendants' Motion lodged six separate attacks on TeamHealth Plaintiffs' request for an award of $264,050.83 in expert costs. First, Defendants pointed out that David Leathers' July 30, 2021 initial expert report was solely on the issue of quantifying TeamHealth Plaintiffs' RICO damages, a claim that TeamHealth Plaintiffs later dropped and did not prevail on at trial, and therefore, TeamHealth Plaintiffs were not entitled to recover any amounts billed by Mr. Leathers

[10] **Exhibit 1** (Google Maps printout showing distance from Golden Nugget to courthouse and typical walking time).

[11] **Exhibit 2** (Google Maps printout showing distance from Vdara to courthouse and typical drivetime).

[12] **Exhibit 3** (printout of price for staying at Golden Nugget from November 1 – 25, 2022).

[13] **Exhibit 4** (printout of price for staying at Golden Nugget from October 18-31, 2022).

related to his RICO claim analysis. Second, Defendants pointed out that over 40% of the claims on TeamHealth Plaintiffs' original disputed claim list had been dropped by TeamHealth Plaintiffs as the list changed over time and that a substantial portion of Mr. Leathers' work had involved analyzing this constantly evolving claim list. Thus, Defendants asserted that a substantial reduction in Mr. Leathers' fee was appropriate since TeamHealth Plaintiffs did not prevail on over 40% of the original claims that Mr. Leathers analyzed for them.

Third, Defendants pointed out that NRS 18.005(5) expressly limits the award of any expert fee to costs related to "the expert's testimony" and therefore TeamHealth Plaintiffs were not entitled to recover any costs incurred by having Mr. Leathers assist with preparing cross-examination outlines[14] since these costs did not relate to his testimony. Fourth, Defendants pointed out that Mr. Leathers spent less than 7 hours on the witness stand at trial and that $264,050.83 is not a reasonable and necessary expenditure in light of his relatively limited role at trial. Fifth, Defendants pointed out that TeamHealth Plaintiffs' counsel has previously admitted on the record that Mr. Leathers' work was duplicative of TeamHealth Plaintiffs' expert Scott Phillips' work. Finally, Defendants argued that the fee awarded for Mr. Leathers' work should be limited to $1,500 because TeamHealth Plaintiffs had completely redacted Mr. Leathers' invoices making it impossible to determine what portion of Mr. Leathers' costs were not recoverable (i.e. costs related to analysis of the RICO claim and the original claim list) and which costs were recoverable (i.e. costs directly related to his expert testimony at trial on compensatory damages).

In response, TeamHealth Plaintiffs only address Defendants' last two contentions. As to duplicativeness, TeamHealth Plaintiffs assert that Mr. Leathers did his own independent analysis to support this expert testimony and attach a number of mostly unredacted invoices to support this. But this does not negate the fact that TeamHealth Plaintiffs' counsel told the court that they asked Mr. Leathers to perform the work in case Mr. Phillips was unable to attend trial. TeamHealth

[14] It is not clear from Mr. Leathers' redacted invoices which witnesses he assisted in preparing cross-examination outlines for. However, Ms. Lundvall's Declaration attached to TeamHealth Plaintiffs' Verified Memorandum of Costs states that Mr. Leathers assisted in "preparing cross-examinations of defendants' witnesses." Verified Memorandum of Costs at 8:1-2.

Plaintiffs' counsel's decision to request duplicative work cannot be foisted upon Defendants, especially when that work occurred **after** the disclosure deadline for expert reports. TeamHealth Plaintiffs also produced partially redacted invoices showing Mr. Leathers' individual billing entry descriptions to address Defendants' contention that it was impossible to determine what work was done and what costs should be recoverable.

However, TeamHealth Plaintiffs completely failed to address Defendants' other contentions set forth above. In addition, the partially redacted invoices attached to their Opposition actually *support* a substantial reduction in any award for Mr. Leathers' work. Mr. Leathers' invoices confirm that TeamHealth Plaintiffs are seeking to force Defendants to pay for Mr. Leathers' work analyzing the dropped RICO claim.[15] At minimum, all of Mr. Leathers' work prior to his July 30, 2021 report on RICO damages should not be recoverable. This would amount to a reduction of $64,670. Exhibit A to Opposition at bates no. 001.

As expected, Mr. Leathers' partially redacted invoices also show that he spent a substantial amount of time analyzing claims on TeamHealth Plaintiffs' constantly evolving claims list that ultimately dropped 40% of the original asserted claims.[16] Due to the vagueness of Mr. Leathers' billing entries, it is not possible to determine which portion of his analysis was on claims that TeamHealth Plaintiffs prevailed on at trial and which portion was on claims that were dropped prior to trial. It was TeamHealth Plaintiffs' burden to prove that Mr. Leathers' fees over $1,500 were reasonably and necessarily incurred and they have failed to carry that burden. For these reasons, and the reasons set forth in Defendants' Motion that were never rebutted by TeamHealth Plaintiffs, Defendants request that the Court award no more than $1,500 to TeamHealth Plaintiffs' for Mr. Leathers' work. In the alternative, the Court should substantially reduce the over $264,000 in fees sought to a more reasonable amount.

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[15] *See e.g.*, Exhibit A to Opposition bates no. 003 (7/29/21 time entry by Craig Evans for 10.6 hours for "**Update RICO damages** with Sierra claims removed…") (emphasis added).

[16] *See e.g.*, Exhibit A to Opposition at bates no. 010 (9/8/21 time entry by David Leathers for 10.0 hours for "analysis of claims data…").

IV. TeamHealth Plaintiffs' E-Discovery Fees are Not Reimbursable Under NRS 18.005(17)'s Catch-all Provision

TeamHealth Plaintiffs seek to recover $78,315.20 in E-Discovery fees under NRS 18.005(17)'s catch-all provision that permits recovery of "any other reasonable and necessary expense incurred in connection with the action." In their Motion, Defendants pointed out that TeamHealth Plaintiffs' only back-up for the $78,000 in E-Discovery fees is a single document (Exhibit 1 to Plaintiffs' Verified Memorandum of Costs at bates no. 0947). This is a self-generated document that does not indicate what the fees incurred relate to or that they were actually incurred. In response, TeamHealth Plaintiffs argued that McDonald Carano pays a license fee to Everlaw for E-Discovery services and that the amounts paid were reasonable. However, TeamHealth Plaintiffs have failed to provide any invoices from Everlaw, failed to provide the contract with Everlaw, and failed to confirm that TeamHealth Plaintiffs are only seeking to pass on the portion of the license fee attributable to this case to Defendants.

Moreover, since TeamHealth Plaintiffs are seeking to recover these costs under NRS 18.005(17)'s catch-all provision, the Court must "sparingly" exercise its disretion to award these costs as they are not specifically allowed by statute or precedent. *Bergmann v. Boyce*, 109 Nev. 670, 679, 856 P.2d 560, 565–66 (1993) (emphasis added).[17] TeamHealth Plaintiffs have not cited a single case where E-Discovery fees, which are not expressly allowed under NRS 18.005, have been found to be recoverable under the catch-all provision. Given the lack of precedent for recovery of E-Discovery costs and the lack of back-up provided by TeamHealth Plaintiffs, these costs should be disallowed.

[17] *Bergman* is still good law and has been cited with approval by the Nevada Supreme Court as recently as March 30, 2022. *Matter of Est. of Schwartz*, 507 P.3d 182 (Nev. 2022). The only portion of the *Bergman* decision that is no longer controlling is the holding that legal research costs are not a recoverable cost under NRS 18.005. That statute was amended two years after the *Bergman* decision to expressly allow recovery of legal research costs "but the analytical framework used in *Bergmann* to decide whether an expense falls within the "catchall" definition in NRS 18.005(17) remains good law." *Matter of DISH Network Derivative Litig.*, 133 Nev. 438, 451, 401 P.3d 1081, 1093 (2017)

V. TeamHealth Plaintiffs Have Failed to Provide Sufficient Back-Up and Itemization to Permit a Recovery of Their Legal Research Costs

Defendants pointed out in their Motion that the $49,935.28 in legal research costs were not properly itemized and no back-up was provided that would allow Defendants or the Court to determine whether these costs were reasonably and necessarily incurred. In response, TeamHealth Plaintiffs attached additional back-up as Exhibit E to their Opposition. However, this back-up suffers from the same problem as the initial supporting documentation. The back-up only indicates the attorney biller, the amount of charges and the date of the charge. No description is provided regarding the purpose of the research that would allow Defendants or this Court to assess whether the research was reasonable or necessary. Moreover, even more importantly, Plaintiffs's counsel has presented no evidence indicating that Plaintiffs actually paid these Westlaw costs. Typically, clients refuse to pay for Westlaw and view it as part of an attorney's overhead. Without an engagement letter showing that Plaintiffs agreed to pay McDonald Carano for Westlaw fees or other proof that thes costs were actually incurred, this request is deficient. Therefore, the Court should deny recovery of these costs.

VI. TeamHealth Plaintiffs' Copying Costs Are Not Supported and Should be Disallowed

Plaintiffs seek to recover $46,304.27 in copying costs. Defendants' Motion pointed out that the back-up for these costs was so deficient that it was impossible to determine what was printed and therefore whether the printing was reasonable and necessary. TeamHealth Plaintiffs responded by attaching additional back-up as Exhibit F to their Opposition. However, while this back-up does tend to support that TeamHealth Plaintiffs actually incurred these costs, it does not indicate what was printed in a way that would allow this Court to determine that the costs incurred were reasonable and necessary.

As one example only, TeamHealth Plaintiffs attached numerous invoices from the federal court document retrieval service PACER. Exhibit F to Opposition at bates nos. 106 – 127. However, PACER provides free access to documents filed in federal court to the attorney of record on the case. Thus, if these documents were from the Nevada federal district court case prior to remand, it is unclear why TeamHealth Plaintiffs needed to pay to obtain these documents. Conversely, if TeamHealth Plaintiffs were obtaining documents from other federal court cases, it

is unclear why those charges should be passed onto Defendants. If these charges relate to other federal court TeamHealth cases against United entities, TeamHealth should seek to recover the printing costs in those cases if it is the prevailing party, not here.[18] Moreover, Exhibit F shows that numerous different client codes were used for various printing charges which tends to indicate that TeamHealth Plaintiffs may be seeking to pass on inappropriate charges for other client matters to Defendants. *Compare* Exhibit F at bates nos. 113-114, 116 (listing printing charges for numerous different client codes) with Exhibit E (listing Westlaw charges for the single client code 019438-3, which presumably is for TeamHealth). For these reasons, the Court should disallow TeamHealth Plaintiffs' request for printing costs.

VII. CONCLUSION

For the reasons set forth above and in the Motion, Defendants request that TeamHealth Plaintiffs' cost request be reduced by at least 50% or, in the alternative, some other substantial amount that the Court finds reasonable.

Dated this 4th day of May, 2022.

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[18] The TeamHealth attorney of record in other federal court matters involving United could also have provided these documents free of charge to TeamHealth's Nevada counsel.

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of May, 2022 a true and correct copy of the foregoing **DEFENDANTS' REPLY IN SUPPORT OF MOTION TO RETAX COSTS** 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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EXHIBIT 1

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EXHIBIT 1

Google Maps

Regional Justice Center to Golden Nugget Las Vegas Hotel & Casino

Walk 0.3 mile, 5 min

	via S Casino Center Blvd	5 min 0.3 mile
	via S 3rd St and S Casino Center Blvd	6 min 0.3 mile

All routes are mostly flat

EXHIBIT 2

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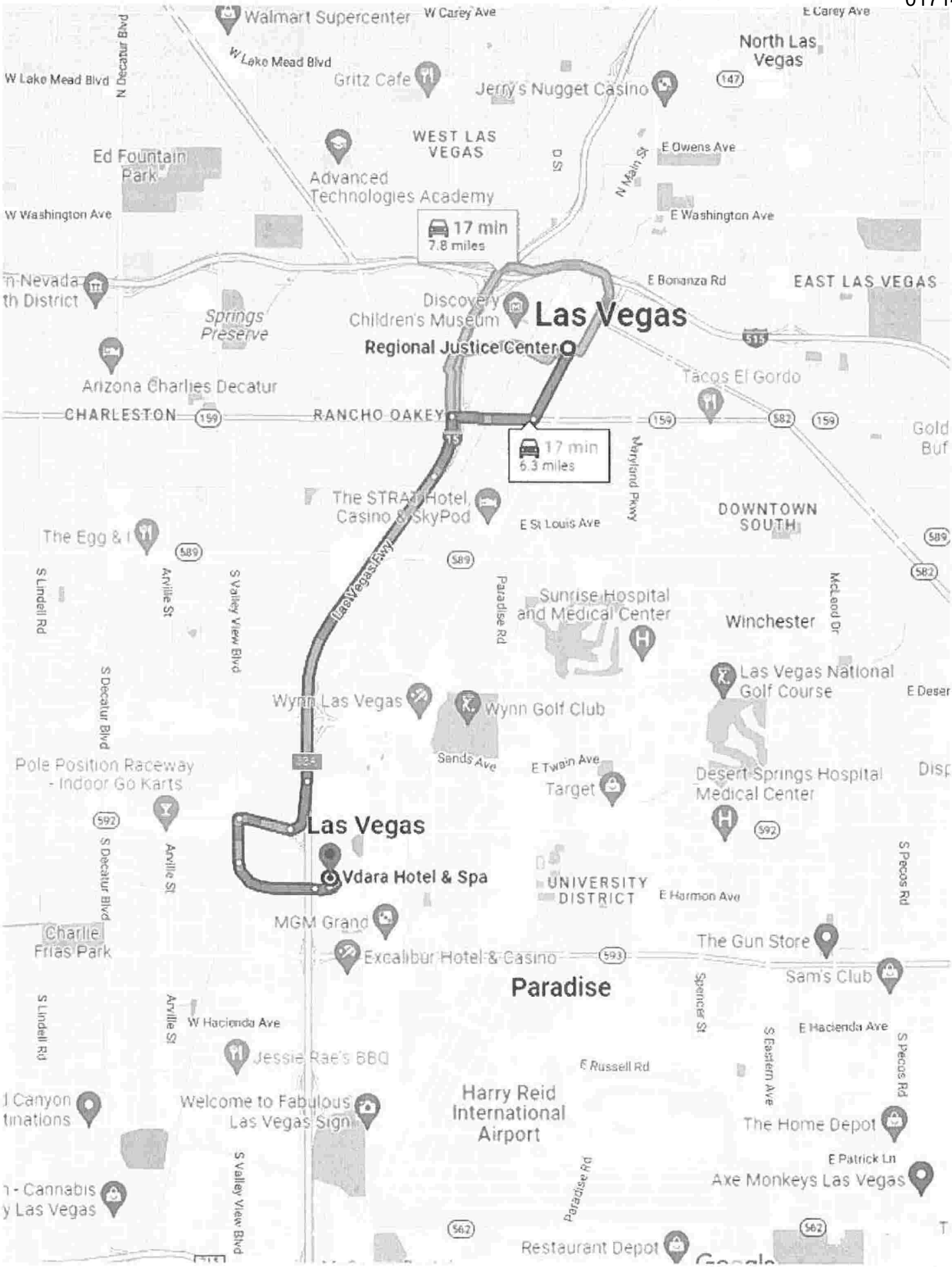
EXHIBIT 2

Google Maps Regional Justice Center to Vdara Hotel & Spa Drive 6.3 miles, 17 min



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via I-15	Best route, despite the usual traffic	17 min 6.3 miles
via I-15 S		17 min 7.8 miles
via E Bonneville Ave and I-15 S	Some traffic, as usual	17 min 6.6 miles

Explore Vdara Hotel & Spa

Restaurants Hotels Gas stations Parking Lots More

EXHIBIT 3

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EXHIBIT 3

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Rooms **Reservation details** Start over

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GUEST DETAILS

* *indicates required field*

☐ I would like to be informed of best offers via email

First name * Last name * Email *

AVAILABLE OFFERS

Best Available Rate
USD 92.75 / night
Excludes taxes or fees
Best available rate Offer details
+ 3 Free Rewards

EXTRA INFORMATION ABOUT YOUR VISIT

* *indicates required field*

RESERVATION DETAILS

ROOM Bed Type Assigned at Check-in

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Accessible guestroom or other special requests?

DATES Tue, Nov 01 — Fri, Nov 25
ADULTS 1
CHILDREN 0

ROOM CHARGES:	**USD 2,226.00**
STANDARD RESORT FEE Details :	**USD 976.32**
OCCUPANCY TAX :	**USD 289.38**
GRAND TOTAL:	**USD 3,491.70**
	+ 3 Free Rewards

Confirm details

Golden Nugget Las Vegas | 129 E. Fremont St. | Las Vegas | Nevada | 1-702-385-7111

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EXHIBIT 4

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EXHIBIT 4

GOLDEN NUGGET LAS VEGAS

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HOTEL DETAILS PHOTOS

Rooms **Reservation details** Start over

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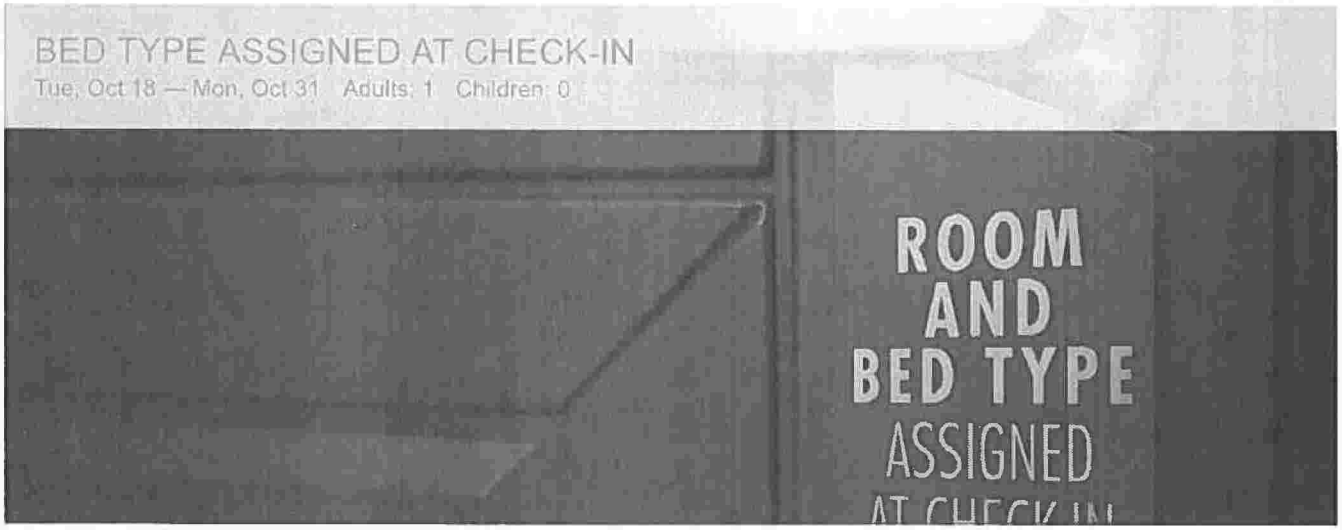

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GUEST DETAILS

*indicates required field

☐ I would like to be informed of best offers via email

First name * Last name * Email *

AVAILABLE OFFERS

Best Available Rate
USD 145.92 / night
Excludes taxes or fees
Best available rate Offer details + **3 Free Rewards**

OTHER SERVICES & OPTIONS

PET ACCOMMODATION $80
USD 80.00 / night

RESERVATION DETAILS

ROOM Bed Type Assigned at Check-in
DATES Tue, Oct 18 — Mon, Oct 31

Got a Dog? Cuddle up with them here. Be sure to book your room in advance. A $80+$10.40 tax fee per night, and a $100 refundable deposit will apply. Available in Carson and Rush Towers Deluxe Room Accommodations only.

ADULTS 1
CHILDREN 0

ROOM CHARGES:	**USD 1,897.00**
STANDARD RESORT FEE Details **:**	**USD 528.84**
OCCUPANCY TAX :	**USD 246.61**
GRAND TOTAL:	**USD 2,672.45**
	+ 3 Free Rewards

Confirm details

EXTRA INFORMATION ABOUT YOUR VISIT

* *indicates required field*

Accessible guestroom or other special requests?

Golden Nugget Las Vegas | 129 E. Fremont St. | Las Vegas | Nevada | 1-702-385-7111

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DISTRICT COURT

CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., a Nevada professional corporation; TEAM PHYSICIANS OF NEVADA-MANDAVIA, P.C., a Nevada professional corporation; CRUM, STEFANKO AND JONES, LTD. dba RUBY CREST EMERGENCY MEDICINE, a Nevada professional corporation, Plaintiffs, vs. UNITEDHEALTH GROUP, INC., a Delaware corporation; UNITED HEALTHCARE INSURANCE COMPANY, a Connecticut corporation; UNITED HEALTH CARE SERVICES INC., dba UNITEDHEALTHCARE, a Minnesota corporation; UMR, INC., dba UNITED MEDICAL RESOURCES, a Delaware corporation; OXFORD HEALTH PLANS, INC., a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., a Nevada corporation;	Case No.: A-19-792978-B Dept. No.: XXVII **HEALTH CARE PROVIDERS' REPLY IN SUPPORT OF MOTION FOR ATTORNEYS' FEES** Date of hearing: 5/11/22 Time of hearing: 9:30 a.m.

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

Defendants.

By not arguing to the contrary, Defendants concede:

1. The Health Care Providers' Motion for Attorneys' Fees ("Motion") was timely pursuant to NRCP 54(d)(2)(B)(i);

2. The contents of the Motion met the requirements of NRCP 54(d)(2)(B)(ii-v);

3. The Health Care Providers were prevailing parties and therefore are entitled to recovery of reasonable attorneys fees pursuant to the Nevada Prompt Pay Act, specifically NRS 683A.0879(5);

4. The attorneys fees sought were actually incurred and paid by the Health Care Providers;

5. The Health Care Providers' chosen law firms, attorneys and paralegals possessed the requisite qualities, including ability, training, education, experience, professional standing and skill, necessary for this case;

6. The character of the work required by this case was extensive and complex in its difficulty, intricacy and importance;

7. The work performed by the attorneys and paralegals was required by this case;

8. The results achieved were successful, i.e. it was the greatest result these professionals could have achieved for the Health Care Providers; and

9. No one *Brunzell* factor should predominate or be given undue weight as the Court evaluates the reasonableness of the Health Care Providers' request for an award of $12,683,044.41 in attorneys fees.

Defendants advance four basic arguments opposing the Health Care Providers' request for a specific award of attorneys' fees:

1. Without revealing any of the rates or even the overall amount charged by any

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of the Defendants' counsel, including those of their own out-of-state counsel or their purported expert on Nevada rates, Defendants baldly contend the rates charged by Health Care Providers' counsel and their paralegals are too high;

2. The amount of attorneys fees awarded should be reduced by 70% because of "block billing" or other sundry complaints about preparation of the law firm invoices;

3. The number of hours worked by counsel for the Health Care Providers should be reduced because of alleged over-staffing or duplication of efforts; and

4. The amount of attorneys fees awarded must be apportioned between those attorneys fees incurred prosecuting the Prompt Pay Act claim and the other claims asserted in the Health Care Providers' pleadings. *See generally,* Opposition.

In advancing these four basic arguments Defendants ignore decisions from this Court and the Nevada's Supreme Court, as well as the evidence offered by the Health Care Providers in their Motion. Also it is clear that Defendants' purported expert's lack of familiarity with the process and procedure of this case, in particular his apparent ignorance of the substantial procedural maneuvers undertaken by Defendants which caused the Heath Care Providers' attorneys to undertake tasks that would have not been required but for by Defendants' bad faith litigation tactics, makes his opinions suspect, at best.

Of any one individual, the Court is clearly in the best position to evaluate both the reasonableness of the rates charged and the necessity of the work performed by counsel for the Health Care Providers to bring forth their successful result. Likewise, this Court is best suited to apply the relevant law to Defendants' legal arguments, particularly on apportionment – an argument which Defendants notably failed to support with any Nevada case law. For all of the reasons set forth in the Motion and herein, the Health Care Providers respectfully request that the Court draw upon its knowledge in exercising its considerable discretion to grant the Health Care Providers' request for attorneys fees in the amount off $12,683,044.41 and allow the Health Care Providers to supplement this request with the amount of attorneys fees incurred in resolving the post-judgment motions currently pending before the Court.

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I. THE HEALTH CARE PROVIDERS' HOURLY RATES ARE REASONABLE AND HAVE BEEN FOUND TO BE REASONABLE BY OTHER COURTS.

Citing federal caselaw, but none from Nevada, Defendants contend that rather than examine the "reasonableness" of the rates charged by counsel for the Health Care Providers, the Court must instead determine "the rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation." Opposition 5:13-15. If there is a difference between a "reasonable rate" and a "prevailing rate," then a reasonable rate would apply since the both the governing Nevada statute and Nevada caselaw obligate the Court to examine the Health Care Providers' fee request for "reasonableness." *See* NRS 683A.0879(5); *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

However, it is respectfully submitted that once you evaluate the rates charged by counsel for the Health Care Providers, in particular by comparing those rates to the rates charged by Nevada attorneys of comparable skill, experience and reputation on work similar to that required by this case, then the Court will readily conclude that the Health Care Providers' rates are both reasonable and prevailing.

As the Court is well aware, attorneys in this market do not broadcast or publicly disclose their billing rates. The undersigned is generally familiar with billing rates for litigation attorneys in the Nevada legal market so to assist in setting marketable rates for McDonald Carano LLP litigation attorneys practicing in the Southern Nevada market. On this basis alone, her declaration attesting to the fact that the hourly rates charged by counsel for the Health Care Providers was reasonable under Nevada standards, is competent, substantial evidence. Moreover, a review of available, other attorneys' applications or orders thereon for reimbursement of attorneys fees in other sophisticated and complex cases also reveals that the rates at issue herein are more than reasonable. Comparable lead attorneys, practicing in cases of comparable sophistication and complexity, are known to have charged the following rates:

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Jim Pisanelli	$650 (2015 rates) - $1,000[1]
Todd Bice	$650 (2015 rates) - $1,000[2]
Dennis Kennedy	$1,000[3]
Dan Polsenberg	$785[4]
Debra Spinelli	$550 (2015 rates) - $750[5]
Colby Williams	$750[6]
Donald Campbell	$750[7]

Moreover, district court judges both in state court and federal court, evaluating the Health Care Providers' law firm's attorneys fee applications have found rates comparable to the partners, associates and paralegal rates at issue in this case to be reasonable on other of their cases. *See, Pardee Homes of Nev. Corp. v. AGRW-Canyons, LLC*, No. 2:16-cv-

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[1] *See Wynn Resorts Ltd. v. Okada et. al.*, Case No. A-12-656710-B, Declaration of James J. Pisanelli Esq. In Support of the Award of Attorneys Fees Related to the Wynn Parties' Motion for Sanctions for Violations of the Protective Order (Jan. 7, 2016).

[2] *See Wynn Resorts Ltd. v. Okada et. al.*, Case No. A-12-656710-B, Declaration of James J. Pisanelli Esq. In Support of the Award of Attorneys Fees Related to the Wynn Parties' Motion for Sanctions for Violations of the Protective Order (Jan. 7, 2016).

[3] Personal knowledge.

[4] *See Boca Park Marketplace Syndications Grp., LLC v. Ross Dress for Less, Inc.*, No. 02:16-CV-1197-RFB-PAL, 2020 WL 2892586, at *3 (D. Nev. May 31, 2020) (granting a motion for attorney fees at the rate of $750 per hour for attorney Dan Polsenberg); *see also,* Affidavit of John E. Bragonje In Support of Lewis and Roca Motion for Attorney Fees and Cost, at 4-5, *Boca Park,* 2020 WL 2892586, ECF No. 157-9 (listing the following rates for its supporting attorneys and paralegals: Partner Dan Polsenberg - $785, Partner Schaffer - $550, Partner Bragonje - $445, Partner Henriod - $485, Partner Fountain - $470, Associate Thorpe - $295, Associate Brantley – Lomeli - $295, Associate Foley - $295, Paralegal Helm - $140).

[5] *See Wynn Resorts Ltd. v. Okada et. al.*, Case No. A-12-656710-B, Declaration of James J. Pisanelli Esq. In Support of the Award of Attorneys Fees Related to the Wynn Parties' Motion for Sanctions for Violations of the Protective Order (Jan. 7, 2016).

[6] *See Mark Hunt v. Zuffa, LLC*, 528 F. Supp. 3d 1180, 1188 (D. Nev. 2021) (granting a motion for attorney fees at the rate of $750 per hour for attorney Colby Williams); *see also*, Declaration of J. Colby Williams, at *4, *Hunt*, 528 F. Supp. 3d 1188, ECF No. 193-1.

[7] *See Mark Hunt v. Zuffa, LLC*, 528 F. Supp. 3d 1180, 1188 (D. Nev. 2021) (granting a motion for attorney fees at the rate of $750 per hour for attorney Colby Williams); *see also*, Declaration of J. Colby Williams, at *4, *Hunt*, 528 F. Supp. 3d 1188, ECF No. 193-1.

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01952-JAD-PAL, 2018 WL 10455160, at *4 (D. Nev. Mar. 27, 2018)("Lundvall declares that her hourly rate during this case was $625 . . . I find that Pardee has demonstrated that the billing rates for the one partner ($625) and three associate attorneys ($300, $275 and $235) who worked on this case are reasonable."); *Winecup Gamble Inc. v. Gordon Ranch LP*, No. 3:17-CV-00163-RJC-WCG, 2020 U.S. Dist. LEXIS 23380, at *13 (D. Nev. Feb. 8, 2021)("The Court finds that the hourly rates charged by Defendant's counsel [Lundvall $625 - $675, Rory Kay $300 - $350, Diane Welch $350] were largely customary. Plaintiff contends that Ms. Lundvall's hourly rate which averaged $641 was unreasonable but the Court disagrees … this rate is reasonable based on the fact Ms. Lundvall has more than thirty years litigation experience in Nevada."); *Pool v. Gail Wiley Landscaping, Inc.*, No. 3:16-CV-0019-HDM-VPC, 2017 WL 343640, at *1 (D. Nev. Jan. 23, 2017) ("It is customary for attorneys to bill an hourly rate for legal services provided . . . The Court finds both of these hourly rates [charged by a McDonald Carano LLP partner and associate] to be reasonable and comparable to hourly rates attorneys practicing before this court routinely charge."); *Maiss v. Fitz*, No. CV18-02309, 2020 Nev. Dist. LEXIS 139, at *6 (J. Egan Walker presiding) (McDonald Carano LLP's rates for partners, associates and paralegal found to be reasonable under Nevada standards and substantiated and therefore recoverable); *WLNS Investments, LLC v. Fayad.*, No. A-20-813011-B, at **3 (Nev. Dist. Ct. Feb. 15, 2022, April 6, 2022 (J. Allf presiding) (twice, the Court awarded attorneys fees after specifically finding "[McDonald Carano LLP attorneys and paralegals] were charging below market rates [.]"); *Aevoe Corp. v. Shenzhen Membrane Precise Electron Ltd.*, No. 2:12-CV-00054-GMN-PAL, 2012 WL 2244262, at *5 (D. Nev. June 15, 2012) ("The fees and costs charged by the McDonald Carano Wilson law firm are the rates that reflect the customary rate charged to the firm's clients for similar litigation, and are comparable to the rates charged by attorneys at similarly situated Nevada based firms. McDonald Carano Wilson has received national recognition as one of the top law firms in the country."); *Saticoy Bay v. Tapestry at Town Center Homeowners Ass'n*, No. A-19-789111-C, 2020 (J. Allf presiding) Nev. Dist. LEXIS 600, at **5-6 (Court found the rates charged by McDonald Carano LLP's attorneys and

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paralegals Ogilvie $550, Sifers $275 to be reasonable, awarding all requested fees and costs); *Signature Fin. LLC v. Nisley,* No. A-18-785296-C (Nev. Dist. Ct. Oct. 17, 2019 (J. Bare, presiding) (order granting attorney fees based on rates charged by McDonald Carano LLP's attorneys Ryan Works ($550) and Amanda Perach ($400) and paralegal Brian Grubb ($185) found to be reasonable and awarded); *ACS Primary Care Physicians Sw. PA v. Molina Healthcare of Texas Inc.*, No. 2017-77084, (Tex. Dist. Ct. December 11, 2021) (J. Rabeea S. Collier presiding) (judgment awarded reasonable attorneys and paralegal fees sought by the law firm of Ahmad Zavitsanos Anaipakos Alavi & Mensing P.C. ("AZA") at the following rates: Zavitsanos $750, Robinson $595, Leyendecker $595, Killingsworth $320, Liao $320, Peter $250, Flores $250, Rivers $250).

And finally, as Defendants concede the "Court may also rely on its own familiarity with the rates in the community to analyze those sought in the pending case." Opposition 5:23-25, *citing United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990). In that regard the Court has found the following rates to be reasonable for the Health Care Providers' Nevada law firm: *Saticoy Bay v. Tapestry at Town Center Homeowners Ass'n,* , No. A-19-789111-C, 2020 (J. Allf presiding) Nev. Dist. LEXIS 600, at **5-6 (court found the rates charged by McDonald Carano LLP's attorneys and paralegals (Ogilvie $550, Sifers $275) to be reasonable, awarding all requested fees and costs); *WLNS Investments, LLC v. Fayad.*, No. A-20-813011-B, at **3 Nev. Dist. Ct. Feb. 15, 2022, April 6, 2022 (J. Allf presiding)) (twice this Court awarded attorneys fees after specifically finding "[McDonald Carano LLP attorneys and paralegals] were charging below market rates [.]").

II. BLOCK BILLING IS NOT PROHIBITED, NOR FROWNED UPON IN NEVADA COURTS.

In awarding attorney's fees, Nevada's seminal case is *Brunzell v. Golden Gate National Bank*. 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). Under *Brunzell*, the guiding principle is always the reasonableness of the attorney's fees requested rather than any specific method or approach in reaching that result. *See Haley v. Dist. Ct.,* 128 Nev. Advance. Op. 16, 273 P.3d 855, 860 (2012) (noting the Court's analysis may include "any

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method rationally designed to calculate a reasonable amount, so long as the requested amount is reviewed in light of the factors set forth in *Brunzell*.").

Instead of analyzing *Brunzell*, Defendants suggest the Court should reduce the requested attorneys fees by 70% because the Ninth Circuit disapproves of block billing, which Health Care Providers' counsel used on a portion of the invoices in this case. Opposition 14:14-22:8. In arguing this, Defendants exclusively rely on Ninth Circuit cases, particularly *Welch v. Metro Life, Ins. Co.* and *Lahiri v. Universal Music & Video Distribution Corp.* *See* 480 F.3d 942 (9th Cir. 2007) and 606 F.3d 1216 (9th Cir. 2010), respectively.

But *Welch* and *Lahiri* are not Nevada cases and thus have no application to the Court's analysis under *Brunzell* or other cases from the Nevada Supreme Court. In both *Welch and Lahiri*, the Ninth Circuit noted that the trial courts in those cases relied on a report from the California State Bar's Committee on Mandatory Fee Arbitration in concluding block billing was inappropriate for those cases. *See* 480 F.3d at 948; 606 F.3d at 1222-23. Although the California State Bar's reports may be given deference in California actions they are not due such deference in Nevada actions. Moreover, Defendants have not presented the Court with the California State Bar's report, and thus neither the parties nor the Court can test the report's conclusions or methodology. *See generally* Opposition. Simply put, *Welch* and *Lahiri*'s reliance on the California State Bar report has no application to this case.

Instead, what does have application to this case is the Nevada Supreme Court's holding that "block-billed time entries are generally amenable to consideration under the *Brunzell* factors, and a district court must consider block-billed time entries when awarding attorney's fees." *In re Margaret Mary Adams 2006 Trust*, No. 6710, 2015 WL 1423378 at *2 (Mar. 26, 2015) (internal citations omitted); *see also Branch Banking*, 2016 WL 4644477 at *5 (quoting *In re Margaret* in allowing recovery for block billed attorney's fees). Thus, only "where a district court determines that none of the task entries comprising the block billing were necessary or reasonable may a district court categorically exclude all of the block-billed time entries." *In re Margaret*, No. 6710, 2015 WL 1423378 at *2 (emphasis added).

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Here, the Health Care Providers' counsel's time entries are all capable of analysis under *Brunzell*, and the billing descriptions are more than sufficient to justify an award of reasonable attorney's fees. Nevada caselaw required Defendants to identify any block-billed entry in which *none* of the task entries were allegedly unnecessary or unreasonable. Not surprisingly, Defendants have not brought a single one to the Court's attention. Therefore, the Court may not categorically exclude any of the block-billed entries either in whole or in part.

Additionally, undersigned counsel has been editing legal invoices for almost 33 years. Across that time, dependent upon the client's preference and that of the jurisdiction, counsel has used both block billing and individually assigned time entries for each task. It has been counsel's experience that block billing generally results in lower time entries overall and therefore a lower client invoice. The undersigned teaches attorneys working with her to organize their workdays to only pick up a file or a client matter once and complete all needed tasks for that day in a single sitting. Most often that means the attorney performs multiple tasks in a single sitting, but in a single unit of time that more realistically approximates the real time needed to perform those tasks. Without waiver of attorney-client privilege, counsel shared those experiences with in-house counsel for the Health Care Providers, who advised counsel to prepare their invoices accordingly. Although some jurisdictions may criticize block billing, Nevada is not one of them. As a result, that criticism is not relevant to Nevada law applicable to this case or the experiences of billing counsel in this case. Under a proper *Brunzell* analysis, there is no basis to reduce the Health Care Providers' fee request due to the use of block billing.

III. THE HEALTH CARE PROVIDERS DID NOT PAY FOR OVER-STAFFING OR DUPLICATIVE OR REDUNDANT WORK AND ARE NOT SEEKING RECOVERY OF ATTORNEYS FEES FOR SUCH.

Without foundation Defendants contend over-staffing, and duplicative or redundant entries contributed to the amount of attorneys fees incurred by the Health Care Providers. Opposition pp. 19-22. But Defendants and their purported expert simply ignored the evidence offered by the Health Care Providers in support of their Motion. At paragraph 6 of

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the declaration offered in support of the Motion, undersigned counsel explained:

> Each law firm retained by the Health Care Providers worked on an agreed-upon hourly basis. That agreement was reached in advance of the engagement and held steady - - and in one instance was agreed-to-be-discounted - - throughout the course of the engagement. The Health Care Providers employ CounselLink to review all law firm invoices before they are submitted to client representatives for review and payment. Generally, CounselLink ensures there are no duplicative or redundant billing entries, all invoices were submitted in accord with agreed-upon rates for agreed-upon timekeepers, and all invoices fell within the scope of the Health Care Providers' Outside Counsel Guidelines. Once CounselLink submitted its comments to a designated in-house counsel, that counsel reviewed all comments and each invoice for accuracy and reasonableness. Thereafter, if the total amount of the invoice was $75,000 or less, (later increased to $100,000 or less), the invoice was submitted for payment (as adjusted after reviews) and paid. If the invoice exceeded those amounts, then a third-level of review was conducted by another in-house counsel before being submitted for payment (as adjusted after reviews) and paid.

Additionally, Defendants criticize the Health Care Providers' use of four law firms to prosecute this case to successful completion, arguing there was no explanation for such. *Id.* Once again, not true. At pages 6-7 of the Motion the Health Care Providers explained the necessity of each law firm. And, Defendants ignore the fact that Defendants themselves retained three law firms, one of which was a large international law firm staffed by lawyers from offices in Los Angeles, Washington D.C., and elsewhere.

Moreover, the Court is well-familiar with the time-consuming games Defendants played during discovery pretrial and at trial, from ignoring multiple Court discovery production orders, from unreasonably delaying compliance with Court-ordered duties to avoid further sanctions, from the spoliation of relevant evidence, to repeatedly re-litigating time and time again decisions made by the Court. At each major discovery interval Defendants waited till the last possible moment to dump hundreds of thousands of pages of documents upon the Health Care Providers' chosen Nevada counsel (McDonald Carano LLP). With each massive dump, the Health Care Providers faced a Hobson's choice: Agree to extend the discovery deadline and ultimately the trial date to analyze those late-produced documents, or to deploy additional legal resources for discovery and trial related tasks. The

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Health Care Providers chose the latter rather than reward Defendants for their gamesmanship. But that choice came at a cost. When the Court analyzes the timing of the pro hac vice applications filed by McDonald Carano LLP, it becomes clear that the retention of each new firm coincided with Defendants' escalating malfeasance during discovery. In sum, Defendants should not be heard to complain about a problem of their own making - - especially when Defendants themselves admitted to the Court they were employing 100's of attorneys to review documents in an effort to meet their Court-ordered duties.[8]

Finally, time and time again Defendants' purported expert or the author of Defendants' Opposition demonstrates their unfamiliarity with the process and procedure of this case as Defendants criticize either the time spent by certain attorneys on specific tasks or the number of attorneys working on specific tasks. For example: Defendants criticize the undersigned's time expenditure preparing for the hearings on Defendants' motion to dismiss claiming she did not handle or present at that hearing. Defendants are simply wrong: the undersigned presented the Health Care Providers' opposition to the Defendants' Motions to Dismiss at the hearings held June 5 and June 9, 2020. Another example: Defendants criticize the number of attorneys attending the hearing on Defendants' Motion for Order to Show Cause. But, each one of those attorneys was accused of intentionally violating a Court order and Defendants sought a contempt finding against them. It follows that each attorney was directly interested and vested in and wished to ensure the accuracy and thoroughness of (1) the content of the oral presentation by the Health Care Providers' counsel in lead position handling the oral hearing, (2) the content of Defendants' oral

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[8] Probably the most egregious example of Defendants' unfounded criticism concerns the document review tasks performed by attorneys at Napoli Shkolnik. Opposition 18:25-27. As the Court recalls at the very last day of document discovery and with only 30 days left for depositions, Defendants dumped over 90% of its overall document production on the Health Care Providers for use in those depositions. Quite obviously it required a significant amount of time for counsel and resources by the Health Care Providers to review those documents.

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presentation to ensure they were not - - as they had done in their moving papers - - making false assertions, and (3) the outcome of the hearing. Defendants' Opposition is replete with such examples. Defendants should not be allowed to suggest a false or misleading record so to substantiate their unfounded request for a 70% reduction in the amount of the attorneys fees sought.

IV. WHEN THE FACTS OF A CASE ARE INEXTIRCABLY INTERTWINED WITH ALL CLAIMS ADVANCED BY A PLAINTIFF, NO APPORTIONMENT IS REQUIRED OR MANDATED.

Once again Defendants chose to ignore Nevada law in favor of their own pronouncement suggesting the attorneys fees incurred must be apportioned between those incurred prosecuting the Prompt Pay Act Claim and those incurred when prosecuting other claims asserted in the Health Care Providers' pleadings. Opposition pp. 23-24. However, Nevada law is clear that apportionment is not required or mandatory and the Court does not abuse its discretion to award all fees or costs requested when the facts and claims founded upon those facts are too intertwined to separate and assign to separate claims. *Mayfield v. Koroghli*, 124 Nev. 343, 353, 184 P.3d 362, 369 (2008) (citing *Abdallah v. United Savings Bank*, 43 Ca. App. 4th 1101, 51 Cal Rptr. 286, 293 (1996), and concluding apportionment is not mandatory if the claims are too intertwined to separate).

The Health Care Providers sought discovery on and tried their case on a single set of facts. Those facts supported multiple legal theories - including the imposition of punitive damages. But no one fact was solely applicable to one claim versus another. All were inextricably intertwined. Tellingly, Defendants made no effort at apportionment because there is no reasonable effort to be made. The factual predicate to all claims for which discovery was sought and for all claims tried was so inextricably intertwined that it would be impossible to separate and assign some attorneys fees to some claims but not to others.

V. CONCLUSION.

The irony of Defendants' Opposition could not be more pronounced. After massively obstructing the search for the truth during discovery, making demonstrated misrepresentations to the Court about their paltry discovery efforts, admitting to utilizing

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hundreds of lawyers for document production, repeatedly re-litigating nearly every decision made by the Court, and then doing everything they could to obscure from the jury the truth uncovered, Defendants now claim the Health Care Providers spent too much time uncovering and presenting Defendants' wrongful, predatory, dilatory, fraudulent, malicious and oppressive conduct. As it has done throughout, this Court should see through this ruse by recognizing the expense incurred by the Health Care Providers was directly caused by Defendants' conduct and that of its counsel. Therefore, the Health Care Providers respectfully request that the Court award $12,683,044.41 in attorneys' fees as reasonable, and be permitted to supplement their request with the attorneys fees being incurred through post-judgment practice in this case.

Dated this 4th day of May, 2022.

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By: */s/ Pat Lundvall*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on this 4th day of May, 2022, I caused a true and correct copy of the foregoing to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

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DISTRICT COURT

CLARK COUNTY, NEVADA

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., a Nevada professional corporation; TEAM PHYSICIANS OF NEVADA-MANDAVIA, P.C., a Nevada professional corporation; CRUM, STEFANKO AND JONES, LTD. dba RUBY CREST EMERGENCY MEDICINE, a Nevada professional corporation, Plaintiffs, vs. 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' OPPOSITION TO DEFENDANTS' MOTION FOR REMITTITUR AND TO ALTER OR AMEND THE JUDGMENT** **Hearing Date:** **Hearing Time:**

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Case Number: A-19-792978-B

I. INTRODUCTION

The Court has already rejected two of Defendants' three arguments in favor of remittitur, including the lead argument that the Plaintiffs lacked standing to assert an Unfair Claims Practices Act cause of action. As for the third, last-ditch argument regarding federal and state Due Process Clauses, examples of the requested remittiturs in favor of Defendants Health Plan of Nevada (HPN) and Sierra Health illustrate why the Court should reject that argument too.

In their Motion, the United Defendants urge a 1:1 ratio, suggest there is a "presumptive outer bound of 9:1" and reference the U.S. Supreme Court's having noted that "few awards exceeding a single-digit ratio between punitive and compensatory damages … will satisfy due process."

This case is plainly one of the *few*. Here, the jury heard evidence including that:

- emergency rooms are a community's healthcare safety net because federal law requires ER doctors to treat all patients regardless of the patient's ability to pay or insurance status; 11/17/21 Trial Tr. 256:8-257:21; 259:4-20;
- failing to adequately pay ER doctors could undermine that safety net; 11/17/21 256:8-18
- the United Defendants (all of whom are affiliated with each other and owned by UnitedHealth Group) not only sell health insurance in Nevada, one of them owns an ER doctor group that competes with the Plaintiffs for staffing emergency rooms in Nevada; 1/17/21 Trial Tr. 254:15-255:2; PX 61 at 155-158;
- the United Defendants targeted the Plaintiffs for years by paying them *less than half* what they paid all other ER doctors in Nevada ($245 v. $528 p/claim); 11/17/2021 Trial Tr. at 38:18-24;
- Defendants HPN and Sierra Health and Life (SHL) led the targeting effort by systematically and repeatedly paying Plaintiffs the same $185 per claim – regardless of whether the ER doctor saved their member from a heart attack or stitched up a minor kitchen knife wound to a finger; 11/17/2021 Trial Tr. 214:1-217:11; PX 473B (1);
- the United Defendants' ER payments in Nevada were the lowest of in the country; 12/7/21 Trial Tr. 63:17-67:17 and
- the United Defendants' Harvard trained public policy economics expert could not provide an explanation for why, if they were not trying to weaken the Plaintiffs to make them more attractive to purchase, the United Defendants paid the Plaintiffs a fraction of what they paid all the other ER doctors in Nevada. 11/18/21 Trial Tr. 284:20-285:19.

Under these facts, the United Defendants contend that Nevada's legitimate interest in punishing bad faith acts by insurers and deterring repetition of the same will be satisfied, for example, by reducing the punitive award in favor of Plaintiff Ruby Crest and against HPN to $281.49 and by reducing the punitive award in favor of Team Physicians and against Sierra to $485.37.

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Obviously, neither $281.49 nor $485.37 will deter any insurance company from doing anything, let alone deter any insurance company from repeating the conduct at issue in *this* case.

To obtain a remittitur of the punitive awards, the Court must find the ratio of punitive to actual damage is *grossly excessive* in relation to Nevada's interest in punishment and deterrence of acts of bad faith by insurers. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996). In light of the evidence heard by the jury, and the inferences required to be drawn from the jury's special verdicts, there is no basis for any such *grossly excessive* finding.[1]

The simple fact of the matter is that the punitive awards in *this* case are justified because *all* of the United Defendants engaged in reprehensible conduct to such a large degree that it precludes the *grossly excessive* finding required by *Gore*.

II. EVIDENCE SUPPORTING A FINDING OF REPREHENSIBILITY

In addition to the evidence set forth in the Introduction, the jury heard evidence that the United Defendants:

- recognized their obligation to pay reasonable rates to physicians who did not participate in United's network of healthcare providers; PX014 at 3; PX025 at 2; PX363 at 3;
- knew the industry determined "reasonable and customary" rates by using a database maintained by the independent nonprofit FAIR Health Inc.; PX014 at 3; PX025 at 2; PX363 at 3;
- knew the "traditional" reimbursement approach resulted in payment of a healthcare provider's billed charge if it did not exceed the 80th percentile of charges in the FAIR Health database; PX025 at 2 *and* PX014 at 3; 11/10/2021 Trial Tr. at 99:6–9;
- used the FAIR Health benchmark, before the unlawful targeting began, to determine reimbursements for out-of-network services; PX025 at 2; 11/3/2021 Trial Tr. at 36:23–37:14; 11/2/2021 Trial Tr. at 142:14–21, 148:10–20; 11/10/2021 Trial Tr. at 99:6–9; 11/12/2021 Trial Tr. at 212:16–21;
- enjoyed industry-leading margins before the targeting began; PX066 at 2;
- knew that lower reimbursements would hurt healthcare providers and increase financial burdens on patients; PX477 at 3 ("[n]o member protection" for programs with higher

[1] Note, counsel for Plaintiffs is unaware of any Nevada or U.S. Supreme Court case that holds the only evidence a Court may consider in its due process gatekeeping role is evidence that was introduced before the jury. Consequently, Plaintiffs believe the Court may consider the allegations regarding *Ingenix* contained in Plaintiff's SAC together with evidence introduced during the trial that indicates the United Defendants effectively engaged in the same kind of intentionally unlawful conduct to suppress reimburse rates for which they were sanctioned in *Ingenix*.

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reductions); nevertheless began a campaign to abolish the industry-standard approach and "get clients off R&C/Fair Health." PX368 at 7; 11/3/2021 Trial Tr. at 50:21–51:1;

- sought alternative contractual arrangements that allowed them to charge their employer clients for additional "shared savings" fees that were unavailable if the clients used FAIR Health; 11/3/2021 Trial Tr. at 49:5–9, 50:21–51:1; 11/15/2021 Trial Tr. at 190:8–12;
- generated revenue from these "shared savings" fees by taking 35% of the difference between a provider's billed charge and the amount they paid/allowed for a claim; PX010 at 60; PX256; 11/12/2021 Trial Tr. at 201:14–17;
- knew that the less they paid of a healthcare providers' billed charges, the more "shared savings" revenue they would receive; *Id.*; 11/8/2021 Trial Tr. at 149:17–150:24; 11/15/2021 Trial Tr. at 190:8–12;
- attempted to conceal their conduct by creating a false impression that the lower rates were reasonable because they also used MultiPlan's Data iSight program which purportedly calculated out-of-network reimbursement using a "legally sound process;" PX043;
- knew that the Data iSight rates were in reality simply the rate they dictated to MultiPlan; PX34 at 10. PX293 at 1; 11/10/2021 Trial Tr. at 82:21–25; 80:3–5; 11/15/2021 Trial Tr. at 16:6–17:6; PX288 at 176; and
- knew that their conduct would enrich themselves at the expense of their own members and healthcare providers in Nevada; PX477 at 3 (acknowledging that its "migration to high reduction programs" resulted in less member protection).

Tellingly, the shared savings revenues generated through Data iSight using the Outlier Cost Management (OCM) program did not exist in 2017, but soared to $1.3 billion a year thereafter; *Id.*; 11/2/2021 Trial Tr. at 158:19–23. Indeed, the United Defendants' 2019 financial results for the West Region described Nevada as one of two "outperforming markets" and showed that per-member-per-month margins skyrocketed at unprecedented levels; PX462 at 33; PX426 at 12.

During the same targeting period at issue in the case, the United Defendants' payments to Plaintiffs declined each year. 11/17/2021 Trial Tr. at 36:23–7. In total, for the claims disputed at trial during the period July 2017 through January 2020, the United Defendants paid an average of $245 per claim compared to the $528 per claim they paid to all other emergency care providers in Nevada. PX473G; 11/17/2021 Trial Tr. at 38:18-24; 39:8–16. These rates translated into the United Defendants paying only **20%** of Plaintiffs' billed charges, even though the charges tracked the 80th percentile of FAIR Health benchmark. *Id.*; 11/16/2021 Trial Tr. at 84:8–14; 11/17/2021 Trial Tr. at 114:4–9.

Put simply, the evidence at trial showed that the United Defendants' calculation of rates for

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claims were devoid of rhyme or reason, reflecting the admission that United used "random calculated amounts." *See, e.g.*, 11/16/2021 Trial Tr. 214:24–216:1; 246:20–247:1; PX043. The rates paid by Defendants HPN and Sierra illustrate the lack of any rational relationship with the service that was actually provided – and that's because HPN and Sierra paid the same $185 per claim regardless of whether Plaintiff's emergency room doctor saved the member from dying from a heart attack or stroke, or simply stitched up a kitchen knife wound to an index finger. 11/17/2021 Trial Tr. 214:1-217:11; PX473; PX473B (1).

The United Defendants rationalized their underpayments with an illusory concern – egregious billing practices and rising costs for out-of-network services (PX012) – even though they were aware that the average billed charges for out-of-network services dropped each year from 2016 to 2019. 11/3/2021 Trial Tr. at 16:17–19. Despite this knowledge, internal documents revealed that the United Defendants acted behind the scenes to advance a false public narrative about the billing practices of emergency room physicians, including by exercising editorial control over an academic study authored by a Yale University economics professor. PX509 at 2–6; PX012; PX239 at 2; PX100.

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The United Defendants' real motive was to maximize profit and shared savings revenue. They acknowledged internally that use of these shared savings programs "generate[d] additional savings by not running the claims through U&C but rather driving all [out-of-network] claims to a more aggressive pricing . . . ." PX243. Their internal documents further depicted a "migration to high reduction programs" starting from 2017 and forecasted cutting out-of-network reimbursement by another $3 billion through 2023. PX477 at 3–4; 11/2/2021 at 161:6–8. The United Defendants even devised a plan to cut MultiPlan to "eliminate vendor fees" and use its own company, Naviguard, to carry out Data iSight's function of determining purportedly fair and geographically adjusted reimbursement rates. PX342 at 16; PX478 at 14.

After hearing the evidence, the jury found against the United Defendants for every count of liability, awarding $2,450,182.29 in actual damages and $60,000,000 in punitive damages. The award was less than the $10.5 million in actual damages and the $100 million in punitive damages that Plaintiffs sought. PX473G; 12/7/2021 Trial Tr. at 106:24–107:1.

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III. ARGUMENT

"Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996). They are "'a means by which the community . . . can express community outrage or distaste for the misconduct of an oppressive, fraudulent or malicious defendant and by which others may be deterred and warned that such conduct will not be tolerated.'" *Bongiovi v. Sullivan*, 122 Nev. 556, 580, 138 P.3d 433, 450 (2006) (quoting *Ace Truck v. Kahn*, 103 Nev. 503, 506, 746 P.2d 132, 134 (1987)).

In Nevada, a jury's award of punitive damages is not the final word on punishment and deterrence. The Court must ensure the award comports with due process by considering: (1) the degree of reprehensibility of the defendant's conduct, (2) the ratio of the punitive damage award to the actual harm inflicted on the plaintiff, and (3) how the punitive damages award compares to other civil or criminal penalties that could be imposed for comparable misconduct. *Bongiovi*, 122 Nev. at 582-83, 138 P.3d at 451-52 (quoting *Gore*, 517 U.S. at 583).

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"Only when an award can fairly be categorized as '***grossly excessive***' in relation to [the interests of punishment and deterrence] does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." *Gore*, 517 U.S. at 568.

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A. The Conduct At Issue Is Highly Reprehensible

"[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore*, 517 U.S. at 575. In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), the United States Supreme Court "instructed courts to determine the reprehensibility of a defendant by considering whether: (1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (3) whether the target of the conduct involved repeated actions or was an isolated incident; and (4) the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Id.* at 418 (referring to *Gore*, 517 U.S. at 576-77).

1. <u>Physical v. Economic Harm</u>

This case involves economic, not physical harm. But neither the United States Supreme Court

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nor the Nevada Supreme Court has ever held that large punitive damages could ***not*** be awarded for economic harm. To the contrary, intentional and/or malicious misconduct that causes economic harm can justify large punitive damages awards. *Gore*, 517 U.S. at 577 ("infliction of economic injury, especially when done intentionally through affirmative acts of misconduct … can warrant a substantial penalty") (citing *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453 (1993)).

The United Defendants strain to suggest the jury's findings *might not mean* they engaged in intentional or malicious conduct. But long-standing black letter law requires the Court to assume that the jury believed all the evidence favorable to the Plaintiffs and that the jury drew all reasonable inferences in the Plaintiffs' favor. *Bongiovi* 122 Nev. at 581, 138 P.3d at 451 (quoting *First Interstate Bank v. Jabros Auto Body*, 106 Nev. 54, 56, 787 P.2d 765, 767 (1990) (quoting *Paullin v. Sutton*, 102 Nev. 421, 423, 724 P.2d 749, 750 (1986)); *see also Wyeth v. Rowatt*, 126 Nev. 446, 470, 244 P.3d 765, 782 (2010).

Here, the jury found by clear and convincing evidence that the United Defendants engaged in oppression, fraud, and/or malice that caused Plaintiffs economic harm. Nevada defines "malice" as "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." NRS 42.001(3) (emphasis added). Similarly, Nevada defines "oppression" as "despicable conduct that subjects a person to cruel and unjust hardship with ***conscious disregard*** of the rights of the person. NRS 42.001(4) (emphasis added). "Conscious disregard" is defined as "***knowledge*** of the probable harmful consequences of a wrongful act and a ***willful and deliberate*** failure to act to avoid those consequences." NRS 42.001(1) (emphasis added). Finally, Nevada defines "fraud" as "***intentional*** misrepresentation, deception or concealment of a material fact known to the person with the ***intent*** to deprive another person of his or her rights or property or to otherwise injure another person." NRS 42.001(2) (emphasis added). Thus, in light of the Court's instructions and the jury's finding of fraudulent, oppressive, and/or malicious acts, it may reasonably be inferred that the jury found the United Defendants intentionally and maliciously engaged in affirmative acts of misconduct.

2. Indifference and Reckless Disregard

Larger punitive damages awards are warranted when a defendant's conduct demonstrates an

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"indifference to or reckless disregard for the health and safety of others." *Gore*, 517 U.S. at 576. Here, the United Defendants' conduct evidenced a clear indifference to or reckless disregard for the health and safety of Nevada's citizens.

For example, the United Defendants knew or reasonably should have known that their scheme to target Plaintiffs by paying unreasonably low rates could undermine, and therefore jeopardize, the emergency rooms that comprise the healthcare safety net for Nevada's citizens.

United suggests that this risk of harm to the health and safety of the public should be ignored because it did not materialize. (Mot. at 5:6-19, 6:10-14.) However, in assessing the reasonableness and/or constitutionality of a punitive damages award, it is clear that both the harm that did occur ***and*** the harm that ***could have occurred but for the plaintiffs' actions*** must be taken into consideration. *Gore* at 581.

3. Repeated Acts or an Isolated Instance

Repeated, intentional misconduct or a pattern of intentional misconduct also "provide[s] relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law." *Gore*, 517 U.S. at 577. Here, the United Defendants acted on their scheme to target Plaintiffs by paying unreasonably low rates compared to the rates paid to all other emergency room doctors in Nevada more than 11,000 times over nearly three years.

The United Defendants' attempt to recast these repeated acts of intentional conduct as one "instance" or an "act" is contrary to the evidence and little more than fantastical thinking. (Mot. at 6:16-22.) Each underpaid claim constitutes a unique and singular occurrence, as each involves discrete patients, dates, facilities, doctors, treatment and claims.

The United Defendants also argues that they did not possess the necessary *mens rea* every time they underpaid one of the Plaintiffs' claims. (Mot. at 6:22-7:9.) They contend instead that reimbursement was dictated by "plan document benefits," not any intentionally unlawful act. (*Id.*) But as the Court is well aware, the United Defendants were sanctioned with an adverse inference for their repeated and wholesale failure to produce the very plan documents that their witnesses baldly asserted dictated the amounts owed to Plaintiffs. In addition, the United Defendants can point to no authority supporting the idea that a defendant's agreement with a third party to violate a plaintiff's

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rights excuses the violation.

4. Mere Accident or Intentional, Malice or Trickery

Reprehensibility of a defendant's actions is worse for intentional, repeated misconduct which serves no legitimate purpose. *Bains LLC v. Arco Prods. Co.*, 405 F.3d 764, 775 (9th Cir. 2005). Here, there is absolutely no legitimate purpose behind the United Defendants' scheme to target Plaintiffs with unreasonably low reimbursement rates.

Indeed, when the United Defendants' Harvard trained public policy economist expert was asked if he could provide the jury with any explanation for why, if they were not trying to weaken the Plaintiffs to make them more attractive to purchase, the United Defendants paid the Plaintiffs a fraction of what they paid all the other ER doctors in Nevada, he had no explanation and testifying that:

> there certainly could be different plans and different out-of-network payment methodologies so there can be lots of reasons why you would observe that. I haven't studied anything about want or intent or things like that.

11/18/21 Trial Tr. 285:5-19

Mr. Deal's reference to different plans and different methodologies is of no more moment than the bald assertions made by the United Defendants' witnesses that the rates they paid Plaintiffs were dictated by plan documents – plans that the Court sanctioned the Defendants for concealing from Plaintiffs.

In sum, analysis of the reprehensibility factors in the context of the evidence heard by the jury (as referenced in this section and summarized in section II above) demonstrates that the United Defendants engaged in reprehensible conduct to such a large degree that it precludes the *grossly excessive* finding required by *Gore*.

B. The Ratio of Punitive to Actual Harm Is Justified

It is generally accepted that "[i]n most cases, the ratio [between punitive damages and compensatory damages] will be within a constitutionally acceptable range, and remittitur will not be justified on this basis." *Gore*, 517 U.S. at 583. Thus, the United States Supreme Court and the Nevada Supreme Court have consistently rejected the imposition of any bright-line rule or mathematical formula for a "reasonable" ratio of punitive damages as compared to compensatory

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damages. *Id.* at 582-83; *Campbell*, 538 U.S. at 425.

The proper inquiry is whether there is a reasonable relationship between the punitive damages award and ***the harm likely to result*** from the defendant's conduct ***as well as*** the harm that actually has occurred.[2] *Gore*, 517 U.S. at 581 (quoting *TXO Prod. Corp.*, 509 U.S. at 460) (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21 (1991))) (emphasis in original; quotation marks omitted).

Here, the harm is not merely the economic damages resulting from the underpaid claims, but also the harm to public health and safety that was likely to have resulted from the conduct at issue but for the intervention of the Plaintiffs' lawsuit. As noted above, the United Defendants knew or reasonably should have known that their scheme to target Plaintiffs by paying unreasonably low rates could have undermined, and therefore jeopardized, the emergency rooms that comprise the healthcare safety net for Nevada's citizens.

Even if the Court were to only consider the actual harm found by the jury, a large ratio is still warranted. While it is generally accepted that few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process, it is also well-recognized that fee awards in excess of these single-digit ratios will "comport with due process" if "'a particularly egregious act has resulted in only a small amount of economic damages.'" *Campbell*, 538 U.S. at 425 (quoting *Gore*, 517 U.S. at 582 (holding that "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages")).

That is precisely what occurred here with several of the Plaintiff/Defendant verdict combinations because the Defendants are severally liable. The compensatory damages for each Plaintiff relating to each Defendant are relatively small.[3] Given the severe reprehensibility of the

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[2] Pending before the Court is Plaintiffs' Motion for approximately $12 million in attorneys' fees pursuant to Nevada's Prompt Pay Act. Such fees, if awarded, are compensatory in nature and could be considered by the Court together with the other compensatory damages awarded in evaluating whether the ratio of punitive to compensatory damages is grossly excessive relative to Nevada's interest in punishing and deterring unlawful conduct.

[3] The United Defendants contend that the jury's verdict is "unreliable" because it "us[ed] the same round numbers" to award punitive damages to each Plaintiff for each particular Defendant. (Mot. at 13:4-14:2.) However, as set forth above, we "assume that the jury believed all the evidence favorable to the prevailing party and drew all reasonable inferences in [that party's] favor." *Bongiovi* 122 Nev. at 581, 138 P.3d at 451 (internal quotations and citations omitted). Therefore, we must

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Defendants' actions combined with their immense wealth, a larger ratio of punitive damages to compensatory damages is essential to sufficiently punish and deter these and other insurers from engaging in such conduct again in the future. The jury was also free to consider the evidence of the high profits the United Defendants earned from their bad acts.

An example of the kind of wealth at issue can be seen in Defendant UHS' financial disclosures, which show that it had $8.8 billion in cash assets in 2019 and and $13.7 billion in cash assets in 2020. Trial Tr. 12/7/2021 at 7:16-17, 7:25-8:21. Further in 2020, UHS' total assets were $171 billion, while its total liabilities totaled only $85 billion. *Id.* at 9:4-11.[4] United is also listed as the fifth business entity in Fortune 500. *Id.* at 18:22-19:1.

At bottom, "[a] punitive damages award is supposed to sting so as to deter a defendant's reprehensible conduct, and juries have traditionally been permitted to consider a defendant's assets in determining an award that will carry the right degree of sting." *Bains LLC*, 405 F.3d at 777. While "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award," it is a factor that should be considered by this Court for an award that otherwise comports with due process. *Campbell*, 538 U.S. at 427; *Bains LLC*, 405 F.3d at 777. As set forth above, this award is not constitutionally excessive based on the reprehensibility of the United Defendants' conduct. Moreover, given their immense wealth, only a large punitive damages award will be able to properly punish the misconduct and deter such egregious actions of intentional misconduct from occurring in the future.

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assume that the jury considered all of the evidence presented by Plaintiffs and utilized such evidence to determine its punitive damages awards. Moreover, the jury did not just assess the same punitive damages amount to each Defendant. The jury assessed $5 million per Plaintiff against SHL; $4.5 million per Plaintiff against both UHIC and UHS; $4 million per Plaintiff against both HPN; and $2 million per Plaintiff against UMR. Finally, the United Defendants contend that the jury's verdict is "unreliable," because "the conduct of each Defendant differed vis-à-vis each [Plaintiff]." (Mot. at 13:12-13.) However, the "conduct" of each Defendant is the same – intentional underpayment of claims for malicious, ulterior purposes. It was only the amount of claims or the severity of the underpayment of each claim that differed, and it is this differentiation that justifies the variations the jury made in its punitive damages assessments.

4 The other Defendants are also extremely wealthy. UHIC reported $21 billion in assets in 2020, with liabilities totaling only $7.6 billion. Trial Tr. 12/7/2021 at 10:8-24. SHL reported $6.1 billion in assets in 2020, with liabilities totaling only $2.7 billion. Id. at 10:25-11:14. HPN reported $722 million in assets, and $410 million in liabilities. Id. at 11:18-12:24.

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C. Statutory or Civil Penalties Are Irrelevant to the Due Process Analysis in This Case

The Ninth Circuit has "acknowledge[d] that violations of common law tort duties 'do not lend themselves to a comparison with statutory penalties.'" *Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1070 (10th Cir. 2016) (quoting *Cont'l Trend Res., Inc. v. OXY USA Inc.*, 101 F.3d 634, 641 (10th Cir. 1996)); *see also CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc.*, 499 F.3d 184, 189-90 (3d Cir. 2007) (finding third guidepost to be "unhelpful" and "not instructive" for common law claims, and basing constitutional analysis on just the first two guideposts). To the extent that the jury based the punitive damages award on Plaintiffs' claim for unjust enrichment, this guidepost is not relevant to this Court's due process analysis.

Relatedly, the United Defendants suggest that because the Prompt Pay Act allows for a "heightened interest on unpaid claims," an assessment of additional punitive damages is "inappropriate." (Mot. at 14:3-22.) However, the United Defendants fail to cite to a single legal authority in support of their contention that a statutory penalty should take the place of punitive damages.

Alternatively, to suggest that approximately $779,000 in interest is an "appropriate comparator" for assessing the reasonableness of a punitive damages award where the compensatory damages totaled $2.6 million is absurd. The Prompt Pay Act statutory interest penalty is a perfect example of why the civil penalty guidepost is unhelpful in cases like this.[5]

Finally, the United Defendants contend that the newly-enacted No Surprises Act (which took effect on January 1, 2022) should be taken into consideration when analyzing the comparative civil penalties guidepost because it "may impact how insurers consider reimbursement rates." (Mot. at 14:24-15:17.)

The phrase "may impact how insurers consider reimbursement rates" illustrates the frivolous nature of this argument. As discussed above, Nevada has a legitimate interest in permitting punitive

5 The United Defendants also contend that Plaintiffs should be prohibited from receiving post-judgment interest under the Prompt Pay Act because they are already entitled to post judgment interest. NRS 17.130(2); Mot. at 16:1-14. However, Plaintiffs have sought Prompt Pay Act interest through the date of entry of the judgment. Post-judgment interest pursuant to NRS 17.130(2) will be assessed from the date of entry of judgment until satisfaction of the judgment. Therefore, there is no compounding of daily interest.

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damages to "punish unlawful conduct and deter its repetition." *Gore*, 517 U.S. at 568. The Court should ignore things that "may" deter the Defendants and other insurers from engaging in the kind of conduct this jury found outrageous and reprehensible and instead, leave in place the findings that are reasonably calculated to effectuate Nevada's legitimate interests.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the United Defendants' Motion for Remittitur in its entirety.

DATED this 4th day of May, 2022.

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I certify that on this 4th day of May, 2022, I caused a true and correct copy of the foregoing to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

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

Plaintiffs,

vs.

UNITED HEALTHCARE INSURANCE COMPANY, a Connecticut corporation; UNITED HEALTH CARE SERVICES INC., dba UNITEDHEALTHCARE, a Minnesota corporation; UMR, INC., dba UNITED MEDICAL RESOURCES, a Delaware corporation; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., a Nevada corporation; HEALTH PLAN OF NEVADA, INC., a Nevada corporation,

Defendants.

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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR NEW TRIAL

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I. INTRODUCTION

The Motion for New Trial ("Motion") of UnitedHealthcare Insurance Company, United Healthcare Services, Inc., UMR, Inc., Sierra Health and Life Insurance Company, and Health Plan of Nevada, Inc. (collectively, "United" or "Defendants") presents no basis for a new trial. Instead, in 147 pages, the Motion takes the kitchen-sink approach, including misstating the record and the case law. Contrary to United's arguments, United is not entitled to a new trial because:

1. Substantial evidence supports the verdict and no alleged error materially affected United's substantial rights because the jury awarded only part of the requested damages.
2. The Court's discovery and related evidentiary rulings do not support a new trial.
3. The Court's limine rulings do not support a new trial.
4. Plaintiffs did not commit attorney misconduct that supports a new trial under *Lioce*.
5. The Court did not violate United's First Amendment rights.
6. The Court's rulings regarding punitive damages, peremptory strikes, conditionally admitted exhibits, and deposition use do not support a new trial.
7. The Court's rulings regarding David Leathers' testimony do not support a new trial.
8. The Court did not commit jury charge errors that support a new trial.
9. Cumulative error does not support a new trial.

II. ARGUMENT

A. United is not entitled to a new trial because substantial evidence supports the verdict and no alleged error materially affected United's substantial rights.

To obtain a new trial for irregularities, misconduct, or errors, United must prove that any alleged basis for a new trial "materially affect[ed] the substantial rights of" United. NRCP 59(a)(1). United does not meet this standard because substantial evidence supports the verdict, and any alleged error or prejudice is accounted for because the jury awarded substantially "less than" the actual and punitive damages Plaintiffs requested. *See Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 266, 396 P.3d 783, 788 (2017).

The jury heard weeks of testimony and evidence. The evidence at trial proved United artificially slashed its rates of payment and developed a scheme to reap profits at the expense of

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Plaintiffs and other healthcare providers. For many years, before this scheme began to unfold, United recognized an obligation to pay reasonable rates to physicians who did not participate in United's network of healthcare providers. PX014 at 3; PX025 at 2; PX363 at 3. United knew the industry standard, as shown in internal documents, of calculating "reasonable and customary" rates using a database maintained by the independent nonprofit FAIR Health Inc. PX014 at 3; PX025 at 2; PX363 at 3. Using this "traditional" reimbursement approach, United paid a healthcare provider's billed charge if it did not exceed the 80th percentile of charges in the FAIR Health database. PX025 at 2 *and* PX014 at 3; 11/10/21 Trial Tr. at 99:6-9.

In 2016, most of United's clients used this FAIR Health benchmark to determine reimbursements for out-of-network services. PX025 at 2; 11/3/21 Tr. at 36:23-37:14; 11/2/21 Tr. at 142:14-21, 148:10-20; 11/10/21 Tr. at 99:6-9; 11/12/21 Tr. at 212:16-21. United enjoyed industry-leading margins in this time. PX066 at 2. It knew lower reimbursements hurt healthcare providers **and** increased financial burdens on patients who received a balance bill. PX477 at 3 ("[n]o member protection" for programs with higher reductions).

United nevertheless began a campaign to abolish the industry-standard approach and "get clients off R&C/FAIR Health." PX368 at 7; 11/3/21 Tr. at 50:21-51:1. It sought to use alternatives that allowed United to charge clients for additional "shared savings" fees that were unavailable if clients used FAIR Health. 11/3/21 Tr. at 49:5-9, 50:21-51:1; 11/15/21 Tr. at 190:8-12. The revenue United generated from shared savings fees for a given claim was calculated as 35% of the difference between a provider's billed charge and the amount United paid. PX010 at 60; PX256; 11/12/21 Tr. at 201:14-17. So, the less United paid on healthcare providers' billed charges, the more shared savings revenue United received from the client. *Id.*; 11/8/21 Tr. at 149:17-150:24; 11/15/21 Tr. at 190:8-12.

To create a false impression that lower rates were reasonable, United used MultiPlan's Data iSight to calculate out-of-network reimbursement using a purported "legally sound process" instead of United's "random calculated amounts." PX043. Data iSight was marketed as an objective and geographically adjusted determination of fair reimbursement rates. PX506 at 3. But internal documents revealed Data iSight simply used the rate **United** dictated to

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MultiPlan. PX34 at 10. PX293 at 1; 11/10/21 Tr. at 82:21-25. When United deployed Data iSight in 2016, the rate of payment United chose was 350% of the Medicare rate for emergency services. 11/10/21 Tr. at 80:3-5; 11/15/21 Tr. at 16:6-17:6. United told MultiPlan to reduce this rate even further to 250% by 2019. 11/10/21 Tr. at 80:3-5; PX288 at 176.

This scheme enriched United at the expense of its own members and healthcare providers in Nevada. United acknowledged that its "migration to high reduction programs" resulted in less member protection. PX477 at 3. Shared savings revenues generated through Data iSight using the Outlier Cost Management (OCM) program did not exist in 2017 but soared to $1.3 billion a year. *Id.*; 11/2/21 Tr. at 158:19-23. These are stark results for the work United performed to earn these revenues. 11/8/21 Tr. at 151:4-9. United's 2019 financial results for the West Region describe Nevada as one of two "outperforming markets" and show that per-member-per-month margins skyrocketed at unprecedented levels. PX462 at 33; PX426 at 12.

During the same period, United's payments to Plaintiffs declined each year. 11/17/21 Tr. at 36:23-7. For the claims disputed at trial, United paid an average of $246 a claim and discounted the Plaintiffs' total billed charges by $10,399,341. PX473G; 11/17/21 Tr. at 39:8-16. As a result, United unilaterally paid only **20%** of Plaintiffs' billed charges, even though these charges tracked the 80th percentile of FAIR Health benchmark. *Id.*; 11/16/21 Tr. at 84:8-14; 11/17/21 Tr. at 114:4-9. Evidence at trial showed that United's calculation of rates for claims was devoid of rhyme or reason, reflecting the admission that United used "random calculated amounts." *See, e.g.*, 11/16/21 Tr. at 214:24-216:1; 246:20-247:1; PX043.

United rationalized its underpayments with an illusory concern: egregious billing practices and rising costs for out-of-network services. PX012. In fact, United was aware internally that the average billed charges for out-of-network services dropped each year from 2016 to 2019. 11/3/21 Tr. at 16:17-19. Plaintiffs' billed charges increased minimally from year to year and were far lower than the billed charges of Sound Physicians, an emergency physician practice United owns in Nevada. 11/17/21 Tr. at 49:11-50:1; 11/18/21 Tr. at 225:9-17, 277:15-20; PX473. Moreover, Plaintiffs' policy against balance billing was demonstrated through documentation, communications with United, and trial testimony. PX424 at 2; 11/16/21 Tr. at

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67:12-19, 68:6-13, 69:14-70:5. Internal documents revealed that United acted behind the scenes to advance a false public narrative about the billing practices of emergency room physicians, including by exercising editorial control over an academic study authored by Zack Cooper, an economics professor at Yale University. PX509 at 2-6; PX012; PX239 at 2; PX100.

United's real motive was to maximize profit and shared savings revenue. It acknowledged internally that it "generate[d] additional savings by not running the claims through U&C but rather driving all [out-of-network] claims to a more aggressive pricing . . . ." PX243. United depicted a "migration to high reduction programs" starting from 2017 and forecasted cutting out-of-network reimbursement by another $3 billion through 2023. PX477 at 3-4; 11/2/21 Tr. at 161:6-8. United even devised a plan to cut MultiPlan to "eliminate vendor fees" and use its own company, Naviguard, to carry out Data iSight's function of determining purportedly fair and geographically adjusted reimbursement rates. PX342 at 16; PX478 at 14.

After hearing this evidence, the jury found against United for every count of liability, awarding $2,450,182.29 in actual damages and $60,000,000.00 in punitive damages. This award was less than the $10.5 million in actual damages and $100 million in punitive damages that Plaintiffs sought. PX473G; 11/22/21 Tr. at 106:24-107:1. As a result, United has the burden of showing that the errors alleged in the Motion would have resulted in a materially lower award. *See Pizarro-Ortega*, 133 Nev. at 266, 396 P.3d at 788. Because United does not meet this burden, United is not entitled to a new trial.

B. The Court did not commit discovery errors or related evidentiary errors that support a new trial.

The Motion begins with another attempt to relitigate pretrial orders that excluded a host of irrelevant evidence at trial. As the Court is aware, United originally tried to expand the scope of litigation through several discovery requests, including:

1. irrelevant non-commercial and in-network reimbursement rates and agreements;
2. irrelevant in-network negotiations between Plaintiffs and United;
3. irrelevant costs information related to the provision of emergency services;
4. irrelevant corporate structure and relationship matters;

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5. irrelevant hospital contracts; and

6. irrelevant charge-setting information.

Through a series of discovery orders, the Court rejected these requests. When United asked the Court to reconsider the positions through orders in limine, the Court declined to do so. In making these rulings, the Court repeatedly reaffirmed that the core dispute is the rate of payment for out-of-network emergency services that United already considered payable. *See, e.g.*, Order Denying Defendants' Motion to Compel Production of Clinical Documents for the At-Issue Claims and Defenses ("October 26 Order") at COL ¶ 18.

The Motion is United's latest attempt to ignore these rulings on the proper scope of litigation. In fact, United recycles most arguments and citations nearly verbatim from prior briefing. *Compare, e.g.*, Mot. at 13:4-14:1*, with* Defendants.' Opp. to Plaintiffs' MIL No. 3 at 9:16-10:10. This is evident from United's heavy reliance on record citations copied from a single pretrial opposition brief and styled as "Opp. Exhibit." *See id.* United has often failed to preserve this pretrial record when it did not disclose that evidence in an offer of proof.

United also fails to meet the burden of demonstrating that excluding this evidence materially affected its substantial rights under NRCP 59(a)(1). *Pizarro-Ortega*, 133 Nev. at 266, 396 P.3d at 788. The Motion describes the trial evidence in broad strokes and provides only superficial analysis of how the excluded evidence **might** have affected the outcome. United also repeatedly distorts the trial record, often mischaracterizing the application of the Court's rulings during trial, or in other instances misstating whether evidence was admitted or excluded.

The bottom line is that there is nothing new for this Court to decide. The Court properly acted within its discretion to constrain discovery and the scope of evidence at trial. *See Sheehan & Sheehan v. Nelson Malley and Co.*, 121 Nev. 481, 492, 117 P.3d 219, 227 (2005) (the "trial court is vested with broad discretion in determining the admissibility of evidence. The exercise of such discretion will not be disturbed absent a showing of palpable abuse.").

1. The Court's rulings on coding and claim submissions do not warrant a new trial.

The Court never ordered a wholesale exclusion of improper coding or claims

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submissions evidence. The Motion ignores trial testimony that United elicited about Plaintiffs' alleged "Sub-TIN" coding scheme, as well as evidence to support United's belief that certain disputed claims did not belong in the litigation. 11/2/21 Tr. at 88:13-20; 11/23/21 Tr. at 36:13-37:1; 11/18/21 Tr. at 217:15-21. As the rulings on these issues reflect, the Court drew sensible boundaries between admissible evidence and the loosely defined categories in United's motion. United fails to establish that any of these three categories of excluded evidence was material to the outcome.

First, the Motion identifies nothing in the record that shows Plaintiffs engaged in improper upcoding, let alone evidence that was material to United's substantial rights. United instead cites expert disclosures from prior limine briefing, in support of the unremarkable proposition that Plaintiffs receive higher reimbursements for higher CPT codes. These citations are devoid of any opinion to show whether damages resulted from an improper upcoding scheme. Mot. at 6:23-20; Defendants' Omnibus Offer of Proof at 183-184. Even if United cited proper evidence, the upcoding issues would remain inapposite because United processed and reimbursed Plaintiffs' claims exactly as they were coded. That same reasoning applied when the Court precluded discovery on clinical records:

> 18. Clinical records for the at-issue claims are not relevant because **United has already deemed the claims allowed and allowable at the CPT code submitted and later adjudicated**. Answer ¶¶ 26, 193, 194, 196; Ex. 3, Answer to Interrogatory No. 6, 7. The relevant inquiry in this action is the proper rate of reimbursement which is based on the amount billed by the Health Care Providers and the amount paid by United. The Health Care Providers do not have the burden to prove what was done clinically to establish their claims.

October 26 Order at ¶ 18 (emphasis added). Indeed, this was the same guidance that the Court reaffirmed when it granted Plaintiffs' MIL No. 3 on upcoding, despite United's contention in the motion that this ruling was unexplained. *See* 10/19/21 Tr. 201:3-14.

United alludes to the alleged prejudice it suffered because of discovery rulings on upcoding issues. But the lack of discovery does not explain United's failure to introduce this evidence. The Motion admits United did not intend to offer Plaintiffs' clinical records at trial. Mot. at 5:3-4. United also feigns ignorance about the thousands of pages of records **that United**

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produced and included in its pretrial disclosures identifying the specific medical procedures performed in connection with each claim. *See, e.g.*, 11/22/21 Tr. at 116:1-117:25, 125:23-126:11 (describing HCFA1500 forms and diagnosis codes in Box 21). Tellingly, United has never disclosed any expert analysis of these records and never made an offer of proof on upcoding. That is because United knows upcoding is immaterial to its defense and is trying to manufacture an issue for appeal.

Second, United asserts without support that the Court excluded expert testimony on Plaintiffs' alleged submission of 491 claims to non-Defendants. United concedes it was allowed to offer evidence about these claims and cites the trial testimony of Deal. Conveniently omitted from the Motion, however, is Deal's testimony that described the effect of removing those claims from his damages analysis. 11/18/21 Tr. at 218:2-13 (stating that removing specific claims would reduce damages amount); Mot. at 7:25-26 (citing 11/18/21 Tr. at 215:12-217:18). Although United vaguely references other analyses, nothing in the record shows that they were excluded at trial. In addition, United cannot plausibly show this small fraction of the 11,593 disputed claims was material to the outcome, given that Deal testified that only a "few hundred thousand dollars" was at stake. 11/18/21 Tr. at 218:2-13.

Third, United contends the Court excluded evidence of claims for non-emergency services. But United knows from meet-and-confers that Plaintiffs agreed to remove those claims from the disputed claims spreadsheet after United moved for summary judgment on this issue. Ex. 1 at 8 (October 21, 2021 e-mail from Blalack to Leyendecker confirming removal of claims); *see* Defendants' Mot. for Partial Summ. J. at 25. The experts for all parties revised their damages calculations based on the final spreadsheet of disputed claims. Ex. 1 at 6. United not only fails to mention these good-faith efforts—which involved many rounds of evaluating claims before removing them from the dispute—but also used this against Plaintiffs at trial. 11/18/21 Tr. at 82:11-84:1 (Deal's testimony discussing number of versions of Plaintiffs' disputed claims sheet). Put simply, the reason United declined to offer testimony about these claims was that United believed the dispute about non-emergency claims was resolved. This issue has nothing to do with the Court's orders in limine and discovery orders.

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In short, the jury already heard United's attempts to introduce evidence of fraudulent coding practices and claims issues. United has not shown why more of this evidence would have materially affected the result. As explained, substantial evidence supports the jury's verdict and no alleged error is material or affects United's substantial rights, especially in light of the jury awarding only part of the damages Plaintiffs requested. *Supra* Section II(A).

2. The Court's limited exclusion of Medicare rates does not support a new trial.

United misrepresents the Court's limine ruling as excluding **any** reference to Medicare rates. *See* Mot. at 12:8-13. The Court only limited comparisons to Medicare as showing a proper rate of payment in this out-of-network commercial case:

> Any evidence, argument, or testimony **that Medicare or non-commercial reimbursement rates are the reasonable rate, that providers accept it most of the time, or arguing reasonableness based on a percentage of Medicare or non-commercial reimbursement rates** is hereby EXCLUDED in limine. If Defendants believe evidence, argument, or testimony subject to this ruling is relevant and should be admitted, they shall make an offer of proof outside the presence of the jury.

Order Granting Pls.' Mot. in Limine to Exclude Evidence Subject to Court's Discovery Orders at 2:22-28. By excluding this evidence, the Court properly weighed its probative value against the risk of confusion. 10/19/21 Tr. at 208:23-209:2. Counsel for the parties also agreed during trial to narrow the scope of this exclusion. 11/9/21 Tr. at 55:9-56:7. The result was that the use of Medicare evidence was limited in only two ways: (i) any argument that "Medicare is the largest payor in the country" and therefore an appropriate rate is Medicare plus a small premium; and (ii) any "suggestion, either explicitly or implicitly, that Medicare, ***itself***, is an appropriate rate." *Id.* (emphasis added).

Despite recognizing the proper scope of the ruling at trial, *id.* 58:7-19, United sets up several straw-man arguments by misconstruing the ruling. First, United suggests certain evidence was excluded simply because it referenced Medicare rates. Mot. at 13:4-14:2; 16:1226. But the Motion fails to identify anything in the record that was excluded on these grounds. Instead, United copies a host of citations from prior briefing that was never included in an offer of proof. *Compare id., with* Defendants' Opp. to Plaintiffs' MIL No. 3 at 9:16-10:10. The

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descriptions in the Motion reveal that if any of this evidence were excluded, it was not because of a bare reference to Medicare. United also does not explain how any specific document on its list was material to the outcome. This kitchen-sink approach wastes the Court's time and is a reason why United should have disclosed its evidence in an offer of proof.

Second, United argues Medicare evidence as to United's state of mind was excluded. But it cites no United witness to support its alleged belief that "[United] reasonably set rates at Medicare plus a small margin." Mot. at 14:3-15:20. Although United alleges its witnesses **could have** offered this testimony at trial, United never disclosed this in an offer of proof. *Cox v. Copperfield*, 2022 WL 1132225, at *7-8 (Nev. Sup. Ct. April 14, 2022). United instead manufactures three after-the-fact opportunities in the transcript where it contends Scott Ziemer and John Haben **could have** explained their positions on Medicare. The reason United made no attempt to preserve this issue is clear: the evidence contradicts United's statement that it believed the Medicare rate with a "small premium" was a reasonable rate for commercial out-of-network programs. 11/10/21 Tr. at 80:3-5 (United's chosen rate was 350% and 250% of Medicare rate during the relevant period). Rather than cite its own witnesses to testify about this purported state of mind, the offer of proof only cites the testimony of non-United witnesses Leif Murphy and Bruce Deal. Defendants' Omnibus Offer of Proof at 183-186.

Third, United argues Deal should have been permitted to explain his rationale for using Medicare rates. As United concedes, however, Deal offered testimony about Medicare at trial, often without objection. United glosses over exactly what was missing from this testimony, stating that "Deal was prevented from opining on necessary details . . . including *why* Medicare is a good comparator, or *why* commercial insurers pay a "premium to Medicare." Mot. at 16:1-3 (emphasis original). It is unclear why these details are probative given the Court's guidance that "the relevant inquiry in this action is the proper rate of reimbursement which is based on the amount billed by the Health Care Providers and the amount paid by United." October 26 Order ¶ 18. Indeed, under these facts, United's argument fails to explain why details about Medicare could be any more probative than details of how the treasury prints currency. Just as the billed charge and amount paid can be described in multiples of dollars, so too can they be

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described as multiples of the Medicare rate for a given CPT code.

In the end, United's analysis fails to identify the specific evidence excluded about Medicare rates that was material to the verdict. United argued to the jury that it owed Plaintiffs zero dollars after paying the reasonable value of the claims. The jury rejected this position and nothing in the record shows that evidence of the Medicare rate would have changed this result. Indeed, United had no substantial rights that were affected at trial: it has never contended that Plaintiffs owe a credit for United's payments above the Medicare rate. The Court has no reason to reverse course from its prior rulings on Medicare evidence.

Finally, as explained, substantial evidence supports the jury's verdict and no alleged error is material or affects United's substantial rights, especially in light of the jury awarding only part of Plaintiffs' requested damages. *Supra* Section II(A).

3. The Court's ruling on in-network rates and provider participation agreements is no basis for a new trial.

United's arguments on in-network rates, provider-participation agreements, and wrap/rental agreements are essentially the same. The Court previously ruled that these agreements are not relevant because Plaintiffs and United had an out-of-network arrangement. These arguments present no basis for a new trial.

a. The Court properly excluded in-network rates.

United recycles legal argument when it contends that determining the "reasonable value of services" requires consideration of in-network rates. As Plaintiffs have maintained through discovery, the test for determining the reasonable "value of services" under Nevada law, for a case involving out-of-network emergency services, is the market value of **out-of-network**, rather than **in-network**, emergency services. *Certified Fire Prot. Inc.*, 128 Nev. 371, 381 n.3, 283 P.3d at 257 n. 3 (2012) (citing Restatement (Third) of Restitution and Unjust Enrichment § 49(3)(c) & cmt. f (2011)).[1] While United relies on *Children's Hosp. Cent. Cal. v. Blue Cross of*

[1] *See Mass. Eye and Ear Infirmary v. QLT Phototherapeutics, Inc.*, 552 F.3d 47, n.26 (1st Cir. 2009), *decision clarified on denial of reh'g*, 559 F.3d 1 (1st Cir. 2009); *Eagle v. Snyder*, 412 Pa. Super. 557, 562-64 (1992) (reasonable value of medical services may be determined through *(continued)*

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Cal. to suggest in-network rates are relevant to "reasonable value of services," that court made clear that it is "the facts and circumstances of the particular case [that] dictate what evidence is relevant to show the reasonable market value of the services at issue." 226 Cal. App. 4th 1260, 1275, 172 Cal. Rptr. 3d 861, 871 (2014). *Children's Hosp.* notably then emphasized that the reasonable value of services was the "market value." *Id*.

As this Court determined under the facts of this case, the market value for out-of-network emergency services does not depend on in-network rates. *See, e.g.*, 08/17/21 Hr'g Tr. at 16:22-17:1 (emphasis added) ("The reason that the fair market value for services is irrelevant, collection efforts irrelevant, the policies and procedures about excluding payments or balance billing is irrelevant. . . . And negotiation with other ER groups or contracts was irrelevant."). United has not explained why the result should be different here.

b. United fails to show that its substantial rights were materially affected.

United fails to demonstrate its rights were substantially affected by the exclusion of in-network rates, in-network agreements, or wrap agreements. The Court properly excluded in-network evidence that has no relevance to the out-of-network context.

United's offers of proof on these issues cite: (i) Bruce Deal's damages analysis premised on in-network rates; (ii) in-network agreements that Plaintiffs entered with BCBS and MGM Resorts, as well as the underlying rates in those agreements (Mot. at 17:23-18:28); and (iii) over fifty pages of deposition testimony from John Haben, Kent Bristow, and Vince Zuccarello about contract negotiations. United also notes that several of Plaintiffs' claims at trial were reimbursed at amounts higher than the rates under the BCBS and MGM agreements.

By relying on these agreements, United ignores the differences between in-network and out-of-network arrangements. In the in-network context, the parties have contractual certainty that reduces risk and ensures consistent payments. The same goes for wrap networks that allow

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expert testimony regarding the market value of the medical services provided based on the average charges in the region where the services were performed); Restatement (Third) of Restitution and Unjust Enrichment § 31 cmt. e (2011) ("Where such a contract exists, then, quantum meruit ensures the laborer receives the reasonable value, usually market price, for his services.").

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providers to access rates that Plaintiffs agreed to by contract. Thus, it is not unusual for a healthcare provider to accept rates below the market out-of-network reimbursement.

Because these in-network issues would add another layer of unnecessary confusion, the Court was therefore well within its discretion to exclude this evidence. *See Chamoun v. Universal Health Services Foundation*, No. A624512, 2012 WL 9100937, at *3 (Nev. Dist. Ct. Feb. 8, 2012) ("the results of negotiated agreements between medical providers and third-party payers . . . do not accurately reflect the reasonable value of medical services provided.").

Finally, as explained, substantial evidence supports the jury's verdict and no alleged error is material or affects United's substantial rights, especially in light of the jury awarding only part of Plaintiffs' requested damages. *Supra* Section II(A).

c. Plaintiffs did not introduce in-network rates at trial

United misrepresents the trial record when it claims that Plaintiffs tried to introduce in-network rates affirmatively at trial. Plaintiffs made no such attempt. United's only support for this statement is deposition testimony discussing United's contract with Envision—an issue that never arose at trial. This again results from United's failure to recognize that certain portions of prior briefing are no longer applicable after trial. *See* Defendants' Opposition to Plaintiffs' MIL No. 3 at 11:12-21.

4. The Court's exclusion of cost evidence does not support a new trial.

United cites no authority holding that courts **must** consider costs in determining the reasonableness of a healthcare provider's charges. The Motion admits the "general" rule is costs can be (but are not necessarily) probative of reasonable value, relying on *Fairbanks N. Star Borough v. Tundra Tours, Inc*. 719 P.2d 1020, 1027 (Alaska 1986) (school bus transportation costs intended to be captured in billed charges). United also cites *Doe v. HCA Health Servs. of Tennessee, Inc.*, but that court noted that "internal factors" may be considered along with "similar charges of other hospitals in the community."

Other authority shows United is wrong to argue costs **must** be considered to determine the reasonableness of billed charges. *Certified Fire*, *NorthBay Healthcare Group v. Blue Shield of Cal. Life & Health*, F. Supp. 3d 980, 990 (N.D. Cal. 2018) (denying a motion to compel cost

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documents because, for quantum meruit, "the reasonable and customary value of hospital services is determined by value to the recipient, not the cost to the provider" and the provider did not intend to introduce such evidence in support of the establishing the value of services); *Regents of the Univ. of California v. Glob. Excel Mgmt., Inc.*, No. SACV160714DOCEX, 2018 WL 5794508, at *19 (C.D. Cal. Jan. 10, 2018) ("under quantum meruit, the costs of the services provided are not relevant to a determination of reasonable value."); *Children's Hosp. Cent. California v. Blue Cross of California*, 172 Cal. Rptr. 3d 861, 872 (2014) (the true marker of the "reasonable value" of services has been described as the "going rate" for the services or the "reasonable market value at the current market prices"); *Risinger v. SOC LLC*, 936 F. Supp. 2d 1235, 1246-47 (D. Nev. 2013).

The Court appropriately excluded discovery and admission of evidence on the costs of providing emergency services. Testimony at trial demonstrated that Plaintiffs determine charges not based on costs, but on FAIR Health data. 11/16/21 Tr. at 83:24-84:7. United's own damages expert, Deal, opined at trial that emergency services are a classic example of a service with inelastic demand. 11/18/21 Tr. at 199:5-21 ("The opposite end of the spectrum is what we call inelastic demand. And that's a situation exactly the opposite where it doesn't matter what your price is effectively. People are going to have to buy that service."). For these reasons, it was well within the discretion of the Court to exclude cost-related evidence because it is not probative of the reasonable rate of payment for out-of-network emergency services.

United cites a single offer of proof: the testimony of Leif Murphy, who stated that TeamHealth's average cost was $150 per emergency encounter. Mot. at 28 (citing Defendants' Omnibus Offer of Proof at 168). But nothing in this offer of proof covers all fixed or variable costs. Nor does it show how these costs compare to other providers' costs. Although Murphy testified in the same offer of proof that TeamHealth collected an average of $350 per encounter from commercial insurers, this evidence is inadmissible because it includes in-network rates. United also waived its argument about internal communications about hospital facilities because it was not cited in its offer of proof. *See* Defendants' Omnibus Offer of Proof at 167:14-175:17.

Because United's offer of proof provides no baseline to compare the Plaintiffs' profits

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vis-à-vis other emergency services providers, it fails to show that the excluded evidence of costs is material. Finally, as explained, substantial evidence supports the jury's verdict and no alleged error is material or affects United's substantial rights, especially in light of the jury awarding only part of Plaintiffs' requested damages. *Supra* Section II(A).

5. The Court's ruling on Plaintiffs' billed charges is no basis for a new trial.

United's argument on billed charges is based on the false premise that it could not discuss how Plaintiffs set their billed charges. This misstates the Court's order, which excluded only certain charge-setting evidence:

> IT IS HEREBY ORDERED that the Motion is GRANTED with respect to the issue of how the Health Care Providers' charges are set. Any evidence, argument, or testimony relating to how the Health Care Providers' charges are set is hereby EXCLUDED in limine. **This shall not preclude the introduction of evidence regarding FAIR Health or percentiles of FAIR Health, nor shall it preclude the introduction of evidence regarding increase in prices set by the Health Care Providers.**

Order Granting Pls.' Mot. in Limine to Exclude Evidence Subject to Court's Discovery Orders at 3:22-28 (emphasis added).

As a result, United elicited testimony about the topics that the Motion now claims United was precluded from eliciting at trial. *See* 11/16/21 Tr. at 81:23-84:14 (discussing Plaintiffs' chargemaster as tied to the 80th percentile of FAIR Health). The only offer of proof United cites relates to "Plaintiffs' conduct in seeking higher reimbursement on a claim-by-claim basis through a collection agency that negotiated with MultiPlan." Defendants' Omnibus Offer of Proof at 156:2-5; Mot. at 32:9. But evidence about the **collection** of payments is irrelevant to how Plaintiffs **set** their billed charges.

Finally, as explained, substantial evidence supports the jury's verdict and no alleged error is material or affects United's substantial rights, especially in light of the jury awarding only part of Plaintiffs' requested damages. *Supra* Section II(A).

6. The Court's ruling on Plaintiffs' corporate flow of funds is no basis for a new trial.

United cites a single offer of proof: Leif Murphy's testimony that physicians will not

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receive profit sharing on the amount the jury awards in this case. Mot. at 36:11-15. United waives its other argument on corporate flow of funds because specific profits to TeamHealth or Blackstone was not included in its offer of proof, despite United taking the opportunity to question Murphy outside the presence of the jury during trial. *Cox*, 2022 WL 1132225, at *7-8.

Also, the Court did not commit error by excluding this evidence. The issue at trial was United's rate of payment. Whether physicians get a share of the verdict is immaterial to Plaintiffs' reasonable and customary charges. The offer of proof is a red herring because United fails to consider whether its underpayments affected physician salary or contract payments. Allowing United to present this evidence to the jury is far more prejudicial than probative because United is conflating corporate earnings with Plaintiffs' charge on a per-service basis.

Although United alleges that the jury was left with a mistaken impression about the identity of the Plaintiffs, the premise that it was precluded from discussing Plaintiffs' corporate relationships is false. United knows that it developed testimony at trial about Plaintiffs' relationship with TeamHealth and Blackstone.

> MR. ROBERTS: I just wanted to say, Your Honor, that I understand that you're -- what your preliminary ruling was on corporate structure, but we've obviously gone through this whole trial and we've talked about the fact that TeamHealth owns Fremont, that Blackstone owns TeamHealth, and we got into that . . . .

11/15/21 Tr. at 180:3-7. That is because the Court did not exclude all evidence about Plaintiffs' relationship with TeamHealth or Blackstone. Order Granting Pls.' Mot. in Limine to Exclude Evidence Subject to Court's Discovery Orders at 2:22-28.

Finally, as explained, substantial evidence supports the jury's verdict and no alleged error is material or affects United's substantial rights, especially in light of the jury awarding only part of Plaintiffs' requested damages. *Supra* Section II(A).

7. United was not prohibited from collecting discovery on balance billing.

United creates a false impression that it had no opportunity to test claims that Plaintiffs did not balance bill patients. But United deposed witnesses to develop evidence that it alleges was undiscoverable. *See* Pls.' Opposition to Defs.' Mot. in Limine No. 15 at 5 n.2. Also, United ignores evidence that Plaintiffs produced and offered at trial to show that they did not balance

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bill United's members in Nevada. PX424 at 2; 11/16/21 Tr. at 67:12-19, 68:6-13, 69:14-70:5. Because United did not show this discovery was inadequate, the Court rejected United's efforts to prohibit Plaintiffs from discussing their policy against balance billing. 10/22/21 Tr. 88:11-12. The reality is United tested its claim during discovery and came up short. United's single offer of proof is Murphy's testimony that TeamHealth balance billed a mere $27,550 of patients in 2017, amounting to 0.08% of its encounters. 11/16/21 Tr. at 124:2-6.

Finally, as explained, substantial evidence supports the jury's verdict and no alleged error is material or affects United's substantial rights, especially in light of the jury awarding only part of Plaintiffs' requested damages. *Supra* Section II(A).

C. The Court's limine rulings do not support a new trial.

United alleges that the Court erred in ruling on United's Motion in Limine regarding: (1) Plaintiffs' prior pleadings, and (2) evidence related to 2020 claims in the claims file and Naviguard. Mot. at 29-46. Because United does not meet the standard for a new trial on either point, the Court should deny the Motion on these points.

1. The Court's ruling on Plaintiffs' prior pleadings is no basis for a new trial.

For three reasons, United is not entitled to a new trial because of the Court's limine ruling that United cannot discuss Paragraph 209 from a prior pleading regarding the dropped claim of tortious interference with an implied covenant of good faith and fair dealing. *See* Mot. at 39-43.

First, as explained, substantial evidence supports the jury's verdict and no alleged error is material or affects United's substantial rights, especially in light of the jury awarding only part of Plaintiffs' requested damages. *Supra* Section II(A).

Second, the Court properly excluded this pleading because a dropped claim is irrelevant, and any probative value is substantially outweighed by the likelihood of unfair prejudice, confusion of the issues, and a waste of time on a mini trial about the claims that Plaintiffs dropped. *See* 10/20/21 Tr. at 93:4-99:12. United argues that Paragraph 209 is a party admission and thus admissible. Mot. at 39-40. But whether a statement is a party admission goes to hearsay, not relevance and Rule 403. *Compare* NRS 51.035(3)*, with* NRS 48.015-48.035.

Third, United waived this issue by not approaching or making an offer of proof. *Cox*,

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2022 WL 1132225, at *7. Opposing counsel admitted that Paragraph 209 is subject to objection and would be admissible at trial only if Plaintiffs opened the door. 10/20/21 Tr. at 96:10-99;12. The Court then granted the limine with the carveout that "[i]f [Plaintiffs] open the door at the time of trial, we will revisit the issue." *Id.* at 99:10-12. Because United did not approach the bench to introduce this paragraph or make an offer of proof, United waived this issue.

2. The Court's rulings on 2020 claims and Naviguard do not support a new trial.

For three reasons, United does not meet the standard for a new trial regarding 2020 claims evidence in the claims file and Naviguard. *See* Mot. at 43-46. First, United waived this argument because: (a) United cannot obtain dispositive relief on a portion of Plaintiffs' damages through a motion in limine (as opposed to filing a motion for summary judgment); and (b) United did not move to compel arbitration, *Principal Investments v. Harrison*, 132 Nev. 9, 20-21, 366 P.3d 688, 697-98 (2016) (a party waives an arbitration clause by engaging in court proceedings).

Second, the Court did not err in admitting Naviguard evidence because this evidence was probative of United's intent to improperly underpay billed charges for out-of-network services during the claims period. *See, e.g.*, 11/9/21 Tr. at 141:18-163:18, 175:18-196:25 (Haben agreed that the Naviguard discussions impacted decisions in **2019** for United to seek more profits by replacing Multiplan and reducing reimbursement rates in Nevada).

Third, as explained, substantial evidence supports the jury's verdict, and no alleged error is material or affects United's substantial rights because the jury awarded only part of Plaintiffs' requested damages. *Supra* Section II(A). For instance, because the jury awarded only one-fourth of the requested actual damages, United has no basis to conclude that the jury awarded relief for the claims from January 1, 2020 to January 20, 2020 in the claims file.

D. United is not entitled to a new trial under *Lioce* for alleged misconduct.

The Court should deny the Motion as to attorney misconduct because: (1) United waived these complaints by not objecting at trial; (2) substantial evidence supports the verdict; (3) United does not meet the standards for a new trial for unobjected-to, cumulative, or objected-to misconduct; and (4) much of what United complains about is not attorney misconduct.

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1. United waived its attorney-misconduct complaints.

United waived these complaints by not objecting to attorney misconduct. *See Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 364, 212 P.3d 1068, 1079 (2009) (waiver occurs "[w]hen a party fails to object to attorney misconduct during the trial"); *Lioce v. Cohen*, 124 Nev. 1, 19, 174 P.3d 970, 981 (2008). United had the burden to contemporaneously object and specify attorney misconduct as the basis for the objection during opening, closing, or the presentation of exhibits and witnesses. *See id.*; *Cox*, 2022 WL 1132225, at *7-8; *Bayerische v. Roth*, 127 Nev. 122, 135-140, 252 P.3d 649, 658-61 (2011); *Grosjean*, 125 Nev. at 364, 212 P.3d at 1079; *United States v. Gomez-Norena*, 908 F.2d 497, 500-01 (9th Cir. 1990) ("a party fails to preserve an evidentiary issue" by "failing to make a specific objection" and "by making the *wrong* specific objection.") (emphasis original). **United admits it did not object to attorney misconduct.** Mot. at 55 n.7. Therefore, the Court can deny the Motion as to attorney misconduct on waiver alone.

Undeterred, in a footnote, United argues cumulative misconduct excuses the requirement to object, let alone object with specificity. *Id.* But the narrow cumulative-misconduct exception does not apply. A court **may** excuse objecting to each instance of misconduct **only**: (1) "after a sustained objection" to attorney misconduct, and (2) the offending attorney engages in "repeated or persistent objected-to misconduct" for which the court sustained the objection. *Lioce*, 124 Nev. at 18-23, 174 P.3d at 981-84. United does not point to a sustained attorney-misconduct objection that Plaintiffs' counsel repeatedly and persistently violated. Mot. at 47-85. Accordingly, this narrow exception does not salvage United's failure to object.

Finally, United usually does not attempt to specify **whether** it objected, let alone the basis for the objection. Mot. at 47-85. It is not the Court's job to search the record for attorney-misconduct objections United chose not to make. *See Gomez-Norena*, 908 F.2d at 500-01 ("a specific objection made on the wrong grounds . . . precludes a party from raising a specific objection on other, tenable grounds."). But, for the avoidance of doubt, this response highlights examples of waiver that correspond to the arguments raised in the Motion:

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1. **No objection during witness testimony.** For the below complaints, United cites these sections of the trial transcript, which contain **zero** objections:

    a. Early "Pinocchio-ish" comment. Mot. at 72 (citing 11/8/21 Tr. at 20:18-20).

    b. Paradise making no decision to fix United's reimbursements in response to the liability verdict. *Id.* at 82-84 (citing 12/7/21 Tr. at 24:13-25:15 and 125:1-126:5). United claims it objected to part of the examination as "harassing." *Id.* at 83 (citing 12/7/21 Tr. at 25:16-30:19, 35:11-38:23). That is just untrue.

    c. Comparing United's program to casino flyers. *Id.* at 76-77 (citing 11/9/21 Tr. at 132:25-136:7). In fact, in this same range, Plaintiffs' counsel compares Data iSight to the "Grand Wizard" in the "Wizard of Oz" telling "Toto" to "ignore the man behind the curtain" **without objection**. *See* 11/9/21 Tr. at 134:23-135:8.

    d. Comparing United's underpayment for life-saving treatment to the cost of hotel time. *Id.* at 63 (citing 11/2/21 Tr. at 133:16-19).

    e. References to "What About Bob?" *Id.* at 67 (*citing* 11/3/21 Tr. at 59:20-60:12).

    f. Comment that United is driven by "more" and that "the children are our future." *Id.* at 67 (citing 11/8/21 Tr. at 30:21-31:6).

    g. Questions on the believability of a hired expert. *Id.* at 70 (citing 11/3/21 Tr. at 16:13-16).

    h. References to the cost of the Bellagio. *Id.* at 70-71 (citing 11/3/21 at 65:16-25).

2. **No objection during opening and closing.** For the below complaints, United cites these sections of the trial transcript, which contain **zero** objections:

    a. Alleged limine violations during closing regarding emotional personal medical stories, references to Plaintiffs as "doctors," United's "greed," and reimbursement rates before 2016. *Id.* at 78 (citing 11/23/21 Tr. at 136:9-138:1, 138:2-12, 140:20-21, 140:22-24, 142:21, 154:4-9).

    b. Alleged limine violations for referring to the Plaintiffs as "doctors." *Id.* at 58-59 (citing 11/23/21 Tr. at 137:2-4, 139:25-140:1, 257:10-23).

    c. Reference to conduct that "anybody living in this state ought to be embarrassed about." *Id.* at 62. (citing 11/23/21 Tr. at 166:11-21).

    d. Comments that saving lives is "not selling stadium seating," comments on the impact of this case on patients, or comments that United is "screwing" Plaintiffs and patients. *Id.* at 64 (citing 11/23/21 Tr. at 150:5-10, 153:25-154:13.

    e. Comment that the jury is wasting its time if it talks to United in a "whisper." *Id.* at 84-85 (citing 12/7/21 Tr. at 107:14-15).

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3. **Objecting on basis other than attorney misconduct.** United cites these sections of the trial transcript, which either include no objection or an objection **other than** attorney misconduct. Also, United complains about a lack of admonishing instructions. But United cites sections in which it did not request instructions:

   a. Referring to United's misconduct as "ramrodding" (objection: form, argumentative). Mot. at 67 (citing 11/8/21 Tr. at 58:5-10). The Court sustained the objection. United did not seek an instruction. *Id.*

   b. Later Wizard of Oz and Toto comments (objections: argumentative, form). *Id.* at 71 (citing 11/9/21 Tr. at 95:5-18, 103:8-105:8, 139:4-8, 182:1-183:6). The Court sustained some of these objections. United did not seek an instruction. *Id.*

   c. Comments that "he who has the gold makes the rules" and about Data iSight as "magic" (objections: argumentative, compound, foundation, speculation). *Id.* at 71 (citing 11/22/21 Tr. at 240:1-6, 250:5-12, 248:19-22). The Court sustained some of these objections. United did not seek an instruction. *Id.*

   d. "Bald-faced lie" comment and later "Pinocchio" comments (objections: argumentative, compound). *Id.* at 72 (citing 11/8/21 Tr. at 41, 91-93). The Court sustained these objections **and** gave an instruction despite United not requesting one. *Id.*

   e. Calling United's conduct "evil" (objection: argumentative). *Id.* at 80 (citing 11/23/21 Tr. at 173:10-16). The Court sustained this objection. United did not seek an instruction. *Id.*

   f. Value of human life compared to cost of airfare (objection: relevance). *Id.* at 63 (citing 11/2/21 Tr. at 132:22-133:15).

   g. Share buybacks (objections: none for certain questions, relevance, facts not in evidence, foundation, compound, asked and answered). *Id.* at 81-83 (citing 12/7/21 Tr. at 13:18-18:6, 108:3-9).

   h. TeamHealth as "biggest kid in school yard" (objection: facts not in evidence). *Id.* at 62 (citing 11/23/21 Tr. at 145:25-146:9).

   i. Use of United's word "egregious" (objection: none for certain questions, argumentative). *Id.* at 63 (citing 11/2/21 Tr. at 124:16-125:18).

   j. The Blob (objections: none for some questions, compound, argumentative). *Id.* at 67 (citing 11/3/21 Tr. at 196:6-22; 11/9/21 Tr. at 142:15-20).

   k. Questions regarding the fact that United pays itself more than it pays ER doctors for life-saving treatment (objections: asked and answered, misstates testimony, argumentative). *Id.* at 68 (citing 11/15/21 Tr. at 192:6-193:11, 203:3-205:2).

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l. Effect of United's misconduct on "mom and pop" providers (objection: speculation). *Id.* at 72-73 (citing 11/12/21 Tr. at 111).

m. Cross examination of Deal (objections: none for some questions, compound, asked and answered, assumes facts not in evidence, improper hypothetical). *Id.* at 74 (citing 11/18/21 at 266:9-270:4; 11/19/21 at 54:2-56:8, 101:15-24). The Court sustained some of these objections. United did not seek instructions. *Id.*

n. Comments that United cheated members out of protection and took money from doctors' pockets and put the money into United's pockets (objections: compound, argumentative). *Id.* at 75 (citing 11/8/21 Tr. 160:23-161:15; 11/9/21 Tr. at 45:18-46:1; 11/12/21 Tr. at 115:19-24). The Court sustained some of these objections. United did not seek instructions.

After opening statements were complete, outside the presence of the jury, opposing counsel objected under *Lioce* solely on the basis that no exhibit at trial would show that the verdict in this case would affect the quality of healthcare in Nevada. Plaintiffs' counsel then pointed to witness testimony that would support this inference. The Court overruled the objection. 11/2/21 Tr. at 59:17-63:15. United cannot take one non-contemporaneous, overruled objection on one discrete issue on the first day of trial and morph that into preserving thirty-eight pages of *Lioce* arguments across weeks of trial. Because United did not contemporaneously object to attorney misconduct for conduct cited, United waived this basis for a new trial. The Court can deny the Motion as to attorney misconduct on this basis alone.

2. United is not entitled to a new trial because the evidence supports the verdict.

Even if United objected to attorney misconduct (which it did not), United is not entitled to a new trial because the evidence supports the verdict. To obtain *Lioce* relief, United must show that: (1) "brief statements" made across a multi-week trial "amounted to such irreparable and fundamental error that **but for** the misconduct the verdict would have been different, especially in light of the evidence supporting [the claims]"; and (2) the jury's actual and punitive damages awards "depart so greatly from the estimated damages so as to indicate the damages award may be explained **only** by plaintiffs' counsels' misconduct." *See Kinder Morgan v. Claytor*, 130 Nev. 1205, *3 (2014) (emphasis added). The bar is so high that, when the evidence

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supports the verdict, the Nevada Supreme Court has denied *Lioce* relief for attorney misconduct even when the jury awards damages "above" the requested amount. *See id.* Here, United is not entitled to a new trial because: (1) substantial evidence supports the verdict, and (2) the jury awarded part of Plaintiffs' requested damages. *Supra* Section II(A). Tellingly, United does not even attempt to argue that it meets this but-for standard.

3. United does not meet the *Lioce* standard for a new trial for attorney misconduct.

Even if United objected to attorney misconduct (which it did not), and even if no evidence supported the verdict (which is not the case), United does not meet the *Lioce* standard for a new trial for unobjected-to misconduct, cumulative misconduct, or objected-to misconduct.

First, United does not meet the standard for unobjected-to and cumulative misconduct. For both, United must show that "no other reasonable explanation for the verdict exists" except for the misconduct and that the misconduct at issue is a "rare occasion when attorney misconduct offsets the evidence adduced at trial in support of the verdict." *Grosjean*, 125 Nev. at 364-365, 212 P.3d at 1079-80. This requires showing the jury's findings were "derivative **solely** of the attorney misconduct or that the evidence was offset by the [improper] comments from [the] attorney." *Id.* (emphasis added). Because substantial evidence supports the jury's liability and damages findings in both phases of trial, United does not meet either standard. *Supra* Section II(A). Tellingly, United does not attempt to argue that it meets these standards. Mot. at 47-85.

Second, United does not meet or attempt to meet one of the standards for a new trial for objected-to attorney misconduct:

1. **Sustained Objection and Instruction.** "When a party objects to attorney misconduct and the objection is sustained, the misconduct must be so extreme that the objection and admonishment could not remove the misconduct's effect." *Carr v. Paredes*, 133 Nev. 993, *2-3, 387 P.3d 215, *2-3 (2017). United does not specify: (a) a sustained attorney-misconduct objection, (b) whether United requested or obtained an instruction, or (c) whether an instruction could remove the misconduct's effect. Mot. at 47-85.

2. **Sustained Objection and No Instruction.** "[W]hen a district court sustains an objection to attorney misconduct but fails to admonish counsel or the jury, if objecting counsel does not promptly request the omitted admonishments," counsel must "demonstrate that the objection and sustainment could not have removed the misconduct's effect." *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 77, 319 P.3d 606, 613 (2014). United does

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not specify: (a) a sustained attorney-misconduct objection, (b) whether United requested or obtained an instruction, or (c) whether the sustained objection could remove the misconduct's effect. Mot. at 47-85.

3. **Objection Overruled.** "If the objection is overruled, then the overruling must be in error and the court's admonishment likely would have changed the verdict." *Carr*, 133 Nev. at *2-3, 387 P.3d at *2-3. United does not specify: (a) an attorney-misconduct objection, (b) whether the Court overruled the objection, or (c) whether an instruction likely would have changed the verdict. Mot. at 47-85.

Instead, United relies solely on high-level references to cumulative misconduct. *Id.* at 55 n.7. Because United does not meet or attempt to meet the standard for unobjected-to, cumulative, or objected-to attorney misconduct, the Court must deny the Motion.

Third, United could not meet the *Lioce* standard for a new trial even if United addressed these three standards because: (1) evidence supports the verdict, **and** (2) Plaintiffs' counsel did not direct the jury to rule **contrary to the evidence**. *Supra* Section II(A); *Pizarro-Ortego*, 133 Nev. at 269, 396 P.3d at 790. For instance, when the evidence supports the verdict and the attorney asks the jury to decide "based on the evidence," the Nevada Supreme Court has denied relief despite finding that an attorney engaged in the following misconduct:

1. Emotionally discussed his marriage, hometown, near-death experiences of loved ones, his children, and his emotions about the case;
2. Emotionally assessed the credibility and emotions of the witnesses;
3. Referred to his opponent's arguments or practices as "smoke and mirrors";
4. Called opponent's witnesses "liar," "rent-a-cop," "goons," and "garbage";
5. Called his opponent a "liar who sued" or acted "for financial gain."

Grosjean, 125 Nev. at 363-65, 212 P.3d at 1078-80; *Cox*, 2022 WL 1132225, at *8-9. Similarly, United admits it had the chance to respond to each issue in closing argument. Mot. at 81.

For these reasons, United does not meet or attempt to meet the standard for a new trial for unobjected-to misconduct, cumulative misconduct, or objected-to misconduct.

4. The examples United complains about are not attorney misconduct.

Much of the cited examples are advocacy, not misconduct. For instance, asking the jury to "send a message" "*based on the evidence*" is advocacy, not attorney misconduct. *Pizarro-*

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Ortego, 133 Nev. at 269, 396 P.3d at 790 (emphasis original). That is what Plaintiffs' counsel did. *See, e.g.*, 12/7/21 Tr. at 107:14-15. It is also not attorney misconduct to invite the jury to "consider the contradiction[s]" in an opponent's conduct when "assessing [the opponent's] credibility." *Cox*, 2022 WL 1132225, at *8. Doing so is "advocacy" and is not improper "personal opinion," "character attack," or "invitation to rely on emotion." *Id.* Even calling an opposing witness a "liar" is misconduct only if it is **not** based on the evidence. *Id.* And, in general, "disparaging" a witness or "disparaging [the opponent's] case" are not misconduct. *Pizarro-Ortega*, 133 Nev. at 269 n.12, 396 P.3d at 790 n.12.

Here, the jury found that United in fact engaged in malicious, fraudulent, and oppressive misconduct. *Supra* Section II(A). Substantial evidence supports this verdict. *Id.* To meet the burden of proof on this misconduct, Plaintiffs had to cross-examine United's witnesses on their dishonesty and malicious conduct. United's complaints conflate "prejudice" with "**unfair** prejudice." *See United States v. McRae*, 593 F.2d 700, 707 (5th Cir. 1979) ("Relevant evidence is **inherently prejudicial**; but it is only **unfair** prejudice, substantially outweighing probative value, which permits exclusion of a relevant matter under Rule 403.") (emphasis added). United simply did not like having to face the truth about the many bad things United did to rationalize United's underpayments for emergency medical services in Nevada.

United also attacks conduct that is not attorney misconduct. Because United does not preserve its objections, this Response only addresses examples:

1. **Paradise's Lack of Decisions.** Asking Paradise about whether United's planned changes following the liability verdict is not attorney misconduct. Mot. at 82-83. For instance, such inquiries are not impermissible inquiries into subsequent remedial measures under Rule 407. This rule only applies when "measures are taken which, if **taken previously**, would have made the event less likely," as opposed to whether United will take action to prevent **future** underpayments based on **future** action. NRS 48.095. On its face, the rule does not apply regarding the "feasibility of precautionary measures." *Id.* This rule also does not apply to post-event analyses or to compelled remediations. *See Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 430-31 (5th Cir. 2006); *O'Dell v. Hercules, Inc.*, 904 F.2d 1194, 1204 (8th Cir. 1990).

2. **Healthcare Providers.** Plaintiffs referring to themselves as "Healthcare Providers" is a fact, not an attorney's opinion or a tactic to improperly inflame emotions. Mot. at 56-59. United's counsel admitted in pretrial that Plaintiffs are physician-owned, employ physician's assistants and nurses, contract with ER doctors, and provide emergency

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services. 10/22/21 Tr. at 137:8-140:11. The evidence at trial supports this label. United is not prejudiced because United had the chance to cross-examine on these points.

3. **Reductions in Medicare Multiple.** Plaintiffs' counsel did not testify that United cut reimbursement rates as a multiple of Medicare. He laid the foundation for United's cut from 350% to 250% of Medicare through a witness. Mot. at 71-72 (citing 11/15/21 Tr. at 131:14-19 for question from counsel but ignoring the foundation laid at 16:8-21).

4. **Doctor Understanding of Pricing.** Plaintiffs' counsel asked about the witness's understanding of whether doctors understand pricing. Mot. at 73 (citing 11/17/21 Tr. at 256:20-257:7). United objected for speculation. Witness answered, "I **do** know." *Id.* (emphasis added). The Court overruled the objection. This is not attorney misconduct.

5. **Talking in a Whisper.** Plaintiffs' counsel, in the punitive-phase closing, told the jury they would waste their time in correcting United's misconduct if they "talk in a whisper." Mot. at 84-85 (citing 12/7/21 at 107:14-15). Counsel directed the jury to award large damages based on "Plaintiffs [Exhibit] 519" and other evidence. *See id.* The Nevada Supreme Court has found that this exact conduct is not attorney misconduct. Specifically, in *Pizarro-Ortega*, the attorney argued to the jury that "verdicts hit the paper," "verdicts shape how people follow the rules," and that, "[i]f you return a verdict that is too low, people don't follow the rules." 133 Nev. at 268-69, 396 P.3d at 789-90.

6. **The Court's rulings are not Plaintiffs' Misconduct.** United complains about the exclusion of testimony from Dr. Scherr about the ownership of Fremont. Mot. at 58. But United waived this point because United did not make an offer of proof. *Cox*, 2022 WL 1132225, at *7. United also does not address how the **Court's** exclusion of irrelevant evidence is attorney misconduct under *Lioce*. Mot. at 58.

Accordingly, United has not shown that many of its complained-of instances of conduct are in fact attorney misconduct. Taken together with United's waiver of its objections, the fact that the evidence supports the verdict, and United's failure to address or meet the *Lioce* standards for new trial, the Court should deny the Motion regarding attorney misconduct.

E. United is not entitled to a new trial for alleged violations of United's First Amendment rights.

The *Noerr-Pennington* doctrine is not a rule of evidence admissibility. Rather, the doctrine applies to provide immunity from statutory liability (or, by extension, common-law liability) for petitioning the government. *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006); *Theme Promotions, Inc. v. News American Mktg. FSI*, 546 F.3d 991, 1007 (9th Cir. 2008). Put another way, only when the conduct that gives rise to the cause of action consists of petitioning the government, the *Noerr-Pennington* doctrine comes into play.

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The problem with United's argument is that the conduct underlying the causes of action in this case is not First-Amendment activity; it is United's reimbursement of Plaintiffs at an unfairly low rate. Because of this, United offers the Court a novel interpretation of *Noerr-Pennington*: not as a basis for immunity from liability, but as an evidentiary rule. But United has not cited a single authority that supports such a conclusion.

Two of the cases United cites address motions to dismiss under Rule 12 of the Federal Rules of Civil Procedure. *See Sosa v. DirectTV, Inc.*, 437 F.3d 923, 927 (9th Cir. 2006); *Garmong v. Tahoe Reg. Planning Agency*, No. 3:17-cv-00444-RCJ-WGC, 2021 WL 4129386, at *7-8 (D. Nev. Sept. 9, 2021). In the third case United cites, the district court dismissed a cause of action for intentional interference with prospective economic advantage that was premised entirely on the defendant mailing letters to third parties threatening litigation if they did business with the plaintiff—protected conduct under the *Noerr-Pennington* doctrine. *See Theme Promotions, Inc. v. News America Mktg. FSI*, 546 F.3d 992, 1006-07 (9th Cir. 2008). In fact, *Theme Promotions* rejected the plaintiff's attempt to characterize the *Noerr-Pennington* doctrine as an evidentiary privilege. *Id.* at 1007 ("The *Noerr-Pennington* doctrine has been articulated as a principle of statutory construction rather than as a privilege."). None of these cases supports the massive expansion of the doctrine that United advocates here.

Plaintiffs' case against United was simple: Plaintiffs provided valuable services to United's members; United acknowledged an obligation to reimburse Plaintiffs at a reasonable rate; and United instead reimbursed Plaintiffs at a rate that was unfair and unreasonable. United's commissioning of the Yale Study provided important context that enabled Plaintiffs to counter United's false narrative that affiliated emergency departments are driving up health care expenses to line their own pockets, a narrative that United still trumpets to this day—in fact, in the very same brief. Mot. at 119 ("When TeamHealth Plaintiffs wanted to undermine the fact that they were egregious billers, they asked Haben whether self-insured employers . . . were going bankrupt because of out-of-network emergency room charges. . . . However, there is no denying that the Nevada Legislature enacted those laws to curb the business practices utilized by private equity backed hospital staffing companies, such as the TeamHealth Plaintiffs, that

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cause financial hardship."). But the United's participation in the Yale Study is not the conduct that underlay Plaintiffs' causes of action. The *Noerr-Pennington* doctrine is inapplicable here.

Finally, as explained, substantial evidence supports the jury's verdict and no alleged error is material or affects United's substantial rights, especially in light of the jury awarding only part of Plaintiffs' requested damages. *Supra* Section II(A).

F. United is not entitled to a new trial because of irregularities, misconduct, or errors.

United is not entitled to a new trial due to the irregularities, misconduct, or errors argued in pages 93-119 of the Motion because: (1) Plaintiffs did not improperly change their punitive damages theory; (2) the voir dire proceedings were not irregular; (3) the Court did not improperly admit or conditionally admit exhibits during the liability phase of trial; (4) the Court did not improperly admit evidence in the punitive phase of trial; and (5) the Court did not commit reversible error regarding Plaintiffs' use of depositions.

1. United is not entitled to a new trial regarding Plaintiffs' punitive damages theory.

Defendants' first argument is that Plaintiffs expanded its punitive damages theory one week before trial by including a finding of malice. Defendants are wrong. Plaintiffs' punitive damages theory has included 'malice' since the filing of this case:

> 55. The acts and omissions of the UH Parties as alleged herein were attended by circumstances of malice, oppression and/or fraud, thereby justifying an award of punitive or exemplary damages in an amount to be proven at trial.

Pls. Orig. Compl. (Apr. 15, 2019) ¶ 55. So did the First Amended Complaint:

> 214. The acts and omissions of Defendants as alleged herein were attended by circumstances of malice, oppression and/or fraud, thereby justifying an award of punitive or exemplary damages in an amount to be proven at trial.

Pls. 1st Am. Compl. (Jan. 7, 2020) ¶ 214. In Plaintiffs' Second Amended Complaint, the operative complaint at trial, instead of regurgitating each part of the statute (since Plaintiffs were seeking all theories), Plaintiffs stated that Plaintiffs sought punitive damages:

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> 96. Defendants have acted in bad faith regarding their obligation to pay the usual and customary fee; therefore, the Health Care Providers are entitled to recover punitive damages against Defendants.

Pls. 2d Am. Compl. (October 7, 2021) ¶ 96; *id.* at ¶ pg. 16. The punitive damages statute outlines that a jury may award punitive damages for "oppression, fraud or malice, express or implied." NRS 42.005(1). Plaintiffs' punitive damage theory did not expand one week before trial, the 'malice' theory has existed from the beginning of this lawsuit.

As to the filing of the sur-reply, Defendants improperly raised new arguments for punitive damages in Defendants' reply to Plaintiffs' response. *See* Pls. Mtn. for Leave to File Supp. in Opp. To Defs.' Reply (October 17, 2021). Plaintiffs sought leave to file a sur-reply to address only those new arguments. The Court granted that leave. Specifically, in United's reply, United abandoned the attack on Plaintiffs' punitive damages theory it articulated in its initial motion, for the first time shifting the focus to NRS 42.005 and a challenge to the sufficiency of the evidence supporting NRS 42.005. Because Defendants did not raise such a challenge to Plaintiffs' theory in their initial brief, Plaintiffs needed to address such an argument. Plaintiffs did just that in its sur-reply. There is nothing "irregular" about this process. Defendants simply want to benefit from sandbagging. The Court was well within its discretion to allow Plaintiffs the chance to respond.

2. Plaintiffs have always sought to recover punitive damages under a theory of unjust enrichment. Defendants' "surprise" is unfounded.

Plaintiffs' position has always been that Plaintiffs seek punitive damages against Defendants as may be available under **any** cause of action. *See, e.g.*, Joint Pretrial Memo. (October 7, 2021), Section II, Plaintiffs' Statement of the Case ("Through this lawsuit, the Health Care Providers seek actual damages in excess of $10,000,000 for Defendants' systematic underpayment of claims, pre- and post-judgment interest, attorneys' fees and costs, and punitive damages, including damages under NRS 42.005(2)(b)"); Pls. 2d Am. Compl., filed 10/07/21 ("the Health Care Providers request the following relief: . . . (D) An award of punitive damages, the exact amount of which will be proven at trial."); Ex. 2 (Fremont's FRCP 26(a) Initial

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Disclosures served October 2, 2019) ("Plaintiff also seeks punitive damages, attorneys' fees, costs and interest under each of the claims asserted in this action"). There was no trial by ambush. Defendants knew of Plaintiffs' theories. As such, the Court correctly allowed the jury to decide punitive damages for unjust enrichment.

The Motion even admits United knew that Plaintiffs sought punitive damages for unjust enrichment. United states that "Defendants then relied on TeamHealth Plaintiffs' statement of their case in creating their trial defense strategy and trying their case." Mot. at 97. Plaintiffs' statement of the case includes the following:

> Through this lawsuit, the Health Care Providers seek actual damages in excess of $10,000,000 for Defendants' systematic underpayment of claims, pre- and post-judgment interest, attorneys' fees and costs, and punitive damages, including damages under NRS 42.005(2)(b).

10/27/21 Joint Pretrial Memo., Section II, Plaintiffs' Statement of the Case, at pg. 4. From this, Defendants knew or should have known that Plaintiffs sought punitive damages under any of Plaintiffs' legal theories in the case because Plaintiffs did not limit the request of punitive damages to any single claim.[2]

In the Joint Pretrial Memorandum, Defendants acknowledged that the Plaintiffs sought punitive damages not just on their Unfair Claims Practices Act claim, but on any available claim:

> 8. Whether TeamHealth Plaintiffs can present evidence sufficient to establish that Defendants are "guilty of oppression, fraud or malice, express or implied" to support the imposition of punitive damages for any of TeamHealth Plaintiffs' claims and whether punitive damages are available to TeamHealth Plaintiffs on any claim for which that category of damages is asserted.

Id. at 15. Defendants thus have been on notice of and have acknowledged that the Plaintiffs sought to recover punitive damages on any claim, including its unjust enrichment claim.

Defendants did not learn "two days before closing argument" that Plaintiffs "wanted to

[2] Plaintiffs incorporate by reference its Motion to Modify the Joint Pretrial Memorandum on Punitive Damages, filed November 22, 2021.

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seek punitive damages based on their unjust enrichment cause of action." At worst, Plaintiffs submitted the Contested Proposed Jury Instructions and a trial brief on punitive damages under a theory of unjust enrichment on November 15, 2021. This is nearly two weeks before closing arguments and **was before Defendants' case in chief even began**. Defendants not only had ample time to prepare for their closing arguments, but they had their entire case in chief to put on evidence to rebut a punitive damages theory under unjust enrichment.

The only case Defendants cite is *Sprouse v. Wentz*, 105 Nev. 597, 781 P.2d 1136 (1989). This case is inapposite. In *Sprouse*, the party seeking punitive damages did not allege in its complaint (or counterclaim) actions arising to the level of fraud, oppression, or malice. Plaintiffs did that here. Also, in the prayer for relief, the plaintiff in *Sprouse* only asked for punitive damages on a fraud claim. In the bench trial, the court explicitly concluded there was no fraud. Here, Plaintiffs sought punitive damages for all claims in their prayer for relief and the jury concluded Defendants engaged in oppression, malice, and fraud. In *Sprouse*, the party seeking punitive damages also limited its theory to fraud in the pretrial memorandum and there was no other evidence that the defendant believed other theories were alleged. Here, the Pretrial Memorandum outlines that Plaintiffs seek punitive damages on all claims.

In sum, Plaintiffs have always sought punitive damages under a theory of unjust enrichment, including in the Pretrial Memorandum—this is not a "new" theory of damages. That is why the Court allowed the Plaintiffs to amend the Pretrial Memorandum to make it crystal clear to Defendants that Plaintiffs were seeking punitive damages under a theory of unjust enrichment. *See* 11/23/21 Tr. at 115:25-116:10. The Court should do the same now by denying the Motion.

3. United is not entitled to a new trial because of voir dire.

To obtain a new trial regarding peremptory strikes, United must show: (1) error under NRS 16.030(4), and (2) the error materially affected its substantial rights. *See Perez v. State*, 128 Nev. 925, *1, 381 P.3d 650, *1 (2012). United does neither.

First, United does not establish error. Instead, United misstates the law and claims that it has an "absolute" right that "no circumstances can bring . . . within the discretion of the trial

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court." Mot. at 100-101. The truth is that "[t]he scope of voir dire and the method by which voir dire is pursued are within the discretion of the district court." *Morgan v. State*, 134 Nev. 200, 210, 416 P.3d 212, 223 (2018). In fact, the *Morgan* court affirmed a trial court's limitations on peremptory strikes. *See id.* (affirming a "use it or lose it" peremptory process). Because "the purpose of voir dire is to ensure that a fair and impartial jury is seated," examples of an abuse of discretion involve when the trial court adopts a procedure that prevents a party from assessing a potential juror's bias or prejudice until **after** the party has used all of its peremptory strikes. *Id.*; *Gyger v. Sunrise Hosp.*, 129 Nev. 1119, *2 (2013). Here, United raises no issue for an abuse of discretion because United does not argue that the court's adopted procedure prevented United from assessing bias and prejudice before United used all of its peremptory strikes.

Second, even if the Court erred, there is no material harm or prejudice to United. Even when there is error in the voir dire process, "[s]uch an error does not warrant reversal, where, as here, the appellant fails to show that an impartial jury was not empaneled or any resulting prejudice." *Kiles v. State*, 433 P.3d 1257, *1-2 (2019). *In Gyger*, the trial court erred because the voir dire process prevented the party from assessing the fairness of a potential juror until after the party used all of its peremptory strikes. 129 Nev. 1119, *2. The complaining party even identified a potential juror who was seated on the jury and who the party believed may have had improper bias or prejudice. *Id.* But, because the potential juror "stated she could be fair and impartial, the evidence at trial was conflicting, and the jury rendered a unanimous verdict," there was no material harm or prejudice that supported a new trial. *Id.* at *2-3. Here, United, at trial and in the Motion, does not claim that the Court empaneled an unfair or partial jury **and** does not identify a single potential juror: (1) with improper bias or prejudice, (2) who was seated as a juror, (3) for whom United was "forced to guess about the comparative fairness," or (4) on whom United would have exercised a peremptory strike but for the Court's adopted procedure. *See id.*; Mot. at 98-101. In fact, United does not identify **any** potential or actual juror United would have struck for **any** reason. Mot. at 98-101.

Accordingly, United has not demonstrated error, material harm or prejudice. Therefore, United is not entitled to a new trial because of the voir dire process.

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4. United is not entitled to a new trial because of conditionally admitted exhibits or foundation issues.

The Court should deny the Motion on the grounds that the Court improperly pre-admitted or conditionally admitted exhibits for five reasons.

First, United waived any objection to conditionally admitted exhibits because United did not move to strike those exhibits from the record before the close of evidence. *See Huddleston v. U.S.*, 485 U.S. 681, 690 n.7 (1988). Specifically, as the U.S. Supreme Court recognized:

> When an item of evidence is conditionally relevant, it is often not possible for the offeror to prove the fact upon which relevance is conditioned at the time the evidence is offered. In such cases it is customary to permit him to introduce the evidence and 'connect it up' later. Rule 104(b) continues this practice, specifically authorizing the judge to admit the evidence 'subject to' proof of the preliminary fact. It is, of course, not the responsibility of the judge sua sponte to insure that the foundation evidence is offered; **the objector must move to strike the evidence if at the close of the trial the offeror has failed to satisfy the condition**.

Id. (emphasis added); *see* NRS 47.070; Fed. R. Evid. 104(b).

Second, contrary to United's argument, the Court did not err by not holding a lengthy hearing under Rule 104(b). As the U.S. Supreme Court recognized:

> The trial court has traditionally exercised the broadest sort of discretion in controlling the order of proof at trial, and we see nothing in the Rules of Evidence that would change this practice. Often the trial court may decide to allow the proponent to introduce evidence concerning a similar act, and at a later point in the trial assess whether sufficient evidence has been offered to permit the jury to make the requisite finding.

Huddleston, 485 U.S. at 690. United has shown no error or abuse of discretion in the manner or timing for the Court's admission of evidence under Rule 104(b).

Third, because the standard for conditional relevancy under Section 47.040 and Rule 104(b) is minimal, there is no error or abuse of discretion. Contrary to United's argument, the Court does not weigh the evidence or affirmatively find whether a witness has personal knowledge or whether a document is authentic. Instead, as the U.S. Supreme Court recognized:

> In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury **could reasonably find** the conditional fact . . . by a preponderance of the evidence.

Huddleston, 485 U.S. at 690 (emphasis added); *Rickets v. City of Hartford*, 74 F.3d 1397, 1410

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(2d Cir. 1996) (recognizing that authenticity is a Rule 104(b) issue that "only the **jury** can finally decide") (emphasis added); *United States v. Gutierrez de Lopez*, 761 F.3d 1123, 1133 (10th Cir. 2014) (citing McCormick on Evidence for the proposition that "The foundational fact of personal knowledge under Rule 602 falls under Rule 104(b); and the trial judge plays only a limited, screening role, merely deciding whether the foundational testimony would permit a rational juror to find that the witness possesses the firsthand knowledge."). United has not shown or attempted to show that no reasonable juror could infer authenticity or personal knowledge regarding complained-of exhibits or testimony.

Fourth, there is no error regarding the authenticity for the complained-of exhibits. **Tellingly, United does not claim that the exhibits lack authenticity.** It is undisputed that these exhibits in fact are what Plaintiffs represented them to be. Instead, United incorrectly challenges the **foundation** for authenticity and argues that authenticity requires the testimony of a witness with personal knowledge of the entire document and how the document was made and kept. Mot. at 105-106. United is wrong on every point:

1. Plaintiffs did not need to lay a business-records foundation because the exhibits are statements by party opponents and thus are not hearsay. *See* NRS 51.035(3), 51.135; Mot. at 105-06. United also did not object to hearsay and thus waived this objection.

2. Witness testimony is not required for authentication. NRS 52.175 ("The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing"); Fed. R. Evid. 903 Advisory Committee Notes ("The common law requirement that attesting witnesses be produced . . . has generally been abolished except with respect to documents which must be attested to be valid, e.g., wills in some states").

3. "[T]estimony of a witness with knowledge" is only one of several recognized methods of authentication (e.g., some documents are self-authenticating). NRS 52.025-52.105, 52.115-52.175. The correct statement of the rule is that the "requirement of authenticity or identification as a condition precedent to admissibility is satisfied **by evidence or other showing** sufficient to support a finding that the matter in question is what the proponent claims." NRS 52.015(1) (emphasis added).

4. The United and Multiplan exhibits at issue are self-authenticating. "Documentary evidence may be authenticated through circumstantial evidence, including the document's own distinctive characteristics and the circumstances surrounding its discovery," including that the document is the opponent's document, the opponent produced the document, and the document reflects the opponent's letterhead or logo.

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Ideal Electric Company v. Flowserve Corp., No. CV-S-1092-DAE(LRL), 2006 WL 8441868, at *1-2 (D. Nev. Sept. 21, 2006).

Fifth, Plaintiffs in fact laid the foundation for personal knowledge of Haben and Paradise (and others) to identify these exhibits and to testify regarding the subject matter of these exhibits. This is a low bar:

> This standard is not difficult to meet. A court should exclude testimony for lack of personal knowledge "only if in the proper exercise of the trial court's discretion it finds that the witness could not have actually perceived or observed that which he testifies to." *United States v. Sinclair*, 109 F.3d 1527, 1536 (10th Cir.1997) (quotations omitted); see also 1 Kenneth S. Broun, MCCORMICK ON EVIDENCE § 10 n. 6 (7th ed.2013) ("[T]he foundational fact of personal knowledge under Rule 602 falls under Rule 104(b); and the trial judge plays only a limited, screening role, merely deciding whether the foundational testimony would permit a rational juror to find that the witness possesses the firsthand knowledge."); WRIGHT & GOLD, supra § 6022 ("[T]he testimony is excluded only if, as a matter of law, no juror could reasonably conclude that the witness perceived the facts to which she testifies.").

Gutierrez de Lopez, 761 F.3d at 1133; *United States v. MMR Corp. (LA)*, 907 F.2d 489, 496 (5th Cir. 1990) (for personal knowledge, "[t]he general rule . . . is that the lay witness need not be able to testify to the factual basis for his or her opinion" and "uncertain[ty]" about the details of documents created by another person is not a bar to meeting the foundational requirement for personal knowledge).

Because the jury could rationally have concluded that Haben and Paradise have personal knowledge sufficient to identify United and Multiplan documents and to discuss how these documents relate to United operations they oversee, the Court committed no error in admitting these exhibits with these witnesses. In fact, all but one of these exhibits were produced by United and were labeled with a Defendants' Bates number. PX 25; PX 53; PX 55; PX 67; PX 92; PX 273; PX 354; PX 361; PX 426; PX 462; PX 470; PX 478; 11/9/21 Tr. at 170:12-15, 170:22-171:2, 171:13-172:7. United concedes that the other is a MultiPlan document that purports to describe Data iSight. PX 413. Similarly, United has not shown that, as a matter of law, no reasonable juror could have concluded that both lacked personal knowledge on these topics.

Finally, as explained, substantial evidence supports the jury's verdict and no alleged error is material or affects United's substantial rights, especially in light of the jury awarding only part of Plaintiffs' requested damages. *Supra* Section II(A).

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5. United is not entitled to a new trial because of the punitive-damages evidence.

a. The evidence admitted during the punitive damages stage is proper Phase Two evidence.

During discovery, Plaintiffs served a request for production seeking the impact of Defendants' out-of-network reimbursement rates on Defendants' profits. *See* Ex. 3, Pls.' 1st RFP, at No. 34. This request for production was served more than a year before the trial in this matter began. On numerous occasions, Defendants supplemented its response to Plaintiffs' request, with the last supplementation occurring on October 30, 2020 (also a year before trial began). In its last supplement, Defendants stated that they had "not located documents responsive to this request. United's efforts to identify such documents, if any exist, are continuing." Ex. 4, United's 9th Supplemental Responses. Defendants never produced a single document responsive to the request. Accordingly, Plaintiffs requested audited financial statements because these demonstrate profits at a certain level.

Defendants did not offer to produce a different set of documents that demonstrated the profit impact of out-of-network reimbursements. Instead, Defendants contested the need to produce **any** financial documents at all. Then Defendants capitulated and produced the documents, purportedly because Defendants were "tired of litigating about the litigation." 12/7/21 Tr. at 52:17-21. But Defendants knew they had not produced any documents responsive to request No. 34 and that the audited financials were responsive documents providing the necessary profit information. This is why Defendants did not seek protection from the Court, nor did they ultimately refuse to produce the documents. The documents are accurate reflections of the profits of the various Defendants, which is why Defendants do not now contest the accuracy of those very documents. Accordingly, the financial documents were properly produced and were directly responsive to requests served during the discovery period.

Defendants argue the audited financials contained information outside the state of Nevada. This is a red herring. Defendants never provided Plaintiffs Nevada-only financials. Defendants could have done so but chose not to. Defendants also could have cured any potential confusion on re-direct examination by breaking down the financial information attributable to

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other states versus only Nevada. But Defendants chose not to do so. Any harm attributable to the inclusion of non-Nevada numbers was manufactured by Defendants.

b. Defendants' argument as to *Limine* No. 40 is wrong. Plaintiffs did not introduce the financial information to exploit the jury's emotions but rather to demonstrate the reprehensibility of Defendants' conduct.

Defendants rely on the faulty premise that the financial condition of Defendants was introduced solely for the purpose to exploit the jury's emotions and bias towards wealthy defendants. That is not the purpose for which Plaintiffs introduced the financial information. Instead, Plaintiffs introduced the Defendants' financial information to demonstrate the reprehensibility of Defendants' conduct. *See Ace Truck & Equip. Rentals, Inc. v. Kahn*, 103 Nev. 503, 506, 746 P.2d 132, 134 (1987), abrogated by *Bongiovi v. Sullivan*, 122 Nev. 556, 138 P.3d 433 (2006). Specifically, Plaintiffs sought to introduce the financial information to demonstrate the profitability of the Defendants due to the scheme they employed as part of its shared-savings program and systematic targeting of Plaintiffs as part of a plan to reduce reimbursement to emergency room doctors. This is the exact type of evidence admissible during the punitive damages phase of trial.

Also, the purpose of punitive damages is to deter future misconduct. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). For a jury to deter a party from future misconduct, it must first have the context to understand what size of award is required to deter the defendant. Here, the financial information introduced was probative of the amount of punitive damages necessary to make United listen to the jury's verdict.

All relevant evidence is prejudicial. *McRae*, 593 F.2d at 707. Here, as the Court found, United did not demonstrate at trial that the prejudicial effect of these financial documents substantially outweighs their probative value. United also acknowledged the probative value of this evidence for punitive damages by agreeing to *Limine* No. 36, which prevented financial-condition information from being admitted **until** the punitive damage stage. *See* October 7, 2021 Order on *Limine* No. 36. Defendants' argument on *Limine* No. 40 simply misses the fairway.

c. United's foundation argument is wrong.

Defendants are incorrect in stating that Rebecca Paradise did not possess the requisite

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foundation to attest to the financial documents introduced as PX 1001-04 and PX 519. Foundation is a low bar that is easily met here. *See Gutierrez de Lopez*, 761 F.3d at 1133 (10th Cir. 2014); *MMR Corp. (LA)*, 907 F.2d at 496. Paradise testified that she has oversight over the West Region (which includes Nevada) because she has oversight over the entire nation. *See* 12/7/21 Tr. at 21:25-22:15. Hence, Paradise has specific knowledge as to the financial performance of the out-of-network programs and that impact from a regional standpoint. It does not matter whether Paradise had seen the specific document before—that is not the test for foundation. Because the jury could rationally have concluded that Paradise had personal knowledge sufficient to identify Defendants' documents and to discuss how these documents relate to Defendants' operations she oversees, the Court committed no error in admitting PX 1001-1004 and PX 519 with Paradise.

Moreover, it is undisputed that the financial documents are what they purport to be. That is why Defendants do not challenge their authenticity nor their accuracy. Instead, Defendants incorrectly challenge the **foundation** for authenticity and argue that authenticity requires the testimony of a witness with personal knowledge of the entire document and how the document was made and kept. Mot. at 112. Defendants are wrong:

1. Witness testimony is not required for authentication. NRS 52.175; Fed. R. Evid. 903 Advisory Committee Notes; NRS 52.025-52.105, 52.115-52.175; NRS 52.015(1).

2. "Documentary evidence may be authenticated through circumstantial evidence, including the document's own distinctive characteristics and the circumstances surrounding its discovery," including that the document is the opponent's document, the opponent produced the document, and the document reflects the opponent's letterhead or logo. *Ideal Electric*, 2006 WL 8441868, at *1-2.

Accordingly, Defendants' foundation argument as to the financial documents is incorrect and should be disregarded by the Court.

d. United's 10K was properly admitted.

Defendants argue that United's Form 10-K should not have been admitted at trial during the punitive phase, but neglect to present the entire picture. First of all, Defendants did not make an objection under NRS 48.035, but instead made only a relevance objection at trial. *See* 12/7/21 Trial Tr. at 14:24-15:4. The confusion and misleading objection United now makes was waived

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and, therefore, should be disregarded. Second, Defendants state that there is no case law to support admitting a parent company's net worth. But Defendants cite no case law that it is improper to admit the Form 10-K. Third, Defendants neglect to mention that one of the Defendants makes up more than 80% of the parent company's total revenue and expenses. Fourth, and maybe most important, Defendants do not demonstrate how the introduction of such evidence was unfairly prejudicial or how any unfair prejudice substantially outweighed the probative value. And, critically, Defendants do not demonstrate how the introduction of such evidence would have changed the outcome of the trial.

e. Plaintiffs did not re-argue liability during the punitive phase.

Defendants next argue that the admission of PX 89 during the punitive damages phase of the case is tantamount to improperly arguing liability during the punitive damages stage of the case. But this is not what Plaintiffs did nor did Plaintiffs introduce the evidence to simply inflame the jury. Instead, Plaintiffs introduced PX 89 to show the jury the market share Defendants possessed in Nevada. *See* 12/7/21 Tr. at 22:25-23:7. That market share is relevant to the need for deterrence and the level of deterrence, which is directly at the heart of punitive damages. Importantly, this was the first time such market share evidence had been introduced to the jury. Yet, Defendants argue the introduction of such evidence is "relitigating the conduct with new evidence." Mot. at 113. But Defendants do not provide how this is re-arguing liability. That is because it is not.

The amount of punitive damages decided by a jury is a direct function of what is necessary to deter future conduct and retribution for past conduct. To make that determination, the jury must have context for what it will take to deter future conduct and what it will take to provide retribution to the plaintiff. Introducing evidence of Defendants' market share in Nevada provides this context.

Moreover, Defendants do not contest the authenticity of PX 89 and the market share evidence. Instead, Defendants once again challenge whether there was proper foundation to introduce such evidence. As shown above, Paradise oversaw all out-of-network programs for the entire United States for United. Paradise is thus aware of which providers are out-of-network

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and the entire market breakdowns as a result. Therefore, a reasonable jury could conclude Paradise had personal knowledge regarding Defendants' own document regarding information that is within Paradise's job description. *See Gutierrez de Lopez*, 761 F.3d at 1133. Therefore, Defendants' foundation argument fails.

f. Substantial evidence supports the verdict.

As explained, substantial evidence supports the jury's verdict and no alleged error is material or affects United's substantial rights, especially in light of the jury awarding only part of Plaintiffs' requested damages. *Supra* Section II(A).

G. United is not entitled to a new trial regarding Plaintiffs' use of depositions.

United's request for a new trial regarding depositions fails for two reasons. First, evidence supports the jury's verdict, and no alleged error is material or affects United's substantial rights, especially in light of the jury only awarding part of the damages. *Supra* Section II(A); *see Domingues v. State*, 112 Nev. 683, 694, 917 P.2d 1364, 1372 (1996) (holding that error in applying NRS 47.120 was harmless because evidence supported the verdict).

Second, United identifies no error and no prejudice regarding Plaintiffs' use of deposition testimony at trial:

1. **Deposition Designations.** Plaintiffs properly provided deposition designations for substantive, "impeachment," and "rebuttal" witness testimony Plaintiffs. NRCP 16.1(a)(3)(A)(ii). United does not contest this point or point to an error in the Court's rulings regarding deposition designations. Mot. at 115-116. Instead, United complains because Plaintiffs designated a lot of deposition testimony. *Id.* But designating a lot of testimony does not violate the rules. *Id.* at 32(a) (providing extraordinarily broad latitude to use depositions at trial for substantive evidence, impeachment, against party opponents, and for unavailable witnesses). The only reason Plaintiffs designated so much testimony is because United refused to confirm which witnesses United would make available live at trial. Accordingly, any prejudice is due to United's conduct. Finally, United cites to no material impact on United's substantial rights at trial for Plaintiffs' limited use of deposition testimony for any specific witness. *Id.* As for United reading depositions at the last minute, United was present for each deposition and knew the contents of the depositions long before trial. *Id.*

2. **Using Parts of a Deposition.** For the complaints in pages 116-118 of the Motion, United does not identify a witness: (a) whose testimony Plaintiffs presented by deposition, (b) for whom Plaintiffs created a "misleading impression . . . by taking matters out of context"; (c) for whom, at the time Plaintiffs introduced the testimony via deposition, United invoked optional completeness to present deposition testimony that is

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substantially related to the specific testimony Plaintiffs introduced, (d) whose specific deposition testimony United wanted to offer at the same time as Plaintiffs but could not, and (e) whose specific testimony was admissible under other rules. Mot. at 116-118; *Rueda-Denvers v. State*, 128 Nev. 931, *2 n.6, 381 P.3d 658, *2 n.6 (2012); *Perez v. State*, 127 Nev. 1166, *3, 373 P.3d 950, *3 (2011). Because United does not make this showing, United's abstract arguments establish no error and no prejudice. Similarly, United presents no reason why United was unable to present specific deposition testimony during its own presentation of the evidence.

3. **Haben Impeachment.** For Haben, United does not specify: (a) any error in excluding Haben from testifying about legislative changes, or (b) the "misleading impression" created "by taking matters out of context" by impeaching Haben as to the effects of alleged egregious billing without covering Haben's unrelated and nonresponsive interjections regarding legislative changes. Mot. at 118-119. United points to no offer of deposition testimony or offer or proof regarding the exact legislative testimony United wanted to elicit from Haben. *Id.* Accordingly, United waived these issues.

For these reasons, United is not entitled to a new trial regarding alleged irregularities regarding use of deposition testimony at trial.

H. United is not entitled to a new trial because of David Leathers' expert opinion.

1. Factual Background: Plaintiffs' Disclosure and Supplementation

The Court's scheduling order set July 30, 2021 and August 31, 2021 as the deadlines for producing original and rebuttal expert reports.

On July 30, 2021, Defendants served the original report of their damage expert (Bruce Deal). In that report. Deal included an exhibit that identified "contracted" claims that he contended should be removed from Plaintiffs' disputed list of claims. Plaintiffs responded to that observation by removing what they believed to be the "contracted" claims from their disputed claim file. On August 31, 2021, Defendants served Deal's rebuttal report in which he contended that Plaintiffs had not yet removed all of the "contracted" claims.

On September 4, 2021, Plaintiffs served a supplemental expert designation and notified Defendants that they expected Leathers to expand his opinions to cover the original and rebuttal reports produced by the other retained experts, including Defendants' experts. *See* Ex. 5, Leyendecker email enclosing Second Amended Expert Witness Disclosures.

Five days later, on September 9th, Plaintiffs notified Defendants that they had removed additional "contracted" claims from their disputed claim file and provided the updated list of

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claims to Plaintiffs' experts. *See* Ex. 6, Leyendecker Sept. 9, 2021 email (below).

From: Kevin Leyendecker
To: Balkenbush, Colby
Cc: Louis Liao; Jason McManis
Subject: Disputed Claims
Date: Thursday, September 9, 2021 12:33:06 PM
Attachments: 08_24_Disputed_Claims.xlsx

Colby,

Although I don't have Phillips workpapers yet, I am sending you the updated claim file we sent him and Leathers.

We took about 500 more claims so new total is 12,081. With this, I don't anticipate the target will move anymore.

Let me know if you have any questions. Also, I don't think it's reasonable to expect Deal to update his analysis bf the depo since he will be seeing this for first time today, but that's your/his call.

Kevin

(emphasis added). Later that same day, Plaintiffs produced Leather's Supplemental Report and work papers, including an analysis of the 12,081 disputed claims contained in the updated list of disputed claims. *See* Ex. 7, Leyendecker Sept. 9, 2021 email with enclosures (below).

From: Kevin Leyendecker
To: Balkenbush, Colby; Blalack II, K. Lee
Cc: Pat Lundvall; Kristen T. Gallagher; Amanda Perach; Jason McManis; Angela Keniston
Subject: SUPPLEMENTAL REPORT
Date: Thursday, September 9, 2021 2:44:11 PM
Attachments: Supplemental Expert Report of David Leathers 9.8.2021.pdf
Workpapers.zip

Colby and Lee,

Enclosed you will find a supplemental report from David Leathers, along with his workpapers.

I've asked Pat's office to do the formal service through the court's portal, but I wanted to send you a courtesy copy since I just received it.

Kevin

(emphasis added). The next day, Friday September 10th at 6:17 p.m., Defendants produced Deal's rebuttal workpapers. *See* Ex. 8**,** Balkenbush Sept. 10, 2021 email with enclosures. The following Monday, September 13, 2021, Plaintiffs took the deposition of Deal. *See* Ex. 9, Cover Page of Bruce Deal Deposition Transcript.

Later that same day, on September 13th, consistent with their disclosure obligations, Plaintiffs notified Defendants that they provided their experts with copies of the exhibits marked in Deal's deposition. *See* Ex. 10, Leyendecker Sept. 13, 2021.

The next day, September 14th, Plaintiffs promptly notified and produced to Defendants

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an additional workpaper they received from Leathers. *See* Ex. 11, Leathers' Sept. 14th 3:28 p.m. email to Leyendecker and Leyendecker's forward of that email one minute later to defense counsel. As explained by Leathers in his deposition the next day, he found an additional 36 claims out of the 12,081 that he believed should be removed because they did not involve a core CPT code. *See* Exhibit 8 to Pl.'s Response to Defs.' Mot. to Strike, Excerpts from Dep. Tr. of David Leathers (Sept. 14, 2021), at 240:10-241:20. As a result, Leathers updated his damage calculations to show the effect of the 12,045 claims (12,081 less the 36 additional claims he removed). Those additional workpapers are what Plaintiffs produced the day before his deposition. *Id.* at 281:4-282:24.

To accommodate any concerns Defendants may have had with the timing of production of Leathers' supplemental report, and the updated calculations produced the day before the deposition, Plaintiffs' counsel made clear during the deposition that defense counsel could take whatever time he needed to examine Leathers without regard to the seven-hour rule. *Id.* at 260:2-9. As Defendants admit, Defendants questioned Leathers about his supplemental report. 10/19/21 Hearing Tr. at 105:3-5 (Blalack: "So when we deposed Leathers, shortly after the service of the supplemental report, we questioned him about the report"). After finishing his examination, defense counsel told Leathers "Thank you, sir. I appreciate your time. I don't know if your counsel has any questions. I do not have any more." Exhibit 8 to Pl.'s Response to Defs.' Mot. to Strike, Excerpts from Dep. Tr. of David Leathers (Sept. 14, 2021), at 317:23-25.

Defendants then moved to strike Leathers' opinions on September 22, 2021. The Court held a hearing on Defendants motion to strike on October 19, 2021. On November 1, 2021, the Court denied Defendants' motion. Order Denying Defendants' Motion to Strike Supplemental Report of Leathers. The Court granted Defendants' requested relief for the option to submit a rebuttal report from Defendants' experts. *Id.*

During the days leading up to and the beginning of trial, counsel for Plaintiffs and Defendants conferred to arrive at a final medical claims list, in part because counsel for Defendants took issue with certain medical claims included in the initial claims file. During the conferral process, counsel for Defendants stated, "[i]f we can reach agreement on these last

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groups of claims, then I think we have a final list of disputed claims for trial and we can have our respective experts update their analysis based on this final list." Ex. 1. After agreeing on the final claims list, Plaintiffs' expert Leathers and Defendants' expert Deal produced their respective updated reports on November 14, 2021.

2. Defendants have not suffered any prejudice.

a. Defendants fail to show what would have changed had Leathers not been allowed to provide his testimony at trial.

The Motion fails to show how the trial would have changed, how the outcome would have changed, how the opinions attested to by each party's experts would have changed, or that Defendants were unable to contest the opinions of David Leathers. Defendants must demonstrate the impact of the prejudice on the trial. *Pizarro-Ortega*, 133 Nev. at 266, 396 P.3d at 788. Here, the Leathers disclosures Defendants complain about are harmless because Defendants: (1) cross-examined Leathers, (2) presented their own experts to contradict and attack Leathers, and (3) did not conduct an offer of proof or provide other evidence demonstrating how Defendants' strategy would have changed had they had more time to review the testimony or analysis. Accordingly, under the relevant legal framework, Defendants' arguments regarding Leathers fail. *See id.* The Court should deny the Motion.

b. Defendants had ample time to review, depose, and question Leathers on his supplemental rebuttal opinions. Tellingly, when presented with an opportunity to cure Defendants feigned prejudice, Defendants explicitly declined the opportunity.

Defendants correctly point out that Plaintiffs served Leathers' supplemental report after the August 31st deadline. And they also correctly point out that Leathers conceded his supplemental report could fairly be characterized as both a supplemental and rebuttal report. Mot. at 121-22.

But Defendants overplay their hand when they claim they suffered prejudice because there was "insufficient time" between the disclosure and associated work papers and the start of Leathers' deposition. Defendants engage in sleight of hand advocacy by complaining that had a timely disclosure been made "Defendants, including their experts, would have had 15-days to

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review, dissect, and develop lines of examination and impeachment before deposing Leathers. Instead, Defendants had six days." *Id.* at 122.

But Defendants had more than twice as much time (7 days) to review the vast majority of Leathers' supplemental work papers before his deposition than Defendants afforded Plaintiffs to review Deal's rebuttal workpapers (3 days). For the supplemental workpapers produced the day before the deposition, Defendants seek to punish Plaintiffs for promptly supplementing their disclosures upon receipt of new information provided to or received from their experts.

These workpapers also contained no new methodology. Instead, they simply recalculated Plaintiffs' damages based on 36 fewer disputed claims and made a straightforward comparison to FAIR Health data contained in the rebuttal report of Defendants' other expert—Alex Mizenko (a FAIR Health employee).

Defendants had ample time to prepare for Leathers' deposition and were invited to take as much time as they needed to complete the examination. Defendants never uttered a word about any prejudice during the deposition and clearly asked all the questions they wanted to ask. This demonstrates that they suffered no prejudice as a result of Plaintiffs' failure to comply with the August 31st rebuttal expert report deadline.

Tellingly, during the hearing on the motion to strike, Defendants were provided the opportunity by the Court to seek whatever relief they wanted such as to depose Leathers a second time with respect to the supplemental report, but Defendants declined the opportunity. *See* 10/19/21 Hearing Tr. at 122:14-22; November 1, 2021 Order Denying Mot. Exclude Leathers; Mot. at 123. Instead, Defendants opted for the opportunity to file a supplemental expert opinion from Deal. *See id*; 10/22/21 Hearing Tr. at 204:4-23. Defendants decided to never serve the supplemental report to address Leathers' supplemental report. Defendants chose not to act on this available relief. There is thus no prejudice nor harm to Defendants.

At trial, counsel for Defendants cross-examined Leathers extensively to attempt to undercut opinions he disclosed in his affirmative and supplemental reports. *See generally,* 11/17/21 Tr. at 52-199, 220-225, 230-232. Defendants elicited testimony from Leathers that identified his methodology, *id.* at 102:23-103:1, attempted to undermine his FAIR Health

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opinion, *id.* at 113:20-124:22, attempted to undercut his analysis in his supplement report regarding what United paid other out-of-network providers in Nevada, *id.* at 149:12-150:20, and attempted to undercut his ultimate damages opinion, *id., e.g.*, at 151:2-155:17, 165:25-169:12, 173:3-25. Deal also provided opinions attempting to undermine and contradict Leathers' opinions. *See, e.g.*, 11/18/21 Tr. at 45:1-7 (admitting he is responding to Leathers), 174:24-175:11 (rebutting Leathers' methodology), 181:5-186:2 (rebutting Leathers' FAIR Health opinion), and 191:3-194:13 (providing alternative damages model of $3.3 million based on Leathers' comparison to what United paid other out-of-network emergency providers).

As a Hail Mary, Defendants allege they were unable to introduce invoices of Scott Phillips solely because the Court allowed Leathers to testify consistent with his supplemental report. Such an argument bears no weight on whether Leathers could testify at trial. Defendants cannot demonstrate that presenting such invoices to the jury would have had any impact on the outcome of the trial.

The bottom line is Defendants suffered no prejudice. *See Pizzaro-Ortega*, 133 Nev. at 266, 396 P.3d at 788 (holding that late disclosed expert testimony is fine if the disclosure is harmless). To the extent any prejudice existed at the time of trial, the Court gave Defendants an opportunity to cure it through a deposition of Leathers, a supplemental report by Deal, or any other means Defendants deemed necessary. Defendants refused and opted to feign prejudice.

c. Defendants incorrectly state that a new damages opinion was first disclosed two days before Leathers took the stand at trial.

The supplement of Leathers' report on November 14, 2021 did not include new opinions but instead simply updated his report after an agreement by counsel as to the final list of medical claims. Defendants filed a motion for summary judgment as to certain medical claims in the operative claims list at the time of the motion. Plaintiffs' counsel reviewed the summary judgment and the medical claims Defendants took issue with, then worked with Defendants to remove certain claims subject to the summary judgment. During the process of reaching an agreement on the removal of claims, counsel for Defendants stated that both Leathers and Deal would update their expert reports based on the finalized and operative list of medical claims:

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From: Blalack II, K. Lee <lblalack@omm.com>
Sent: Friday, October 29, 2021 6:18:10 PM
To: Kevin Leyendecker <kleyendecker@AZALAW.COM>; Louis Liao <lliao@AZALAW.COM>
Cc: Yan, Jason <jyan@omm.com>; Plaza, Cecilia <cplaza@omm.com>; Louis Liao <lliao@AZALAW.COM>
Subject: RE: Partially Denied Claim Issue

* * *

If we can reach agreement on these last group of claims, then I think we have a final list of disputed claims for trial and we can have our respective experts update their analysis based on this final list. Thanks. Lee

Ex. 1. Both Leathers and Deal updated their expert reports on November 14, 2021. Despite reaching an agreement to update the expert reports, Defendants now complain that such a supplementation was improper, contained new opinions, and caused prejudice. The Court should ignore such gamesmanship.

First, the update simply reduced the number of medical claims at issue in the case, thereby reducing the overall damages. This reduction in claims was the exact relief Defendants sought in its motion for summary judgment.

Second, there were no new opinions in this supplement. Defendants' principal complaint alleges that Leathers' supplement for the first time disclosed a damages methodology that is based on the billed charge less the allowed amount, including in his "DML" work papers. Mot. at 126-127. Defendants are wrong. During his deposition on September 15, 2021, Leathers specifically noted that, as part of his non-RICO analysis, his work papers reflected the difference between the billed charge and the allowed amount:

A. You can certainly see in my exhibits the full amount of damage that the plaintiffs are claiming between the billed charge and the amount allowed.

Exhibit 8 to Pl.'s Response to Defs.' Mot. to Strike, Excerpts from Dep. Tr. of David Leathers (Sept. 14, 2021), at 131:2-4. Leathers affirmative report did indeed disclose the total billed charges for the claims in the case at the time of his report and the total allowed amounts for the claims in the case:

- For the claims at issue, the Health Care Providers' billed charges were $14,657,921, of which UHC only paid/allowed the Health Care providers a total of $3,105,310.[57]

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Opening Expert Report of David Leathers (July 30, 2021) at 10.[3] Accordingly, the information necessary to reach Leathers' opinion as to damages has been disclosed since Leathers' July 30, 2021 report. Plaintiffs informed the Court of this exact fact to rebut Defendants' claim that the supplement contained a "new damages methodology." *See* 11/17/21 Tr. at 278:9-25.

The Court then provided the opportunity to counsel for Defendants to examine Leathers about its allegations outside the presence of the jury. During that examination, Leathers testified that: (1) he did a basic calculation of the difference between the billed charge and the allowed amount in his first affirmative report, and (2) in his supplemental report, he looked at the difference between the billed charge and the allowed amount. *Id.* at 287:17-25, 289:25-291:2. Leathers further testified that Exhibit 4 ("DML") from his workpapers—the exhibit Defendants complain about—is the same work paper from his initial affirmative report, except with the Data iSight-related information removed (since the RICO claim was dropped prior to trial). *Id.* at 294:16-295:3. Finally, Leathers testified that he told counsel for Defendants during his deposition that he would come to trial and testify as to the difference between the billed charge and allowed amount. *Id.* at 295:4-14.

Also, a damages model based on the difference between the billed charge and the allowed amount is simple arithmetic. The operative claims file entered into evidence as PX 473 had every single billed charge and allowed amount for the medical claims in the case. All that is necessary to do this calculation is to add up the totals of each and subtract the two totals. This is not a complex methodology.

Defendants incorrectly state that Leathers disclosed a new methodology for calculating damages in his supplemental report update. Instead, such information has been disclosed since his affirmative report, including in his initial work papers, and was discussed and disclosed during his deposition. Despite these disclosures, Defendants claim prejudice for a methodology that boils down to simple arithmetic. The Court got it right when it allowed Leathers testify.

[3] As agreed to by the Parties, specific medical claims were removed after the date of Leathers July 30, 2021 expert report. By the time of trial, these numbers had been reduced. But the same methodology applied.

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Third, Defendants allege that Leathers provided a new methodology and opinion relating to FAIR Health two days prior to taking the stand at trial. This is incorrect. Leathers disclosed his FAIR Health opinion in the workpapers to his supplemental report and Defendants even questioned Leathers about this opinion in his deposition. *See, e.g.*, Ex. 12., 9/15/21 Leathers Depo. Tr., at 297-300.[4] This is the same opinion Leathers provided at trial. Accordingly, there was no new opinion disclosed.

Moreover, Defendants suffered no prejudice or harm because Defendants had an expert on FAIR Health, Mizenko (an employee of FAIR Health), who provided a similar, although contradicting, opinion. Mizenko provided an expert report that laid out how often the Plaintiffs' billed charges exceeded the 80th percentile of FAIR Health. Leathers' supplemental report and work papers, along with his updated work papers, demonstrate that Mizenko's analysis was too general and that, when considering all the claims, Plaintiffs' billed charges were **below** the 80th percentile of FAIR Health.

At trial, Defendants brought Mizenko to testify with regard to his expert report. *See generally,* 11/19/21 Tr. at 149-190, 233-248. And Defendants cross-examined Leathers with Mizenko's findings to undermine Leathers' FAIR Health opinion. *See*, *e.g.*, 11/17/21 Tr. at 113-117.

In their motion, Defendants have failed to provide any manner in which they have suffered prejudice or any demonstration that the testimony at trial or the outcome of the trial would have changed. This is because they cannot.

Finally, as explained, substantial evidence supports the jury's verdict and no alleged error is material or affects United's substantial rights, especially in light of the jury awarding only part of Plaintiffs' requested damages. *Supra* Section II(A).

Based on the foregoing, Plaintiffs respectfully request the Court deny Defendants' Motion for a New Trial as it relates to the opinions of David Leathers.

[4] Plaintiffs provided Leathers' workpapers on 9/14/21. Exhibit 11. This was marked as Exhibit 15 to Leathers' deposition.

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I. United is not entitled to a new trial because of jury instruction errors.

1. Standard of Review

A district court's decision to give or decline a proposed jury instruction is reviewed for an abuse of discretion. *Atkinson v. MGM Grand Hotel, Inc.*, 120 Nev. 639, 642, 98 P.3d 678, 680 (2004). A party is entitled to have the jury instructed on case theories that are supported by the evidence. *Id.* However, even if supported by the evidence, a specific proffered instruction must also be consistent with existing law. *Silver State Disposal Co. v. Shelley*, 105 Nev. 309, 311, 774 P.2d 1044, 1045 (1989). And "even though it might embody a correct rule of law, the trial court may still refuse [a proffered instruction] if it has a tendency to mislead the jury." *Id.*

2. Defendants' proffered instruction regarding a condition precedent was confusing and was not supported by the evidence.

A condition precedent is different from a covenant. A covenant is a contractual promise, that is, the type of promise that is exchanged to form a contract. *See Rimini Street, Inc. v. Oracle Int'l Corp.*, 473 F. Supp. 3d 1158, 1208 (D. Nev.) (interpreting California law but applying general contract principles). A condition precedent is not a covenant; rather, it is an event that must occur for the contractual covenants to become effective, unless its non-occurrence is excused. *See id.*; Restatement (Second) of Contracts § 224 (1981); *McCorquodale v. Holiday, Inc.*, 90 Nev. 67, 69, 518 P.2d 1097, 1098 (1974) ("A promisor's purpose in attaching a condition precedent to his promise and the legal effect in doing so is to narrow the promisor's obligation so that he will not have to perform if the event fails and can never happen.").

The Restatement provides the following example of a condition: "A contracts to sell and B to buy goods pursuant to a writing which provides . . . that 'the obligations of the parties are conditional on B obtaining from X Bank by June 30 a letter of credit' on stated terms." Restatement (Second) of Contracts § 224, Cmt. a. B obtaining the letter of credit by June 30 is a condition; once it is satisfied, A will have the obligation to sell the goods to B and B will have the obligation to buy them. *Id.*[5]

[5] The Restatement uses the term "condition" generally to include what used to be termed "conditions precedent" and "conditions subsequent." *Id.*, Reporter's Note.

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This Court properly refused United's proffered instruction because the instruction addressed conditions precedent, a legal concept that was not at issue in this case. The implied contract that the jury found here was simple: Plaintiffs provided emergency care to United's members, and in return, United was obligated to reimburse Plaintiffs at a reasonable rate for that care. Those were the contractual covenants. Providing care to a United member was not a condition precedent to the existence of contractual obligations.

Even if the covenants in this case could be restated as conditions precedent, United's instruction was confusing, unnecessary, and was not supported by the evidence. The parties' position throughout trial was clear: Plaintiffs were not asking the jury to award damages for services rendered to patients who were not members of Defendants. The fact that the parties disputed the evidence regarding whether a subset of claims were for members of Defendants does not change the fundamental presentation and theory of the case.

United's basis for offering this instruction was that if Plaintiffs provided care to someone for whom United was not financially responsible, it should not be liable for that care. That proposition was already clear to the jury from the presentation and instructions in the case, and United's proposed instruction simply confused the issue by injecting irrelevant matter that was not supported by evidence. Specifically, the proposed instruction provides that "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." 11/15/21 Defs' Contested Jury Instructions at 20. United provided no evidence of a situation where the requirement that it be financially responsible for the member was "waived, excused, or [United] voluntarily prevented or made the occurrence of the condition impossible."

United's instruction regarding conditions precedent was not supported by the evidence, was not a legal theory that applied to the case and would have served only to mislead the jury. Therefore, the Court did not abuse its discretion by rejecting the proffered instruction.

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3. The Court properly rejected United's proffered instruction on the definition of "insurer" under the Unfair Claims Practices Act.

The Court properly refused United's instruction purporting to define "insurer" under the Unfair Claims Practices Act. NRS 686A.020 plainly establishes that all persons are prohibited from engaging in "any practice which is defined in NRS 686A.010 to 686A.310, inclusive, as, or determined pursuant to NRS 686A.170 to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance." The statute does not carve out liability for third-party administrators. This issue was extensively briefed before the court and is covered again in Plaintiffs' response to United's renewed motion for judgment as a matter of law; that argument is incorporated herein by reference.

Even if supported by the evidence, a proffered instruction must also be consistent with existing law. *Silver State*, 105 Nev. at 311, 774 P.2d at 1045. Because third-party administrators are subject to the Unfair Claims Practices Act, the Court correctly refused United's instruction.

4. The Court properly rejected United's proffered instruction on exhaustion of administrative remedies under the Prompt Pay Act.

Similar to the definition of "insurer" discussed above, the Court properly refused to instruct the jury regarding exhaustion of administrative remedies because that legal requirement does not apply to this case. This issue has been briefed to the court both in trial briefing and in Plaintiffs' response to United's renewed motion for judgment as a matter of law, which is incorporated herein by reference. *See* Pls.' Trial Brief Regarding Defs.' Prompt Payment Act Jury Instruction Re: Failure to Exhaust Administrative Remedies; Pls.' Opposition to Defs.' Renewed Motion for Judgment as a Matter of Law.

The Prompt Pay statutes applicable to this case each provide that "[a] court shall award costs and reasonable attorney's fees to the prevailing party in an action brought pursuant to this section." NRS 683A.0879; NRS 689A.410; NRS 689B.255; NRS 689C.485; NRS 695C.185. The inclusion of this language indicates a specific intention to allow court action by a claimant. *See Arora v. Eldorado Resorts Corp*., No. 2:15-cv-00751-RFB-PAL, 2016 WL 5867415, at *8 (D. Nev. Oct. 5, 2016) ("the provision within the [wage] statute for the payment of 'attorney

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fee[s]' further supports an implied private right of action. There would be no need for such allowance within the language of the statute if a private right of action were not implied."); *Neville v. Eighth Judicial District Court*, 133 Nev. 777, 783, 406 P.3d 499, 504 (2017) (stating it would be absurd to think that the Legislature intended a private cause of action to obtain attorney fees for an unpaid wages suit but no private cause of action to bring the suit itself).

By contrast, in *Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 571, 170 P.3d 989, 993 (2007), on which United relies, the relevant casualty prompt-pay statute did not include language specifically contemplating court action. Based on the casualty-insurance statute in that case, which does not apply here, the court held that the Division of Insurance had exclusive jurisdiction over claims brought pursuant to that statute. *Id.* at 575-76.

Moreover, the parties did not submit evidence regarding administrative exhaustion. Therefore, the instruction was not supported by the evidence and only would have served to confuse the jury. Because United's instruction did not accurately reflect the law and was not supported by the evidence, the Court did not abuse its discretion in declining it.

J. United is not entitled to a new trial because of the rebuttable presumption instruction.

1. A rebuttable presumption was warranted due to defendants' refusal to produce client requests and plan documents.

Defendants' arguments miss the relevant points. First, Defendants argue they produced documents demonstrating customer demand and list a number of examples. Mot. at 137. But Defendants concede that the documents are United-created documents that purportedly summarize or "distill" customer feedback and desires. *Id.* at 138. The documents do not provide the actual client feedback, requests, and/or complaints. In other words, the documents leave Plaintiffs in the position to simply trust United's word. In fact, that is exactly what Defendants attempted to do during trial. At trial, Defendants continually stated their clients requested these out-of-network programs and, specifically, shared savings due to "egregious" billers and out-of-network medical spend. For example:

- Mr. Blalack in Opening:
  - "He [John Haben] will testify that United Healthcare and United Healthcare Insurance developed out-of-network programs for employer clients because

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they – the clients demanded those programs to control excessive out-of-network costs and to protect employees from balance billing and collections activity by doctors." 11/2/21 Tr. at 87:11-15.

- John Haben:
  - "No, that – our clients have complained about excessive charges." 11/3/21 Tr. at 121:18-19;
  - "That's what our employer groups and members want." *Id*. at 178:17;
  - "It's not in these documents that I am aware of. It was through conversations with clients and consultants." 11/4/21 Tr. at 27:5-6;
  - "Yeah, I can – we've got feedback from clients." *Id.* at 134:2;
  - "We were aware that they had a client issue that they raised. That clients were saying they're spending too much for non-par, and they needed assistance." *Id.* at 154:25-155:2;
  - "Clients were saying that we weren't managing their costs, so we were trying to explain it." *Id.* at 160:12-13.
  - "Clients were looking for us to help address high medical expense." 11/9/21 Tr. at 73:2-3;
  - "Yes. The clients are asking for help on their medical costs." *Id.* at 82:22;
  - "Clients were asking for a competitive medical cost reduction, yes." *Id.* at 158:13-14;
  - "Clients were demanding better controls on medical costs, and they were looking for better solutions." 11/10/21 Tr. at 136:20-21;

Even though the "client demands" or "client requests" were a central part of Defendants' defense, Defendants refused to produce any documents where the client made such requests or demands. When Plaintiffs asked where the documentation of complaints and requests from the clients were, Defendants had no answer. *See, e.g.*, 11/3/21 Tr. at 178:18-21. Not only were such documents requested by Plaintiffs and compelled by the Court during the discovery process, *see* Ex. 3 at 7 (RFP 6, 7, 18, and 32), but such documents are required to be produced under NRCP 16.1 without awaiting a discovery request because Defendants relied on them as an essential part of their defense.

Defendants' attempt to escape their production duty by blaming Plaintiffs is wrong. Defendants argue Plaintiffs should have subpoenaed third parties to get the communications between Defendants and their third-party clients. But this is not how it works. Instead, if documents can be obtained from a party to the lawsuit, then those documents should be sought from that party, not a third party. *See* NRCP 45. Because Defendants would have received the complaint or request from the client, Defendants would be in possession of the documents. As

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such, Defendants, not the third-party client, are the parties responsible for producing the documents. Therefore, Defendants' argument is wrong.

Second, Defendants argue they produced over 200,000 pages of administrative records in order to bury the relevant point: Defendants did not produce the plan documents (i.e., "summary plan descriptions" or "administrative services agreements") for all the claims at issue in the case. While Defendants produced many administrative records in discovery, Defendants improperly refused to produce the most relevant portion of those administrative records.

At trial, Defendants relied on the plan documents to rebut Plaintiffs' claims and argue to the jury that Defendants had to reimburse Plaintiffs based on the payment obligations outlined in the plan documents. *See, e.g.*, 11/2/21 Tr. at 78:21-23 ("Like every other type of health insurance, the plan document, the contract between the employer and the administrator or the health insurer determines what the benefit is"). Defendants produced some of the plans but withheld a majority of them. This is important because, as Defendants argued in opening, the plan documents are different based on the employer. *See id.* at 78:24-25 ("And those plan documents can be different because different employers pick different benefits and different plans"). Left without the plan documents, Plaintiffs were unable to directly show the jury that Defendants' argument was false and that, in fact, Defendants had not followed the plan but instead reimbursed based on their own randomly calculated amounts.

Defendants further argue that the August 3, 2021 Order that formed the basis of the adverse inference instruction did not contain a request that would include the administrative records. *See* Mot. at 141-142. That is wrong. Specifically, the Court compelled Defendants and further granted the order to show cause as it relates to RFP 6, 7, and 18:

> **REQUEST FOR PRODUCTION NO. 6:**
>
> Produce any and all Documents and/or Communications relating to Your decision to reduce payment for any CLAIM.
>
> **REQUEST FOR PRODUCTION NO. 7:**
>
> Produce any and all Documents and/or Communications supporting or relating to Your contention or belief that You are entitled to pay or allow less than Fremont's full billed charges for any of the CLAIMS.

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REQUEST FOR PRODUCTION NO. 18:

All documents and/or communications regarding the rational, basis, or justification for the reduced rates for emergency services proposed to Fremont in or around 2017 to Present.

See August 3, 2021 Order to Show Cause at 7; Ex. 3 (First Set of RFPs). Each request seeks documents that form the basis for why Defendants paid Plaintiffs less than the billed charge. At trial, Defendants said the basis was the plan document, so Defendants should have produced the plan documents: (1) in discovery, (2) after the Court ordered them to, and (3) after the Court granted Plaintiffs Renewed Motion for an Order to Show Cause regarding these requests.

As a last-ditch effort, Defendants also argue it would have been burdensome to produce all of the administrative records. Defendants' argument is wrong. For the adverse inference, Plaintiffs' focus was the plan documents, not all the administrative records. Yet, to manufacture harm, Defendants lump all the administrative records into their argument. Once the focus is on just the plan documents, the world of documents Defendants refused to produce is much smaller. Defendants know this and that is why they lump in all of the EOBs, PRAs, and appeals.

2. The jury was correctly instructed on the rebuttable presumption under NRS 47.250(3) and the law supports such an instruction.

Defendants incorrectly state the standard for a rebuttable presumption under NRS 47.250(3). First, Defendants are incorrect that there must be a loss or destruction of evidence before a rebuttable presumption can be given. Second, Plaintiffs established Defendants willfully suppressed evidence. Third, the jury does not need to decide willfulness.

Defendants cite *Bass-Davis v. Davis*, 122 Nev. 442, 448, 134 P.3d 103, 106 (Nev. 2006) for the proposition that the party seeking the benefit of a rebuttable presumption instruction must demonstrate evidence was lost or destroyed.[6] But Defendants gloss over the fact that NRS 47.250(3) only refers to the suppression of evidence. It does not say destruction or loss anywhere within the plain statutory language. Moreover, consistent with the plain language of the statute,

[6] Defendants also rely on *Samsara Investments LLC Series #4 v. Carrington Mort. Servs., LLC*, 488 P.3d 678, 2021 WL 2493878, *3 (Nev. Ct. App. 2021) for a similar proposition. This case should be ignored, as it is distinguishable because there was no motion to compel filed by the party seeking the instruction. Under that framework, suppression simply was not an issue.

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in *Bass-Davis* the Nevada Supreme Court discussed "willful suppression **or** destruction, which triggers the rebuttable presumption under NRS 47.250(3) . . ." *Bass-Davis*, 122 Nev. at 452, 134 P.3d at 109 (emphasis added). In fact, the court in *Bass-Davis* later only referred to "destruction" instead of "suppression" because that case involved destruction of evidence, not because the court was contrasting the two concepts. Defendants' premise is simply wrong. The Court's August 3, 2021 Order met the criteria of NRS 47.250(3) when it held that Defendants had suppressed evidence by failing to produce documents by 5 P.M. on April 15, 2021.

Rives v. Farris, 506 P.3d 1064, 138 Nev. Adv. Op. 17 (Mar. 31, 2022) is similarly unavailing. In *Rives*, the Nevada Supreme Court concluded that the adverse inference instruction should not have been given because the allegedly suppressed evidence was irrelevant, and even if it had a modicum of relevance, the probative value of such evidence would be substantially outweighed by the danger of unfair prejudice. In other words, the Nevada Supreme Court concluded that inadmissible evidence cannot be admitted as a discovery sanction. The court reached this conclusion independently of the issue of whether the evidence had been lost or destroyed. Moreover, in *Rives*, the evidence that the defendant initially withheld or suppressed was actually produced months before trial; thus, the facts are also distinguishable.

Defendants next argue that Plaintiffs must demonstrate Defendants "willfully" suppressed evidence. The Court, in its August 3, 2021 Order, specifically held: "the Court finds United's conduct to be willful." Therefore, Plaintiffs did establish willfulness. Defendants only counter to the Court's order is *MDB Trucking, LLC v. Versa Prods. Co., Inc.*, 136 Nev. 626, 632, 475 P.3d 397, 404 (Nev. 2020). But Defendants ignore that the standard applied in *MDB Trucking* is a higher standard applicable only to case-ending sanctions. *Id.* at 631. Case-ending sanctions are not at issue here, thereby mooting the relevance of *MDB Trucking* to this case.

Defendants' final argument is that the Court improperly took the willfulness determination out of the hands of the jury. Defendants cite to *Bass-Davis* and *Boland v. Nev. Rock & Sand Co.*, 111 Nev. 608, 613, 894 P.2d 988, 991 (1995) to support their position. But *Bass-Davis* supports the conclusion that a judge **can** determine willfulness. In fact, the court recognized that, "if the district court, in rendering its discretionary ruling on whether to given

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an adverse inference instruction, has examined the relevant facts, applied a proper standard of law, and, utilizing a demonstratively rational process, reached a conclusion that a reasonable judge could reach, affirmance is appropriate." 122 Nev. at 447-448, 134 P.3d at 106-107. *Boland* stands for the same proposition and the Nevada Supreme Court upheld the district court's determination on willfulness. It was thus proper for the Court to determine willfulness.

In the August 3, 2021 Order, the Court concluded that Defendants willfully failed to produce documents responsive to requests served by Plaintiffs and compelled by the Court to be produced by 5 P.M. on April 15, 2021. The Court went further to explain Defendants' pattern of noncompliance and efforts to keep Plaintiffs from discovering information relevant to the case. As such, the Court found the conduct: (1) was willful and (2) done to suppress evidence from Plaintiffs such that a rebuttable presumption instruction was warranted. The Court made this determination after the examination of the facts and by applying the proper standard of law. As such, the rebuttable presumption instruction given by the Court was proper under the applicable case law.

K. Cumulative error does not support a new trial.

To obtain a new trial for cumulative, United would have to prove that the Court's cumulative errors are the sole explanation for the verdict. *See Gunderson*, 130 Nev. at 78, 319 P.3d at 613-14. United cannot meet this burden because, as explained, substantial evidence supports the jury's verdict and no alleged error is material or affects United's substantial rights, especially in light of the jury awarding only part of Plaintiffs' requested damages. *Supra* Section II(A). Accordingly, United is not entitled to a new trial for cumulative error.

III. CONCLUSION

For these reasons, Plaintiffs respectfully ask the Court to deny United's Motion for New Trial.

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DATED this 4th day of May, 2022.

AHMAD ZAVITSANOS & MENSING P.C.

By: */s/ Louis Liao*

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John Zavitsanos (admitted pro hac vice)
Joseph Y. Ahmad (admitted pro hac vice)
Jason S. McManis (admitted pro hac vice)
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Ahmad Zavitsanos & Mensing PC, and on this 4th day of May, 2022, I caused a true and correct copy of the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR NEW TRIAL** to be served via this Court's Electronic Filing system in the above-captioned case, upon the following:

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From: Blalack II, K. Lee
To: Kevin Leyendecker; Louis Liao
Cc: Yan, Jason; Plaza, Cecilia
Subject: FW: Partially Denied Claim Issue
Date: Friday, November 5, 2021 9:25:14 AM
Attachments: FESM 29011 (for trial).xlsx

Kevin,
My folks reviewed the spreadsheet you sent. There is one claim you've tagged as DiS which was not identified as non-DiS. That claim is Acct # 233718879/526.
Please let me know if you have any questions. Lee

From: Kevin Leyendecker <kleyendecker@AZALAW.COM>
Sent: Wednesday, November 3, 2021 2:28 PM
To: Plaza, Cecilia <cplaza@omm.com>; Blalack II, K. Lee <lblalack@omm.com>; Louis Liao <lliao@AZALAW.COM>
Cc: Yan, Jason <jyan@omm.com>; Louis Liao <lliao@AZALAW.COM>
Subject: RE: Partially Denied Claim Issue

[EXTERNAL MESSAGE]

Lee/Ceci,
I've added a column to this that tags what I believe are the iSight claims. Please review and let me know if you have any issues with those designations.
Thanks

From: Plaza, Cecilia <cplaza@omm.com>
Sent: Sunday, October 31, 2021 3:35 PM
To: Kevin Leyendecker <kleyendecker@AZALAW.COM>; Blalack II, K. Lee <lblalack@omm.com>; Louis Liao <lliao@AZALAW.COM>
Cc: Yan, Jason <jyan@omm.com>; Louis Liao <lliao@AZALAW.COM>
Subject: RE: Partially Denied Claim Issue

Kevin,
We have reviewed and did not find any errors in the edits to the charge and CPT columns.
Thanks,
Ceci

Cecilia Plaza
O: +1-212-728-5962
cplaza@omm.com

From: Kevin Leyendecker <kleyendecker@AZALAW.COM>
Sent: Sunday, October 31, 2021 1:55 PM
To: Plaza, Cecilia <cplaza@omm.com>; Blalack II, K. Lee <lblalack@omm.com>; Louis Liao <lliao@AZALAW.COM>
Cc: Yan, Jason <jyan@omm.com>; Louis Liao <lliao@AZALAW.COM>
Subject: RE: Partially Denied Claim Issue

[EXTERNAL MESSAGE]

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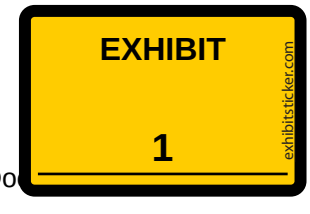

Lee/Ceci,
Here is an updated version of what I consider to be the final. I substituted the net charge (orig – denied) for the Total Charge column; and I also edited the CPT column to remove the denied CPTs.
Please review and let me know if you find any mistakes in either.
.

From: Plaza, Cecilia <cplaza@omm.com>
Sent: Sunday, October 31, 2021 11:05 AM
To: Kevin Leyendecker <kleyendecker@AZALAW.COM>; Blalack II, K. Lee <lblalack@omm.com>; Louis Liao <lliao@AZALAW.COM>
Cc: Yan, Jason <jyan@omm.com>; Louis Liao <lliao@AZALAW.COM>
Subject: RE: Partially Denied Claim Issue

Kevin,
We have reviewed your list and confirmed that, consistent with our discussions, all the relevant claims have been removed. We are in agreement that this is the final list of disputed claims. Please see attached a spreadsheet reflecting the final list of claims. Note that we deleted the extra columns ("KL delete claim" and "FAIR Health 80th"), renamed a few of the columns for clarity, and deleted the extra tab that shows denied billed charges for each disputed claim. It is otherwise the same as the spreadsheet you sent yesterday.
Thanks,
Ceci

Cecilia Plaza
O: +1-212-728-5962
cplaza@omm.com

From: Kevin Leyendecker <kleyendecker@AZALAW.COM>
Sent: Saturday, October 30, 2021 9:04 PM
To: Blalack II, K. Lee <lblalack@omm.com>; Louis Liao <lliao@AZALAW.COM>
Cc: Yan, Jason <jyan@omm.com>; Plaza, Cecilia <cplaza@omm.com>; Louis Liao <lliao@AZALAW.COM>
Subject: RE: Partially Denied Claim Issue

[EXTERNAL MESSAGE]

Per this discussion, I've removed those two other claims.
Please have your crew review and let me know if we've now removed all the claims consistent with these discussions.
If we are in agreement, I will produce just the claim file as 29011 (B).
K

From: Blalack II, K. Lee <lblalack@omm.com>
Sent: Saturday, October 30, 2021 8:37 PM
To: Kevin Leyendecker <kleyendecker@AZALAW.COM>; Louis Liao <lliao@AZALAW.COM>
Cc: Yan, Jason <jyan@omm.com>; Plaza, Cecilia <cplaza@omm.com>; Louis Liao <lliao@AZALAW.COM>
Subject: RE: Partially Denied Claim Issue

Kevin,

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Yes, not to belabor this issue, we will waive an ERISA claim based on partially denied claims if you remove these last two. That would resolve the issue that we raised in our SJ motion. That obviously does not result in waiver of other ERISA arguments that have nothing to do with a partially denied claim (e.g., basic conflict preemption, which is the argument that we presented originally in the case when we removed the case to federal court). We are preserving those other ERISA arguments but the removal of these last two partially denied claims would obviate the ERISA argument stated in our SJ motion. Thanks. Lee

From: Kevin Leyendecker <kleyendecker@AZALAW.COM>
Sent: Saturday, October 30, 2021 11:07 PM
To: Blalack II, K. Lee <lblalack@omm.com>; Louis Liao <lliao@AZALAW.COM>
Cc: Yan, Jason <jyan@omm.com>; Plaza, Cecilia <cplaza@omm.com>; Louis Liao <lliao@AZALAW.COM>
Subject: RE: Partially Denied Claim Issue

[EXTERNAL MESSAGE]

Hmmm… if there is a 99291, 99292 claim and the 99292 was denied, but the 99291 claim was allowed and I've adjusted the ttl charge to reflect the denied charges, then how is it different than if the denied claim was a 93010 and I removed the denied charge for the 93010? Regardless, if you are saying you are effectively walking away from ERISA arguments if I remove the 2 claims, then the answer to that riddle is obvious.
So what say you?

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From: Blalack II, K. Lee <lblalack@omm.com>
Sent: Saturday, October 30, 2021 7:57 PM
To: Kevin Leyendecker <kleyendecker@AZALAW.COM>; Louis Liao <lliao@AZALAW.COM>
Cc: Yan, Jason <jyan@omm.com>; Plaza, Cecilia <cplaza@omm.com>; Louis Liao <lliao@AZALAW.COM>
Subject: RE: Partially Denied Claim Issue

Not unless you are seeking to recover damages for the denied claim lines. The whole point of our proposal was to remove from your damages calculations any claims lines that were denied. If you all do that, and I think you have except for these last two, then it would mean that you are only seeking damages for underpayments of claims that were allowed at an amount less than full charges and you would not be seeking any damages for claim lines that were denied. If that is the case, while I might have other ERISA objections to this entire party, I don't think we would have an argument that you all were seeking to recover damages for a service as to which coverage was denied by my clients. Lee

From: Kevin Leyendecker <kleyendecker@AZALAW.COM>
Sent: Saturday, October 30, 2021 6:09 PM
To: Blalack II, K. Lee <lblalack@omm.com>; Louis Liao <lliao@AZALAW.COM>
Cc: Yan, Jason <jyan@omm.com>; Plaza, Cecilia <cplaza@omm.com>; Louis Liao <lliao@AZALAW.COM>
Subject: Re: Partially Denied Claim Issue

[EXTERNAL MESSAGE]

Don't you have the erisa argument in all the other 1700 plus where a non core er code was denied?
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From: Blalack II, K. Lee <lblalack@omm.com>
Sent: Saturday, October 30, 2021 2:49:39 PM
To: Kevin Leyendecker <kleyendecker@AZALAW.COM>; Louis Liao <lliao@AZALAW.COM>
Cc: Yan, Jason <jyan@omm.com>; Plaza, Cecilia <cplaza@omm.com>; Louis Liao <lliao@AZALAW.COM>
Subject: RE: Partially Denied Claim Issue

Thanks Kevin. It looks this resolves all issues but the 2 remaining partially denied claims. I leave it to you all whether you want to keep these last two on your list. But just to be clear, if you leave them on the list, I still have my ERISA objection that there are coverage denials at issue in your damages calculation. If you remove them, I don't. Whether those two claims are worth it to you or not, I leave to your client and your judgment.

Let me know if you all want to stand pat on this list or remove those final two partially denied claims. Once we have the final list, we will send you our understanding of your final list of disputed claims. Perhaps you all can then review that list and confirm that we're in agreement that it is the final list of disputed claims for trial and we can then enter a stipulation to that effect to help make sure our experts are not ships passing in the night with different disputed claims.

017249

Lee

From: Kevin Leyendecker <kleyendecker@AZALAW.COM>
Sent: Saturday, October 30, 2021 1:40 PM
To: Blalack II, K. Lee <lblalack@omm.com>; Louis Liao <lliao@AZALAW.COM>
Cc: Yan, Jason <jyan@omm.com>; Plaza, Cecilia <cplaza@omm.com>; Louis Liao <lliao@AZALAW.COM>
Subject: RE: Partially Denied Claim Issue

[EXTERNAL MESSAGE]

Honest Abe, here is where I am.
I've noted all but the 2 (with 99291 allowed) should come out. And that's bc those partial denials are no different than all the others where a core EM line was not denied.
So now its your turn to say, ok we're there.
K

From: Blalack II, K. Lee <lblalack@omm.com>
Sent: Friday, October 29, 2021 8:25 PM
To: Kevin Leyendecker <kleyendecker@AZALAW.COM>; Louis Liao <lliao@AZALAW.COM>
Cc: Yan, Jason <jyan@omm.com>; Plaza, Cecilia <cplaza@omm.com>; Louis Liao <lliao@AZALAW.COM>
Subject: RE: Partially Denied Claim Issue

I cannot tell a lie . . .

From: Kevin Leyendecker <kleyendecker@AZALAW.COM>
Sent: Friday, October 29, 2021 11:07 PM
To: Blalack II, K. Lee <lblalack@omm.com>; Louis Liao <lliao@AZALAW.COM>
Cc: Yan, Jason <jyan@omm.com>; Plaza, Cecilia <cplaza@omm.com>; Louis Liao <lliao@AZALAW.COM>
Subject: Re: Partially Denied Claim Issue

[EXTERNAL MESSAGE]

The question is clear.
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From: Blalack II, K. Lee <lblalack@omm.com>
Sent: Friday, October 29, 2021 8:02:22 PM
To: Kevin Leyendecker <kleyendecker@AZALAW.COM>; Louis Liao <lliao@AZALAW.COM>
Cc: Yan, Jason <jyan@omm.com>; Plaza, Cecilia <cplaza@omm.com>; Louis Liao <lliao@AZALAW.COM>
Subject: RE: Partially Denied Claim Issue

Now, do I need to swear I wrote it all by myself? If not, I have my pinky ready to go . . .

From: Kevin Leyendecker <kleyendecker@AZALAW.COM>
Sent: Friday, October 29, 2021 10:54 PM
To: Blalack II, K. Lee <lblalack@omm.com>; Louis Liao <lliao@AZALAW.COM>
Cc: Yan, Jason <jyan@omm.com>; Plaza, Cecilia <cplaza@omm.com>; Louis Liao <lliao@AZALAW.COM>
Subject: Re: Partially Denied Claim Issue

017250

[EXTERNAL MESSAGE]

Lee,
If you pinky swear that you wrote this email, I will give further consideration to your requests.
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From: Blalack II, K. Lee <lblalack@omm.com>
Sent: Friday, October 29, 2021 6:18:10 PM
To: Kevin Leyendecker <kleyendecker@AZALAW.COM>; Louis Liao <lliao@AZALAW.COM>
Cc: Yan, Jason <jyan@omm.com>; Plaza, Cecilia <cplaza@omm.com>; Louis Liao <lliao@AZALAW.COM>
Subject: RE: Partially Denied Claim Issue

Kevin,
Thanks for pulling this revised list together. We have reviewed your comments.
You identified 5 claims (rows 5, 8, 9, 13, and 14) which were part of the original 17 claims you noted that appeared to be allowed, but denied. As previously stated, these claims were denied in full. For all 17 of these claims, including the 5 you identified in your most recent spreadsheet, we reviewed PRAs, EOBs, or disallowed reason codes and confirmed that they were denied in full. Based on our review of your spreadsheet, it appears that TeamHealth may have recorded an allowed amount for these claims due to an amount

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