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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

RACHEL CONDRY, JANCE HOY, CHRISTINE ENDICOTT, LAURA BISHOP, FELICITY BARBER, and RACHEL CARROLL on behalf of themselves and all others similarly situated, Plaintiffs, v. UnitedHealth Group Inc.; UnitedHealthcare, Inc.; UnitedHealthcare Insurance Company; UnitedHealthcare Services, Inc.; and UMR, Inc., Defendants.	Case No.: 3:17-cv-00183-VC **PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' *DAUBERT* MOTION CONCERNING THE EXPERT TESTIMONY AND OPINIONS OF DANIEL MCGLONE IN CONNECTION WITH PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** Honorable Vince Chhabria

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MEMORANDUM OF POINTS AND AUTHORITIES

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<u>INTRODUCTION</u>

3   Plaintiffs, Rachel Condry, Jance Hoy, Christine Endicott, Laura Bishop, Felicity Barber,

4   and Rachel Carroll (collectively, "Plaintiffs"), engaged expert witness, Daniel McGlone

5   ("McGlone"), from Azavea to perform data analytics and geospatial mapping regarding

6   Defendants'[1] "380"-designated providers.[2] (Declaration of Kimberly Donaldson-Smith in

7   Support of Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Motion

8   for Class Certification ("Donaldson-Smith Decl."), Exhibit 29 [ECF No. 161-2] ("McGlone

9   Report" or "Report"), at 2.) After his extensive data analysis and mapping efforts, McGlone's

10 findings resulted in the following conclusions: (1) UHC had a *de minimis* number of

11 comprehensive lactation support ("CLS") network providers ***identifiable*** by insureds throughout

12 the Class Period; and (2) there were four or fewer CLS providers identified per 1,000 live births,

13 with most Metropolitan Statistical Areas ("MSAs") having less than one "380" Provider per

14 1,000 live births. [*See* ECF No. 161 at 10, 11.] Defendants' *Daubert* Motion Concerning the

15 Expert Testimony and Opinions of Daniel McGlone in Connection with Plaintiffs' Motion for

16 Class Certification ("*Daubert* Motion") is substantively meritless, and the Court should not

17 consider its unmeritorious arguments in determining the weight to give the McGlone Report.

18   Defendants mischaracterize the methods and conclusions of the McGlone Report

19 throughout their entire *Daubert* Motion in a desperate attempt to salvage their baseless, rejected

20 position that because provider *types*, like pediatricians and OB/GYNs provide CLS, and are in

21 UHC's network, UHC therefore, "provided" CLS coverage in compliance with the ACA and was

22 justified in its CLS coverage policy, denial of CLS claims, and imposition of cost-sharing.

23

24 [1] UnitedHealth Group Inc.; UnitedHealthcare, Inc.; UnitedHealthcare Insurance Company;
UnitedHealthcare Services, Inc.; and UMR, Inc. (collectively, "Defendants" or "UHC").

25 [2] Discovery has revealed that: UHC's system denoted lactation specialists with the specialty
code, "380"; UHC's system populated UHC's online provider finder search tool for "lactation

26 specialists" with only network "380"-designated providers; and, nationally, throughout the Class
Period, UHC has only a smattering of "380"-designated providers, who were the ***only*** network

27 lactation specialists identifiable by UHC to insureds online. *See* Plaintiffs Motion for Class
Certification; Memorandum of Points and Authorities [ECF No. 161 at 1]. These providers are

28 hereinafter referred to as "380" Providers.

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1   Seemingly, Defendants do not understand the purposes for which the McGlone Report is offered,

2   and their arguments against its validity assume that the Report will be applied outside the scope

3   of its conclusions. All of Defendants' arguments regarding relevance assume that the McGlone

4   Report should be broader in scope than it actually is—Defendants criticize McGlone for only

5   using the "380" Provider data instead of considering any and all other providers that may also

6   happen to provide CLS; for using 1,000 live births as a comparator; and for using a simple, but

7   effective, methodology that they claim without reason is inherently "unreliable." Defendants

8   refuse, however, to consider the scope of the McGlone Report, and fail to understand that the

9   data and methodology used is relevant and spot-on *for the purposes of his Report and its*

10 *findings*. Defendants' arguments do not attack the validity of the McGlone Report itself, they

11 simply argue that it is too limited in scope; but that just reflects Defendants' off-base argument

12 about other network provider types. Defendants' arguments are insufficient to limit the

13 consideration of the McGlone Report for this purpose, at this stage.

14   Further, Defendants' specific critiques of McGlone's datasets and methodology are

15 meritless. Defendants know that the only way UHC's in-network lactation-services providers

16 are identified, both internally and to UHC insureds, is through the "380" designation and that,

17 even if it were true that some pediatricians, OB/GYNs, or other providers could provide CLS,

18 those providers are not and cannot be identified through UHC's existing systems. Yet,

19 Defendants criticize McGlone's use of the "380" Provider data as the source of data for his

20 analysis, because the only way Defendants' position can hold water is if the "380" Provider data

21 is deemed under-inclusive. As explained below, UHC cannot make this argument consistently

22 with its Interrogatory responses and cannot maintain its position that unidentified lactation-

23 services providers be included in McGlone's analysis in light of the Summary Judgment Order.[3]

24   Moreover, despite their unfounded criticism of McGlone's methodology, Defendants fail

25 to recognize that mere disagreement with an expert's methodology does not render that

26 methodology arbitrary or unreliable. McGlone discloses and explains his methodology in

27

28 [3] Order Re Motions for Summary Judgment and Motion to Strike [ECF No. 146] ("Summary
    Judgment Order").

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employing his data analysis and his methodology regarding the mapping, both of which are

indisputably reliable, and he reliably applies both methodologies to the data.

Accordingly, McGlone satisfies the *Daubert* requirements, and this Court should deny

Defendants' *Daubert* Motion.

LEGAL STANDARD

An expert is qualified under Federal Rule of Evidence 702 if his report and/or testimony

(1) will be helpful to the trier of fact, (2) is based on sufficient facts and data, (3) is the product

of reliable principles and methods, and (4) reliably applied those principles and methods to the

facts of the case. (*See* Fed. R. Evid. 702.) The Ninth Circuit has "interpreted Rule 702 to require

that '[e]xpert testimony . . . be both relevant and reliable'" to be admissible. *Estate of Barabin v.*

AstenJohnson, Inc., 740 F.3d 457, 463 (9th Cir. 2014) (citations omitted). The Ninth Circuit has

explained that the Court may not determine admissibility at the class certification stage:

> [I]n evaluating challenged expert testimony in support of class certification, a
> district court should evaluate admissibility under the standard set forth in *Daubert*.
> *Ellis*, 657 F.3d at 982. But admissibility must not be dispositive. Instead, an inquiry
> into the evidence's ultimate admissibility should go to the weight that evidence is
> given at the class certification stage.

Sali v. Corona Reg'l Med. Ctr., 909 F.3d 996, 1006 (9th Cir. 2018). "The inquiry envisioned by

Rule 702 is . . . a flexible one." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579,

594 (1993). The "court is not tasked with deciding whether the expert is right or wrong, just

whether his testimony has substance" helpful to the factfinder. *Pyramid Tech. Inc. v. Hartford*

Cas. Ins. Co., 752 F.3d 807, 813 (9th Cir. 2014).

Here, as explained in detail below, McGlone's conclusions are both relevant and reliable.

As such, the Court should give the Report whatever weight the Court deems appropriate for the

purposes of deciding Plaintiffs' Motion for Class Certification [ECF No. 161].

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ARGUMENT

I. McGlone's Report And Testimony Regarding The "380" Providers Is Reliable Because He Is Qualified To Render This Opinion And He Used Sufficient Data

A. McGlone Is Qualified To Render This Opinion Because He Is An Expert In Data Analytics And Geospatial Mapping

Defendants absurdly argue that McGlone is unqualified as an expert because he is unqualified to give an opinion that he is not, in fact, offering. "[A] witness can qualify as an expert through practical experience in a particular field" and "an expert opinion may be based on *any type of evidence* commonly used by experts in the field." *Rogers v. Raymark Indus., Inc.*, 922 F.2d 1426, 1429 (emphasis added); *see also PixArt Imaging v. Avago Tech. Ge. IP (Singapore) Pte*, No. C 10-00544 JW, 2011 WL 5417090, at *3-4 (N.D. Cal. Oct. 27, 2011); *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1015-16 (9th Cir. 2004); *Thomas v. Newton Int'l Enters.*, 42 F.3d 1266, 1269 (9th Cir. 1994)). "The threshold qualification is low: a minimal foundation of knowledge, skill, and experience suffices." *PixArt Imaging*, 2011 WL 5417090, at *3. Further, "Rule 702 is broadly phrased and intended to embrace more than a narrow definition of a qualified expert." *Hangarter*, 373 F.3d at 1015 (citing *Thomas*, 42 F.3d at 1269) (quoting Rule 702 advisory committee note: "In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony"); *see also Audionics Sys., Inc. v. AAMP of Fla., Inc.*, CASE NO. CV 12-10763 MMM (JEMx), 2015 WL 12712288, at *19 (C.D. Cal. July 10, 2015) (same). Of course, Defendants do not argue, because they cannot argue, that McGlone is unqualified to offer the opinion that he actually offers: a data analysis and geospatial mapping of the "380" Providers, as those providers are identified by UHC both internally and to UHC's members. McGlone is undoubtedly qualified to render an opinion on data analytics and geospatial mapping: he is a Senior GIS Analyst on Azavea's Data Analytics team and has more than six years of experience maintaining and providing analysis on GIS databases in the public and private sectors. (McGlone Report at 2.) He also has substantial experience in technical writing and producing reports and extensive skills with a range of mapping tools. (*Id.*) He earned his Bachelor of Science degree in geography and geospatial imaging from Harrisburg University and his Master's Degree in Urban Spatial Analysis from the

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1   University of Pennsylvania. (*Id.*) McGlone is more than qualified to conduct the data analytics

2   and geospatial mapping he performed, here, and to report on the conclusions of his analysis and

3   mapping, which is precisely what he does in his Report.

4   Defendants insist that McGlone is unqualified to offer an opinion because he has "no

5   training or experience in healthcare, lactation services, or insurance. Therefore, to the extent his

6   report is viewed as an opinion as to the availability of lactation providers in UHC's network or

7   the sufficiency of UHC's coverage, these are opinions he is not qualified to offer."[4] (Motion at

8   4.) However, this is a red herring. Defendants misunderstand and mischaracterize McGlone's

9   opinion—he is not offering an opinion on the ***availability*** of all potential lactation-services

10   providers in UHC's network, but is offering an opinion on the concentration, or lack thereof, of

11   "380" Providers nationwide.

12   The availability of lactation providers in UHC's network, generally, or the sufficiency of

13   UHC's coverage, generally, is, admittedly, and purposefully, outside the scope of McGlone's

14   opinion. UHC's argument serves to distract from the key issue: ***UHC*** providing the identity of

15   its network lactation providers. Of course, McGlone is only able to render an opinion on the

16   concentration of lactation-services providers in UHC's network ***that UHC itself identifies***. ***UHC***

17   identifies its lactation providers by the "380" designation. When asked to identify in-network

18   ***"providers of lactation and breastfeeding services, support and counseling"*** (*i.e.*, not lactation

19   specialists or certified lactation consultants, specifically), UHC referred to its response to

20   Interrogatory No. 7, in which it explained that only the network providers "identified by the

21   specialty code '380' . . . have been electronically searchable as 'Lactation Specialists' in

22   Defendants' provider directory." [ECF No. 161 at 9-10 (citing UHC Resp. to Rog. 7).] Because

23   this is the only data UHC has to classify its in-network lactation-services providers, this is the

24   only data McGlone can feasibly use to analyze and map to demonstrate how many ***identified***

25   lactation-services providers UHC has in its network and where those providers are located.

26

27   [4] Notably, Defendants' proffered statistics expert, Joao dos Santos, has no training or experience with regard to lactation services and testified that it "falls outside of the scope of my assignment to - - to make a determination of what lactation support services providers are." (Declaration of

28   Kolin C. Tang (Tang Decl.), Exhibit 1 (Deposition Excerpts of Joao dos Santos), at 64:14-65:9.)

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B.   McGlone's Specialized Knowledge Of Data Analytics And Geospatial Mapping Will Help The Court Understand The Scope Of UHC's Lactation-Provider Network

Contrary to Defendants' baseless assertion, the McGlone Report is relevant to the issues in this case as it will be helpful to the trier of fact.[5] "[R]elevance means that the evidence will assist the trier of fact to understand or determine a fact in issue." *Cooper v. Brown*, 510 F.3d 870, 942 (9th Cir. 2007). In other words, the "evidence must logically advance a material aspect of the party's case." *Id.* Defendants self-servingly oversimplify McGlone's task, asserting, "McGlone viewed his task as counting up the number of self-reported UHC lactation specialists and then dividing that number by 1,000 live births," but this is merely a broad-brush overview of McGlone's conclusion, and does not speak to the complexity of the data analysis he employed in determining the UHC lactation specialists to be included in his analysis and the subsequent task of geospatially mapping the specialists in an accurate way that will assist the Court in understanding the concentration (or lack thereof) of UHC's lactation-services providers.

For example, McGlone described his process for generating the table in Figure 1 of his Report as follows: "[W]e had geographic coordinates for [the lactation specialists]. So we took an MSA boundary sharefile and in GIS software we found which lactation specialists fell within which boundary and assigned the metropolitan statistical area ID to those lactation specialists." (Tang Decl. Ex. 2 (Deposition Transcript of Daniel McGlone ("McGlone Dep.")) at 157:22-158:8.) He also described the mapping of the MSAs: "They are based on different scales to be able to view the data in a way that's cartographically you're able to interpret it. So they are not

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[5] Defendants' reliance upon *United States v. Hanna*, 293 F.3d 1080, 1086 (9th Cir. 2002), is misplaced. Defendants cite *Hanna* for the proposition that "it is well established that expert testimony is appropriate only to establish facts outside the common knowledge of a reasonable factfinder," (*Daubert* Motion at 4) but the expert opinion in *Hanna* required no analysis from the expert whatsoever. In *Hanna*, the issue was "whether a reasonable person in Hanna's position would foresee that his communications would be perceived by those to whom he communicated as serious expressions of intent to harm the President," and the Court determined that "[w]ithout additional assistance, the average layperson is qualified to determine what a 'reasonable person' would foresee under the circumstances." 293 F.3d at 1086. The data analysis and geospatial mapping conducted by McGlone is not the kind of "common knowledge" akin to determining the reasonableness of a threat at issue in *Hanna* and, therefore, *Hanna* is inapposite.

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necessarily matching metropolitan areas." (*Id.* at 149:5-16.) This clearly goes beyond the "common knowledge" of a layperson and will assist the trier of fact in determining a fact in issue; namely, whether UHC provided its members with meaningful access to CLS providers given how it identified those providers and given the locations of those identified providers.

Of course, McGlone's Report does not and cannot address the operations of UHC in states with no listed "380" Providers—the only data that UHC produced identifying its in-network lactation-services providers was the "380" Provider data. (*Id.* at 158:21-161:12 ("If UHC provided the data indicating that they were lactation specialists, then they were considered in the data . . . .").) By process of elimination, in states where there are no "380" Providers listed, there are no lactation providers that UHC identifies for its insureds. UHC takes issue with McGlone on this point because it holds the ludicrous position that it may still have lactation-services providers in those states with no "380" Providers because it may have other in-network providers other than "380" Providers that offer CLS. (*Daubert* Motion at 6 ("[E]vidence . . . demonstrates that thousands of women *did* receive lactation services from pediatricians, OBGYNs, and others who are *not* self-described lactation specialists . . . .").) Defendants suggest that the data McGlone uses is insufficient because it may not capture all the lactation-services providers in UHC's network, but the "380" Providers are the only lactation-services providers identified as such by UHC and that UHC members can find through UHC's database. That is the relevant inquiry, and a position that comports with the Court statements:

> [T]he Affordable Care Act's requirement that health insurers provide coverage for comprehensive lactation support and counseling is a requirement that women have ***meaningful access*** to those services. Illusory or de minimis access is not sufficient, and a woman does not have access to lactation support ***if she cannot practically find those services***.

(Summary Judgment Order at 2 (emphasis added).)

> Even assuming that some pediatricians, OBGYNs and their practices provide comprehensive lactation support and counseling, this fact – absent evidence that pediatricians and OBGYNs in a particular plaintiff's vicinity ***were in fact providing those services*** to their patients ***and that the defendants made the plaintiff aware of that*** – does not create a genuine issue of fact as to whether a particular plaintiff had meaningful access to lactation support.

Id. at 3 (emphasis added).

Plaintiffs' position is that UHC members cannot practically find lactation-support services if lactation-services providers are not identified by UHC, and UHC admittedly only identifies lactation-services providers using the "380" designation, each of such providers are the only identified providers (*not provider type)* that Defendants can state in fact provide those services. Accordingly, it is appropriate for McGlone to use the UHC 380 Lists[6] in analyzing and mapping where UHC's identified lactation-service providers are located nationwide. Moreover, Defendants berate McGlone because his "cited metric of lactation specialists per thousand live births among the general population . . . was merely 'descriptive of the data,'" without citing any authority suggesting descriptive data is insufficient for an expert opinion. (Motion at 5.) Defendants also baselessly state that McGlone's "mathematical calculations and related maps, standing alone, are not useful to the Court's resolution of any issues," but that simply is not true. (*Daubert* Motion at 5.) On its own, the *de minimus* providers identified on the list as network providers for UHC nationwide is conclusive of the systemic lack of UHC-identified network lactation providers. McGlone's analysis takes the UHC 380 Lists and gives the factfinder a sense of how the identified UHC in-network lactation-services providers are disbursed nationwide—the McGlone Report provides the factfinder with distributions and concentrations of "380" Providers over various regions and MSAs and a useful comparison of the number of "380" Providers to the number of live births within each region and MSA.[7]

C.   **The Data Upon Which McGlone Relied is Sufficient Because it is All the Data UHC Has That Identified its Lactation-Services Providers**

1.   **McGlone Used Data Provided by UHC which UHC Itself Uses to Identify Lactation Providers to its Members**

Defendants argue that the data McGlone relies upon is insufficient, but Defendants cite

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[6] UHC_114514-UHC_114517 constitute the "UHC 380 Lists."

[7] Unlike the documents at issue in *Pooshs v. Phillip Morris USA, Inc.*, 287 F.R.D. 542, 548 (N.D. Cal. 2012), the UHC 380 Lists do not speak for themselves. On their own, the UHC 380 Lists give no sense of how concentrated or scattered the "380" Providers are nationwide and give no sense of whether the raw number of "380" Providers in any given region is sufficient compared to the number of live births in that region. McGlone's analysis and mapping provides that additional information, which is helpful to the finder of fact.

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1   no authority to suggest that McGlone's use of UHC's only data on its lactation-services

2   providers is insufficient for purposes **of his Report**. *See Victorino v. FCA US LLC*, 16cv1617-

3   GPC(JLB), 2018 WL 2767300, at *3 (S.D. Cal. June 7, 2018) (permitting expert to base his

4   opinion only on defendant's data). Further, Defendants carefully parse McGlone's description of

5   the data used without considering it in context. It is true that McGlone did "utilize summary

6   datasets provided by Clients" but this does not indicate that he did not also use the UHC 380

7   Lists—in fact, it is clear from the next paragraph in his Report and in his Exhibit B that he also

8   reviewed and utilized the UHC 380 Lists themselves. (*See, e.g.*, McGlone Report at 4 ("The

9   UHC 380 Lists included schedules with other relevant data for each LS . . .") (Ex. B (listing "The

10 UHC 380 Lists: a. UHC_114514 b. UHC_114515 c. UHC_114516 d. UHC_114517" as

11 documents he considered "[i]n preparing [his] analysis")); *see also* McGlone Dep. at 83:13-

12 84:12 (indicating that Azavea received and used the UHC 380 Lists and summary compilation in

13 conducting the data analysis); 152:11-17 ("We relied on the data that was originally provided by

14 UHC which was found in the data source listed here as well as the compilation.").)

15   Defendants also argue that McGlone "did not consider whether individuals beyond those

16 stated in the UHC 380 lists **should be** counted in his analysis," (Motion at 5 (emphasis added))

17 but, once again, Defendants do not provide any authority requiring that McGlone include such

18 individuals given the scope of his Report. The purpose of the McGlone Report is to analyze and

19 map UHC's "380" Providers from the UHC 380 Lists because that is the only data UHC has and

20 produced regarding its identifiable in-network lactation-services providers.[8] There is no reason

21 McGlone should have included any individuals beyond the UHC 380 Lists in conducting his

22 analysis and mapping, and Defendants have not identified any reason why individuals beyond

23 the UHC 380 Lists should have been included.[9]

24

25 [8] *See* ECF No. 161 at 9-10 (citing UHC Resp. to Interrogatory No. 7); McGlone Dep. at 83:13-
    84:12, 158:21-161:12; *see also* Summary Judgment Order at 2 (finding that "a woman does not

26 have access to lactation support if she cannot practically find those services").
    [9] Defendants argue, "McGlone does not (and cannot) explain why the limited subset of providers

27 he considered supports a reliable assessment of UHC's network for lactation services or
    allegations of systemic problems." (*Daubert* Motion at 6.) However, once again, this is not

28 what the McGlone Report is being offered for, and Defendants are attempting to limit

                                                    9

2.   McGlone Properly Used Number of Live Births as a Comparator

Once again, Defendants are only able to argue that the Court should not give weight to the McGlone Report by arguing that he does not account for potential results outside the scope of his Report and beyond the purpose for which the Report is being offered. In Plaintiffs' Class Certification Motion, they state, "[A]s reflected in Mr. McGlone's work, even viewing the data by the [] [MSAs] where network '380' providers were located, there were four or less CLS providers identified per 1,000 live births, with most MSAs having less than one '380' provider per 1,000 live births." (ECF No. 161 at 11 (citing McGlone Report at 13).) Plaintiffs are not drawing any further conclusion on this point. Notably, Defendants do not argue that McGlone's calculations or analysis are inaccurate, but that is a "deliberate underrepresentation of the availability of lactation services in UHC's network." (*Daubert* Motion at 6.) However, and UHC does not dispute it, this is all the data UHC has and has produced regarding its identified, known lactation-services providers, and it is up to the factfinder to determine whether McGlone's analysis based on this comparator is persuasive and whether it bears on the sufficiency of UHC's lactation-services provider network. *See Pyramid Tech.*, 752 F.3d at 813. Just because McGlone's analysis is limited does not mean it is irrelevant, and Defendants cite no authority to conclude that it is *per se* irrelevant.[10]

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consideration of his Report because it does not explain conclusions that are beyond the scope of the Report. Accordingly, Defendants' reliance on *Heisler v. Maxtor Corp.*, No. 5:06-cv-6634-JF (PSG), 2011 WL 1496114, at *8 (N.D. Cal. Apr. 20, 2011) and *Perex v. State Farm Mut. Auto Ins. Co.*, No. C 06-01962 JW, 2012 WL 3116355, at *6 (N.D. Cal. July 31, 2012), is misplaced. The expert in *Heisler* tested 15 Maxtor drives to conclude that there was a common defect; McGlone is not, however, attempting to conclude that there was a systemic problem in UHC's network, but that "UHC has a *de minimis* number of CLS network providers ***identifiable*** by insureds" based on the fact that the only ***identifiable*** UHC in-network lactation-services providers were the "380" Providers. (*See* ECF No. 161 at 10-11.) Likewise, *Perex* is inapposite because the expert in that case selected sources that may have been "biased toward a particular conclusion," while the evidence McGlone used is simply all the data the UHC itself provided.
[10] *Feduniak v. Old Republic National Title Company*, Case No. 13-cv-02060-BLF, 2015 WL 1969369 (N.D. Cal. May 1, 2015), does not help Defendants. In *Feduniak*, the Court found that "Because Lloyd's testimony addresses the precise issue that the jury must determine, it is relevant." *Id.* at *2. Likewise, here, the finder of fact will determine whether Defendants provided Plaintiffs with meaningful access to lactation-services providers, and the McGlone Report addresses that issue, rendering it relevant. *Feduniak* is equally inapplicable to the McGlone Report on reliability grounds—in *Feduniak*, expert testimony was excluded in part

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II.   McGlone's Methodology Is Reliable

There is no exhaustive list of factors by which judges determine the reliability of expert testimony. "Many factors will bear on the inquiry," and courts have not "set out a definitive checklist or test." *Daubert*, 509 U.S. at 593; *Estate of Barabin*, 740 F.3d at 463 (citing *United States v. Hankey*, 203 F.3d 1160, 1167 (9th Cir. 2007) and *Daubert*, 509 U.S. at 592-94)). Defendants suggest that because McGlone did not consider factors that they deem important and because McGlone analyzed and mapped the data by first parsing it out into different categories, that his methodology is *per se* unreliable—but, Defendants cite no authority requiring that McGlone consider these specific factors in analyzing this data and drawing his conclusions. Again, just because Defendants disagree with McGlone's methodology does not mean that he does not employ any methodology or that the methodology he did apply is unreliable.

Defendants argue that McGlone "employed no discernible methodology for selecting the relevant inputs for his calculations and maps" (Motion at 7)—but this is untrue. In the Background section of his Report, McGlone explains

> The lawsuit claims that, among other things, UHC has not complied with the ACA for CBS coverage because it did not establish a network of CBS providers (called lactations specialists, or lactation specialist group ("LS")) and it did not give insureds access to network LS. UHC has produced data identifying the LS. The Clients sought the services of Azavea to use the UHC produced data to map the identified LS by location, and to identify certain data for each LS . . . .

(McGlone Report at 3.) This quite clearly demonstrates that (1) the task was to map and identify data for each LS in UHC's network, so (2) McGlone used the UHC data which identified each LS. This is a straightforward explanation for McGlone's choice of input, but simplicity does not render methodology unreliable. *See Victorino*, 2018 WL 2767300, at *3 ("While the mathematical formula eventually developed by Boyles is a simple formula, it was created after careful review of the facts of the case, the theories alleged and consideration of different variables. Therefore, the Court concludes that the Boyles' development of the formula is not simply grade-school arithmetic as FCA alleges and involves an analysis of information and

---

because the expert "did not use the preferred means of determining real property value." *Id.* Here, McGlone's use of live births per region is a reasonable comparator for this kind of geospatial analysis. Accordingly, *Feduniak* is inapposite.

11

theories sufficient to constitute expert testimony.") Further, McGlone extensively explained his

methodology in the Report. He first explained that he reviewed both the UHC 380 Lists **and**

summary datasets and categorized them into various categories: (1) whether an entity name was

separate from an individual lactation specialist; (2) solo versus group lactation specialists; (3)

full-time versus part-time lactation specialists; and (4) "primary" versus "secondary" specialty

designations. (McGlone Report at 4-6.) He explains why these distinctions were made and the

variables for which the distinctions were intended to control. (*Id.*) McGlone identified the

unique locations for identified lactation specialists, organized them by category, stated his

assumptions and exclusions, and explained his use of MSAs. (*Id.* at 6-9.) McGlone explained

the mapping process, including the geocoding and mapping methodology. (*Id.* at 9-10.)

It is, therefore, laughable that Defendants suggest that "McGlone failed to describe any

discernible methodology to his analysis" and that he "failed to disclose his methodology."[11]

(*Daubert* Motion at 8.) Again, Defendants may disagree with McGlone's methodology, but their

disagreement does not render the methodology nonexistent or unreliable. *See City of Pomona v.

SQM N. Am. Corp.*, 750 F.3d 1036, 1043-44 (9th Cir. 2014) (citing *Alaska Rent-A-Car v. Avis

Budget Group, Inc.*, 738 F.3d 960, 969 (9th Cir. 2013) ("The judge is 'supposed to screen the

jury from unreliable nonsense opinions, but not exclude opinions merely because they are

impeachable.'")). McGlone's data analysis is consistent with his many years of experience with

data analytics, and his geospatial mapping utilized "the industry standard for mapping

---

[11] Defendants rely on *Pecover v. Electronic Arts, Inc.*, 2010 WL 8742757 (N.D. Cal. Dec. 21, 2010), for the proposition that "Plaintiffs cannot carry their burden of showing McGlone's report should be considered" if McGlone "failed to disclose his methodology." But the Court in *Pecover* found that certain aspects expert Hamburger's opinions based on her direct observations and direct knowledge of the industry had "reliable bas[es] in the expert's knowledge and experience of the relevant field." *Id.* at *5. The only opinions that the Court found unreliable were those involving economic or statistical analysis outside her expertise. *Id.* at *6. The proffering of McGlone's opinions, therefore, is fully consistent with the *Pecover* analysis: McGlone's opinions are rooted in his experience in data analytics and geospatial mapping, and his descriptions of his methodologies regarding both, and the analysis is fully within his realm of expertise. Accordingly, McGlone's methodologies are reliable, and *Pecover* does not support Defendants' argument to exclude his Report.

Case No.: 3:17-cv-00183-VC   PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS'
                                       DAUBERT MOTION CONCERNING THE EXPERT TESTIMONY
                                       AND OPINIONS OF DANIEL MCGLONE

production." (McGlone Report at 2, 9.) McGlone's methodology is reliable and satisfies this prong of the *Daubert* analysis.[12]

III.   McGlone's Methodology Was Reliably Applied To The Data

A.   McGlone's Methodology is Not Unreliable Because He Divided the Data into Categories

Once again, Defendants baselessly assert that McGlone has not reliably applied his methodology to his analysis without citing any authority in support of that proposition. Defendants claim that McGlone "divides the UHC 380 lists into arbitrary buckets with no apparent purpose," (*Daubert* Motion at 8), but he clearly demonstrates that he did so for mapping purposes "to illustrate the various factors considered." (McGlone Report at 11.) The factors themselves came from the information included on the UHC 380 Lists, and were separated into various categories and plotted onto various maps so that all the information on the UHC 380 Lists could be accurately reported on the maps. (*See, e.g.*, McGlone Report at 4 (describing the information in the UHC 380 Lists that required the necessity of "Category One Groups"), 5 (describing the need for the full-time vs. part-time distinction based on whether providers had a unique address), and 6 (describing why primary and secondary designations were made).) The categories are based on UHC provided data: the primary and secondary designations were identified on the 380 Lists by UHC (*e.g.* 380 speciality code listed as primary or secondary as to the provider); and, the full vs part time distinction based on providers' addresses (and, of course,

---

[12] Defendants' reliance on *Pooshs* - in discussing the reliability of McGlone's methodology - is misplaced. (*Daubert* Motion at 7.) In *Pooshs*, the Court granted in part defendants' motion excluding Mr. Johnson because (1) his opinion was based, in part, on an unreliable assumption; and (2) Mr. Johnson did not use "the most common measure of a defendant's financial condition," *i.e.*, net worth, in determining whether the punitive damages award was excessive. *Pooshs* is inapplicable here, because McGlone's opinion is narrowly tailored to the assumptions he considered, and he outlined those assumptions fully in his Report. Further, this is not a circumstance where there is a "most common" method or comparator for determining whether the number of providers in a network is sufficient and McGlone ignored that most common method; instead, he used a reasonable comparator (live births) that has been used in other analysis (*see* Donaldson-Smith Decl., Ex. 36 (Rebuttal Expert Report of Dr. Mark L. Labovitz at 16-19). Accordingly, the analysis in *Pooshs* does not render the methodology in the McGlone Report unreliable.

Case No.: 3:17-cv-00183-VC   PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS'
DAUBERT MOTION CONCERNING THE EXPERT TESTIMONY
AND OPINIONS OF DANIEL MCGLONE

1   the provider is accounted for not eliminated by McGlone, as UHC seems to imply). Defendants

2   criticize McGlone's decisions to create categories by which to display the UHC "380" Provider

3   data, but, again, just because Defendants disagree with McGlone's methodology or its

4   application does not render his methodology or application unreliable.

5   Defendants hastily conclude that "McGlone did not reliably apply any process to the data.

6   Instead, he manufactures a nomenclature and applied it arbitrarily to an under-inclusive list of

7   lactation service providers." But, Defendants are mistaken. McGlone has used reliable

8   methodology both with regard to his data analysis and his mapping; he reliably applied the

9   methodology he outlined to the data—data provided by Defendants as the only data identifying

10   in-network lactation specialists. McGlone's analysis from the application of his methodology to

11   the data Defendants produced is what Plaintiffs reference in their Motion for Class Certification

12   [ECF No. 16 at 10-11.] McGlone's Report is both relevant and reliable, this Court should afford

13   it appropriate weight at this stage, and should deny Defendants' *Daubert* Motion.

14   <div align="center">**CONCLUSION**</div>

15   For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants'

16   *Daubert* Motion Concerning the Expert Testimony and Opinions of Daniel McGlone in

17   Connection With Plaintiffs' Motion for Class Certification.

18   DATED: April 4, 2019   **SHEPHERD, FINKELMAN, MILLER AND**

19   **SHAH, LLP**

20   By: */s/ Kolin C. Tang*

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Case No.: 3:17-cv-00183-VC   PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS'
DAUBERT MOTION CONCERNING THE EXPERT TESTIMONY
AND OPINIONS OF DANIEL MCGLONE

CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2019, I served the foregoing **PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' *DAUBERT* MOTION CONCERNING THE EXPERT TESTIMONY AND OPINIONS OF DANIEL MCGLONE IN CONNECTION WITH PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** on the following counsel of record via email:

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6   **IN THE UNITED STATES DISTRICT COURT**

7   **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

8   **SAN FRANCISCO DIVISION**

9

10 RACHEL CONDRY, JANCE HOY, CHRISTINE   Case No.: 3:17-cv-00183-VC
    ENDICOTT, LAURA BISHOP, FELICITY
    BARBER, and RACHEL CARROLL on behalf of   **DECLARATION OF KOLIN C. TANG**
11 themselves and all others similarly situated,   **IN SUPPORT OF PLAINTIFFS'**
                                                RESPONSE IN OPPOSITION TO
12   Plaintiffs,   **DEFENDANTS' *DAUBERT* MOTION**
                                                CONCERNING THE EXPERT
13   v.   **TESTIMONY AND OPINIONS OF**
                                                DANIEL MCGLONE IN CONNECTION
14 UnitedHealth Group Inc.; UnitedHealthcare, Inc.;   **WITH PLAINTIFFS' MOTION FOR**
    UnitedHealthcare Insurance Company;   **CLASS CERTIFICATION**
15 UnitedHealthcare Services, Inc.; and UMR, Inc.,

16   Defendants.   **Date: April 25, 2019**
                                                Time: 10:00 am
17   **Place: Courtroom 4**

18   **Honorable Vince Chhabria**

19

20

21

22

23

24

25

26

27

28

I, Kolin C. Tang, declare that the following is true and correct:

1. I am an associate at Shepherd, Finkelman, Miller & Shah, LLP and am one of the attorneys representing Plaintiffs in the above-captioned matter. I am a member of the bar of the State of California.

2. I have personal knowledge of the facts set forth herein and, if called as a witness, could testify competently as to those matters stated in this Declaration.

3. I respectfully submit this Declaration in Support of Plaintiffs' Response In Opposition To Defendants' *Daubert* Motion Concerning the Expert Testimony and Opinions of Daniel McGlone in Connection With Plaintiffs' Motion for Class Certification.

4. Attached hereto as **Exhibit 1** is a true and correct copy of excerpts of the Deposition of Joao dos Santos, dated January 10, 2019.

5. Attached hereto as **Exhibit 2** is a true and correct copy of excerpts of the Deposition of Daniel McGlone, dated March 4, 2019.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed on April 4, 2019, in Santa Ana, California.

/s/ Kolin C. Tang
Kolin C. Tang

EXHIBIT 1

1   IN THE UNITED STATES DISTRICT

2   FOR THE NORTHERN DISTRICT OF CALIFORNIA

3   SAN FRANCISCO DIVISION

4

  RACHEL CONDRY, JANCE HOY,   ) Case No.:
5 CHRISTINE ENDICOTT, LAURA   ) 3:17-cv-00183-VC
  BISHOP, FELICITY BARBER, and   )
6 RACHEL CARROLL, on behalf of   )
  themselves and all others   )
7 similarly situated,   )
)
8   Plaintiffs,   )
)
9   v.   )
)
10 UNITEDHEALTH GROUP INC.;   )
   UNITEDHEALTHCARE, INC.;   )
11 UNITEDHEALTHCARE INSURANCE   )
   COMPANY; UNITEDHEALTHCARE   )
12 INC.; AND UMR, INC.,   )
)
13   Defendants.   )
   _____)

14

15   VIDEOTAPED DEPOSITION OF JOAO C. dos SANTOS

16   Taken Thursday, January 10, 2019

17   At 10:05 A.M.

18   At 355 South Grand Avenue, Suite 2800

19   Los Angeles, California

20

21

22

23

24 Reported by: DONNA J. RUDOLPH, RPR, CA. CSR NO.
   9652, NV. CCR NO. 420
25

1   MR. HAWLEY: Same objections.

2   THE WITNESS: I created a relational

3   database; right? So all these are elements of that

4   relational database.

5   BY MS. DONALDSON SMITH:

6   Q   Do you have an understanding of who the

7   providers are that provide lactation support

8   services?

9   MR. HAWLEY: Objection. Vague.

10   Overbroad.

11   THE WITNESS: Sorry. I don't mean for --

12   I don't understand what you mean specifically.

13   BY MS. DONALDSON SMITH:

14   Q   So there -- there are references to

15   providers of lactation support services throughout

16   your report.

17   A   Uh-huh.

18   Q   Who was -- what's your understanding as to

19   who provides lactation support services?

20   MR. HAWLEY: Objection. Vague.

21   Overbroad. Lacks foundation.

22   THE WITNESS: Well, I was not asked to

23   develop an opinion as to what our -- the providers

24   that provide lactation support services; right?

25   That's number one. But from my -- as I express in

1   my report, from the review of the data that was

2   provided to me, I was able to gain an understanding

3   of what are the types of providers that are listed

4   there. So I -- you know, I -- that's how I gain an

5   understanding of what providers are in the data.

6   But I have not been asked to opine as

7   to -- that falls outside of the scope of my

8   assignment to -- to make a determination of what

9   lactation support services providers are.

10 BY MS. DONALDSON SMITH:

11   Q   Okay. So your understanding about who

12 lactation support services are is based on your

13 review of the claims data and the providers listed

14 in the claims data?

15   MR. HAWLEY: Objection. Vague. Lacks

16 foundation. May mischaracterize his testimony.

17   THE WITNESS: Well, my understanding is

18 the following: That there are providers that are in

19 the data that based upon the description of the

20 types of service that's were provided, which are

21 characterized or indicated to me that they are

22 characterized as lactation support services, are

23 providing lactation support services. So that's,

24 you know, that's what it is.

25 / / / /

EXHIBIT 2

Page 1

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 1            UNITED STATES DISTRICT COURT
             NORTHERN DISTRICT OF CALIFORNIA
 2               SAN FRANCISCO DIVISION
                        -  -  -
 3    RACHEL CONDRY, JANCE         :
      HOY, CHRISTINE               :  CASE NO.:
 4    ENDICOTT, LAURA BISHOP,      :  3:17-cv-00183-VC
      FELICITY BARBER, and         :
 5    RACHEL CARROLL, on           :
      behalf of themselves         :
 6    and all others               :
      similarly situated,          :
 7               Plaintiffs,       :
                    vs.            :
 8    UNITEDHEALTH GROUP,          :
      INC., UNITEDHEALTHCARE,      :
 9    INC., UNITEDHEALTHCARE       :
      INSURANCE COMPANY,           :
10    UNITED HEALTHCARE            :
      SERVICES, INC., and          :
11    UMR, INC.,                   :
               Defendants.         :
12

                        -  -  -
13               March 14, 2019
                        -  -  -
14
15         Videotape deposition of DANIEL
16    MCGLONE, taken at the offices of CHIMICLES
17    SCHWARTZ KRINER & DONALDSON-SMITH LLP, 361
18    West Lancaster Avenue, Haverford,
19    Pennsylvania 19041, beginning at 9:00 a.m.,
20    before LINDA ROSSI-RIOS, a Federally Approved
21    RPR, CCR and Notary Public.
22                      -  -  -
             VERITEXT LEGAL SOLUTIONS
23               MID-ATLANTIC REGION
         1801 Market Street - Suite 1800
24            Philadelphia, PA  19103
```

Page 83

1   MR. GOLDICH: Duly noted.

2   BY MR. DEEGAN:

3   Q.   Let's look at page 4 of your

4   report.

5   A.   Page 4 of the --

6   Q.   Of your report.

7   A.   Of my report.

8   Q.   You can set Exhibit 2 aside.

9   So this is a section on page 4

10   titled Roman Numeral VII, "Data Preparation

11   Methodology." Do you see that?

12   A.   Yes.

13   Q.   Okay. Look to the second

14   sentence of the first paragraph.

15   We utilized summary data sets

16   provided by Clients that included a single

17   row of data for each unique combination of

18   addresses and lactation specialist that

19   appeared on the UHC 380 Lists and included

20   individual -- individuals, if any, ("LSI") or

21   groups.

22   Do you see that?

23   A.   Yes.

24   Q.   Can you describe the process

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1   that's associated with utilizing the summary

2   data sets provided by clients?

3   A.   Yes.   So we received a

4   compilation workbook from counsel that

5   contained data on lactation specialists and

6   unique addresses, at their unique address.

7   Q.   So that compilation workbook

8   had already been -- well, it had already been

9   compiled by the time you received it?

10   A.   We also received data from UHC

11   and asked that it be compiled into a

12   workbook.

13   Q.   Who did the compilation?

14   A.   Counsel.

15   Q.   So I'm going to hand you a

16   series of documents that we will designate as

17   exhibits. They are printouts of multi-tabbed

18   spreadsheets that are -- have divider sheets

19   between tabs with the tabs titled at the top

20   and the native file production number is on

21   the very first page, for your understanding.

22   A.   Okay.

23   Q.   So I guess we'll be bouncing

24   through some of these.

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1   Q.   -- boundaries?

2   A.   No. The file is delineated by

3   the US Census Bureau, and made available in a

4   shapefile format.

5   Q.   All right. And out of -- so

6   related, are the -- the maps that you

7   generated -- so on page 10 you describe a set

8   of maps, right, detail map, regional detail

9   and metro detail? Are those based on MSAs?

10   A.   They are based on different

11   scales to be able to view the data in a way

12   that's cartographically you're able to

13   interpret it. So they are not necessarily

14   matching metropolitan areas. They're just

15   meant to give enough in one map that you can

16   see it in a way that's easy to interpret.

17   Q.   All right. And so here it also

18   says, returning to page 9, birth data.

19   "...U.S. Census Bureau's Population Estimates

20   for Metropolitan and Micropolitan Areas

21   vintage 2017," with a cite to a census.gov

22   website. Do you see that?

23   A.   Yes.

24   Q.   Okay. So can you describe for

Page 157

1   UHC.

2   Q.   That you were provided by

3   opposing counsel in their compilation data?

4   A.   Provided by counsel and the

5   compilation data and the data that came from

6   UHC.

7   Q.   So do you have any opinion of

8   the operations of UHC with respect to any of

9   the 20 states on pages listed as 1 to 20 on

10   page 11?

11   A.   No, that's not within the scope

12   of this report.

13   Q.   Turn to page 12. This is

14   lactation specialist per MSA. So, again,

15   these MSAs which are listed across the

16   bottom, you have Figure 1 here. Right?

17   A.   Yes.

18   Q.   These are not -- there is not a

19   corresponding map for each of these areas.

20   Is that right?

21   A.   No.

22   Q.   Can you describe for me the

23   process of generating the table in Figure 1?

24   A.   Yes. So the data on lactation

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1   specialists were -- we had geographic

2   coordinates for them. So we took an MSA

3   boundary shapefile and in GIS software we

4   found which lactation specialists fell within

5   which boundary and assigned the metropolitan

6   statistical area ID to those lactation

7   specialists. That's what we were able to

8   summarize on metropolitan statistical area.

9   Q.   In any of these MSA areas that

10   are described in Figure 1, did you conduct an

11   assessment or an analysis of UHC's market

12   share or operations in terms of the number of

13   insureds or number of --

14   A.   No, that was not within the

15   scope of this report.

16   Q.   In the -- as part of your

17   assessment of lactations per MSA, did you

18   consider the -- whether providers such as

19   pediatricians provided lactation services?

20   A.   Can you repeat the question?

21   Q.   Sure. In your analysis of the

22   total number of LS per MSA, did you assess

23   whether other practitioners such as

24   pediatricians provide lactation services?

Page 159

1   MR. GOLDICH: Objection.

2   Confusing.

3   THE WITNESS: If UHC provided

4   the data indicating that they were

5   lactation specialists, then they were

6   considered in the data, they were

7   considered in that number.

8   BY MR. DEEGAN:

9   Q.   And that number was limited

10 to -- I'm sorry, that data was limited, in

11 your analysis, to something bearing a 380

12 designation?

13   A.   If the lactation specialists

14 had a 380 designation as primary or

15 secondary, they were included in this analysis.

16   Q.   So the analysis did not include

17 pediatricians without a 380?

18   A.   It would include any lactation

19 specialist that UHC designated having a 380

20 designation as primary or secondary.

21   Q.   Right. So did it include

22 pediatricians who did not have a 380?

23   MR. GOLDICH: Objection. Asked

24   and answered.

Page 160

1   THE WITNESS: I answered that.

2   If they did not have a 380 code

3   provided by UHC, then they would not

4   be included.

5   BY MR. DEEGAN:

6   Q.   Did it include obstetricians or

7   gynecologists who did not have a 380 on the

8   compilation data set?

9   A.   If UHC provided us with data --

10   UHC provided us with data with a 380 code, if

11   they did not have a 380 code, they were not

12   included.

13   Q.   Okay. No other type of

14   provider -- in the absence of 380, no other

15   type of provider was considered a potential

16   lactation specialist in MSA analysis?

17   MR. GOLDICH: Objection. Asked

18   and answered.

19   THE WITNESS: I answered that

20   question multiple times.

21   BY MR. DEEGAN:

22   Q.   Are you refusing to answer now?

23   MR. GOLDICH: You can answer.

24   THE WITNESS: UHC provided us

Page 161

1   data on lactation specialists with a

2   380 code.   If they -- if UHC

3   designated them with a 380 code as a

4   primary or secondary specialty, they

5   were included in the analysis.

6   BY MR. DEEGAN:

7   Q.   And by implication if not, they

8   were not included in the analysis?

9   A.   If UHC did not designate them

10   as a lactation specialist as either their

11   primary or secondary specialty, they were not

12   included.

13   Q.   As part of your analysis, did

14   you undertake any research to see if other

15   non-380 providers might provide lactation

16   services?

17   MR. GOLDICH: Objection. Asked

18   and answered.

19   THE WITNESS: It was not within

20   the scope of this report.

21   BY MR. DEEGAN:

22   Q.   Okay. All right. Let's look

23   at Footnote 6. There's a statement at the

24   bottom of Footnote 6, "Category One Group