

Kristen Law Sagafi (Bar No. 222249)
TYCKO & ZAVAREEI LLP
483 Ninth Street, Suite 200
Oakland, CA 94607
Phone: (510) 254-6808
Fax: (202) 973-0950
ksagafi@tzlegal.com

*Attorney for Plaintiffs, and Additional
Counsel for Plaintiffs identified in
Signature Block.*

**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' MEMORANDUM OF
POINTS & AUTHORITIES IN
OPPOSITION TO DEFENDANTS'
DAUBERT MOTION CONCERNING
THE EXPERT TESTIMONY AND
OPINIONS OF JANE MORTON, M.D.,
IN CONNECTION WITH PLAINTIFFS'
MOTION FOR CLASS
CERTIFICATION**

**Date: April 25, 2019
Time: 10:00 am
Place: Courtroom 4**

Honorable Vince Chhabria

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MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs, Rachel Condry (“Condry”), Jance Hoy (“Hoy”), Christine Endicott (“Endicott”), Laura Bishop (“Bishop”), Felicity Barber (“Barber”), and Rachel Carroll (“Carroll”) (collectively, “Plaintiffs”), respectfully submit this Memorandum of Points and Authorities in opposition to the *Daubert* Motion concerning the Expert Testimony and Opinions of Jane Morton, M.D. in connection with Plaintiffs’ Motion for Class Certification [ECF No. 177] (“Motion”), filed by Defendants, UnitedHealth Group Inc., UnitedHealthcare, Inc., UnitedHealthcare Insurance Company, UnitedHealthcare Services, Inc., and UMR, Inc. (collectively, “Defendants” or “UHC”).

INTRODUCTION AND BACKGROUND

Defendants’ Motion challenges certain opinions from the two expert reports by Dr. Jane Morton, which Plaintiffs submitted in support of class certification.¹ As Plaintiffs made clear in their motion for class certification and Dr. Morton made clear in her 12/4/18 Report, Dr. Morton is proffered as a leading member of American medicine with respect to breastfeeding and lactation support, whose testimony rebuts UHC’s policy justification that it did not “need to develop a specific, broad strategy for contracting with lactation specialists since [it has] pediatricians and OB’s [sic] that already provide this service,” as well as UHC’s attempt to conjure individualized or typicality issues by asserting that Carroll and Endicott received a full complement of lactation counseling from network providers. [ECF No. 161, at 8, 19 n.23.]

Drawing from decades of experience providing patients with lactation support, teaching medical students and other medical professionals about lactation support, conducting research on lactation support techniques and curriculum, collaborating with colleagues on the same, leading professional organizations centered on lactation support research and education, and advocating

¹ Plaintiffs have produced three expert reports by Dr. Morton in this litigation, two of which were submitted in support of class certification. *See* Expert Report of Jane Morton, M.D., December 4, 2018 [ECF No. 161-2, at 226-242] (“12/4/18 Report”), submitted as Ex. 24 in support of Plaintiffs’ motion for class certification; Expert Report of Jane Morton, M.D., January 25, 2019 [ECF No. 161-2, at 545-564] (“1/25/19 Report”), submitted as Ex. 43 in support of Plaintiffs’ motion for class certification.

1 for lactation support education, Dr. Morton proffers opinions, with citations to academic and
 2 professional studies and literature as further support, that: (1) as a general matter, pediatricians
 3 and OB/GYNs do not receive training as medical students or residents and, as such, cannot be
 4 expected to be proficient at providing comprehensive lactation support; and consequently, (2)
 5 providing comprehensive lactation support is generally not within a pediatrician's or OB/GYN's
 6 standard of care; and (3) that, as a general matter, comprehensive lactation support providers
 7 need to be specifically identified so mothers who require their assistance can timely and
 8 reasonably locate them. *See generally*, 12/4/18 Report; 1/25/19 Report, Ex. A.

9 Dr. Morton also responds to Dr. Henry Lee's assessment of the lactation support that Ms.
 10 Carroll and Ms. Endicott received. In the 1/25/19 Report, she elaborates on the fact that
 11 comprehensive lactation support is not within the standard of care for physicians to assume
 12 primary responsibility for the management of comprehensive lactation support (1/25/19 Report,
 13 at 3-5); and opines that, contrary to Dr. Lee's assessment, Ms. Carroll and Ms. Endicott did not
 14 receive comprehensive lactation support, which was, unfortunately, predictable in light of the
 15 fact that the aforementioned standard of care for physicians with respect to comprehensive
 16 lactation support and that most primary care providers are not trained or equipped to provide
 17 such support. *See id.* at 5-9. Dr. Morton also noted that Dr. Lee misunderstood the critically
 18 time-sensitive nature of comprehensive lactation support, as well as the material differences in
 19 the provision of lactation support between general providers and those specifically trained and/or
 20 specialized at providing lactation support. *See id.*, at 5, 6 n.14.

21 Apparently unable to respond to the reasoning and substance of Dr. Morton's opinions,
 22 Defendants resort to taking pot-shots at her ostensible failure to support those opinions with
 23 "quantifiable" measures and other inapplicable criticisms.² Dr. Morton is not a statistician or a
 24 survey expert, and neither Plaintiffs nor Dr. Morton have presented her as such. And Dr. Morton
 25 is not proffering scientific or technical testimony—her conclusions do not concern any

26
 27 ² Strangely, Defendants also challenge portions of Dr. Morton's prior 2017 report, which has not
 28 been submitted in connection with Plaintiffs' class certification motion. Motion, at 4:13-17,
 5:11-13, 8:19-21.

laboratory, engineering, or survey work. Instead, as introduced above and discussed in further detail below, Dr. Morton's opinions concern the history, status, and standard of lactation support in American medicine, which is experience-based in nature, and, in addition, are supported by academic and professional studies and literature.

The Supreme Court, the Ninth Circuit, and the Federal Rules of Evidence expressly contemplated and endorsed the propriety of this type of expert testimony. As the Ninth Circuit explained with respect to a witness proffered for his testimony on the basis of his experience:

The *Daubert* factors (peer review, publication, potential error rate, etc.) simply are not applicable to this kind of testimony, whose reliability depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it. *See Kumho Tire*, 119 S.Ct. at 1175 ("Engineering testimony rests upon scientific foundations, the reliability of which will be at issue in some cases.... In other cases, the relevant reliability concerns may focus upon personal knowledge or experience.") (internal citations omitted); *United States v. Plunk*, 153 F.3d 1011, 1017 (9th Cir.1998) (upholding admission of expert testimony from law enforcement officer regarding jargon of narcotics trade, on basis of expert's training, experience, and personal knowledge). The district court probed the extent of this knowledge and experience during the motion in limine-FRE 104 hearing, and therefore did not abuse its discretion in determining how best to conduct an assessment of the expert testimony.

United States v. Hankey, 203 F.3d 1160, 1169 (9th Cir. 2000). *Hankey's* reasoning applies here. Defendants' broad, conclusory statements in opposing class certification (as they have argued throughout the litigation) about the general proficiency of pediatricians and OB/GYNs at providing lactation support are not "quantifiable." Instead, Dr. Morton's elucidation of American medicine with respect to lactation support, which depends heavily on her knowledge and experience, provides a framework to refute such position by UHC.

Finally, Defendants' relevancy argument barely merits a response. As noted above, Defendants raised the issue of lactation support proficiency with respect to pediatricians and OB/GYNs in this action, as an unpersuasive alternative to demonstrating (which they cannot) the identity of Defendants' network providers who were, in fact, providing those services to their patients and that Defendants made the insureds aware of the identity of the network providers. They can hardly claim that Plaintiffs' evidence is irrelevant unless they concede that issue.

LEGAL STANDARD

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). At the class certification stage, however, the Court may not make admissibility determinations. As the Ninth Circuit explained:

[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) (emphasis added). Rule 702 requires that “[e]xpert testimony ... be both relevant and reliable.” *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 463 (9th Cir. 2014) (quotation omitted). “Relevancy simply requires that ‘[t]he evidence ... logically advance a material aspect of the party’s case.’” *Id.* “The relevancy bar is low,” and “is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry.” *Messick v. Novartis Pharm. Corp.*, 747 F.3d 1193, 1197 (9th Cir. 2014) (quotation omitted).

With respect to reliability, the Court’s task is to determine “whether an expert’s testimony has a reliable basis in the knowledge and experience of the relevant discipline.” *Estate of Barabin*, 740 F.3d at 463. Ultimately, the Court has broad discretion and flexibility in assessing an expert’s reliability. *Id.*

ARGUMENT

I. Dr. Morton’s Opinions Are Reliable

UHC first challenges Dr. Morton’s opinions on the grounds that they are “not based on data or any appropriate foundation.” More specifically, UHC levies a slew of strange and irrelevant charges on her purported lack of “data” and “methodology.” For example, UHC faults Dr. Morton for failing to “quantify” the different aspects of comprehensive lactation support. As a preliminary matter, comprehensive lactation support, as a general matter, cannot be quantified. As Dr. Morton explained:

A. I have not seen any well-researched reports on how much time it takes the

average IBCLC or the average provider -- a sophisticated provider of lactation support takes to perform a first-time complete exam. And the reason one would not conduct that study is because *it varies so much from mother to mother*.

Morton 2/11/19 Dep. 243:8-15 (emphasis added).³ In other words, providing comprehensive lactation services is, obviously, not the same as manufacturing an automobile on an assembly line; there is no predictable lead time for the process. Moreover, such quantification and variability are irrelevant. As this Court already made clear, the ACA “requires coverage of lactation support regardless of whether a woman is receiving it in response to symptoms,” so the length of time it takes to provide comprehensive lactation support or “role of various factors that lead to breastfeeding cessation” is beside the point. [ECF No. 146, at 2-3.]

UHC’s other “quantification” criticisms also make no sense—UHC asserts that Dr. Morton “refers to physicians’ knowledge, skill and care as ‘suboptimal’ without qualifying or quantifying what that means or how the alleged problem is distributed.” But as explained thoroughly in her report and discussed below, the “problem” is that physicians generally do not receive adequate lactation support training as medical students or residents; the distribution of that problem, obviously, is throughout the United States. 12/4/18 Report, at 7-10. UHC’s remaining critiques are similarly based on the absurd notion that each of Dr. Morton’s opinion needs to be supported by quantitative or statistical evidence or a peer review article to be reliable.⁴ But Dr. Morton is not proffered as a scientific or technical expert, and, as such is not subject to the set of reliability requirements UHC attempts to impose.⁵

To the contrary, as noted above, the Ninth Circuit has made clear that the *Daubert* analysis is different for non-scientific or technical experts. *Hankey*, 203 F.3d at 1169; *see*

³ [ECF No. 177-1, at 94.]

⁴ Therefore, even if Dr. Morton had admitted that her opinion that time constraints prevent providers and physicians from rendering lactation support and counseling would not be sufficiently grounded “for submission for a peer reviewed paper or publication” (Motion, at 3:5-7), it is of no moment.

⁵ Indeed, based on its own standard, UHC has presented no admissible or credible evidence to support its assertion that its in-network pediatric and OB/GYN providers are capable of comprehensive lactation support. Its expert, Dr. Lee, does not proffer any quantitative, statistical, or peer review support to that effect. [ECF No. 163, at 6.] While Dr. Lee’s Report is not unreliable on those grounds, it is unreliable for other reasons as well.

1 *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 156 (1999) (“no one denies that an expert may
 2 draw a conclusion from a set of observations based on extensive and specialized experience”);
 3 *see also* Fed. R. Evid. 702, advisory committee’s note (“Nothing in this amendment is intended
 4 to suggest that experience alone—or experience in conjunction with other knowledge, skill,
 5 training or education—may not provide a sufficient foundation for expert testimony”).

6 Instead, expert testimony on certain subjects, such as industry standards and practices,
 7 can be reliably based on knowledge and experience. *See, e.g., Hangarter v. Provident Life &*
 8 *Acc. Ins. Co.*, 373 F.3d 998, 1018 (9th Cir. 2004) (“unlike scientific or technical testimony, the
 9 reliability of Caliri’s testimony [on insurer industry standards] was not contingent upon a
 10 particular methodology or technical framework, the district court did not abuse its discretion in
 11 finding Caliri’s testimony reliable based on his knowledge and experience”); *Kanellakopoulos v.*
 12 *Unimerica Life Ins. Co.*, No. 15-CV-04674-BLF, 2018 WL 984826, at *2 (N.D. Cal. Feb. 20,
 13 2018) (“The Ninth Circuit has held that insurance experts with similar qualifications [of 40 years
 14 of experience in the insurance field] satisfy the *Daubert* reliability prong” to “testify regarding
 15 industry standards and practices”); *English v. Estes Express Lines*, No. 516CV01353CASSKX,
 16 2018 WL 1136058, at *5 (C.D. Cal. Feb. 15, 2018) (“Kleiner may properly testify as to the
 17 particular industry standards that govern appropriate human resource management, given
 18 Kleiner’s education and training in the area of human resource management and his current
 19 position as a professor of human resource management”); *Med. Sales & Consulting Grp. v. Plus*
 20 *Orthopedics USA, Inc.*, No. 08CV1595 BEN BGS, 2011 WL 290986, at *2 (S.D. Cal. Jan. 27,
 21 2011) (“Phillips appears qualified to offer a reliable opinion on industry standards and practices
 22 and the effect of specific events on Plaintiffs’ [orthopedic medical device] businesses given those
 23 standards and practices. In this respect, his testimony is admissible”).

24 Here, Dr. Morton is providing testimony regarding the industry standards and practices of
 25 American medicine with respect to breastfeeding and lactation support. And as Dr. Morton
 26 repeatedly makes clear in her reports and deposition testimony, her opinions are grounded in her
 27 experience and research as a pediatrician and Stanford Medical School professor with a long-
 28

1 standing interest in and focus on breastfeeding. *See, e.g.*, 12/4/18 Report, at 8-9; Morton 2/11/19
 2 Dep., at 166:14-16, 205:23-206:8;⁶ *see generally* 12/4/18 Report, Ex. A.

3 For this type of expert testimony, Rule 702 provides that, “[i]f the witness is relying
 4 solely or primarily on experience, then the witness must explain how that experience leads to the
 5 conclusion reached, why that experience is a sufficient basis for the opinion, and how that
 6 experience is reliably applied to the facts.” Fed. R. 702, advisory committee’s note. Dr. Morton
 7 does just that in her reports.

8 Dr. Morton’s expertise, experience and reputation in breastfeeding and lactation support
 9 are impeccable, which UHC does not, because it cannot, plausibly challenge.⁷ As described in
 10 her biographical sketch, Dr. Morton has been a pediatrician for almost 50 years, with a long-
 11 standing interest in and focus on breastfeeding. 12/4/18 Morton Report, Ex. A. In the course of
 12 her extensive career, she, among many other things, was a Clinical Professor of Pediatrics at the
 13 Stanford University School of Medicine, developed and directed the Breastfeeding Medicine
 14 Program at the Stanford University Medical Center, and helped develop and test a breastfeeding
 15 curriculum for medical residents that evolved into the model “Breastfeeding Residency
 16 Curriculum” that the American Academy of Pediatrics recommends today. *See id.* at 2; Morton
 17 11/14/17 Dep., at 90:10-20.⁸ She also served as an Executive Board Member of the American
 18 Academy of Pediatrics, Section of Breastfeeding (“AAP”), as well as an Executive Board
 19 Member of the American Academy of Breastfeeding Medicine. *See* 12/4/18 Morton Report, Ex.
 20 A, at 2-3. Indeed, Dr. Morton’s storied career covers and is intertwined with American
 21 medicine’s re-discovery of the benefits of breastfeeding, including the introduction of lactation
 22 consultants during the 1980s. Morton 11/14/17 Dep., at 19:12-25:25.⁹ And Dr. Morton
 23 continues to be an active member in the breastfeeding community today, presenting regularly

24 ⁶ [ECF No. 177-1, at 75, 85.]

25 ⁷ Notably, one of UHC’s experts and a colleague of Dr. Morton, Dr. Henry Lee, not only agreed
 26 that Dr. Morton was an “expert in breastfeeding,” but testified that Dr. Morton served as the
 27 pediatrician for Dr. Lee’s first child and even assisted Dr. Lee’s wife with breastfeeding. 1/21/19
 Lee Dep., at 28:14-22.

28 ⁸ [ECF No. 177-1, at 28.]

⁹ [ECF No. 177-1, at 10-11.]

1 and frequently, conducting research, teaching medical students, and providing consultation
2 services on breastfeeding-related issues. 12/4/18 Report, Ex. A, at 3-6.

3 Based on her accomplishments, credentials, and experience, it should be obvious that Dr.
4 Morton is intimately aware of the recent history and current status of lactation support in
5 American medicine. But Dr. Morton also pinpoints and explains the precise bases for her
6 conclusions in her reports and testimony. Defendants imply that Dr. Morton only relied on two
7 studies in support of her claim. Motion, at 3:20-22, 4:3-17, 7:9-19. That is not true. Among
8 other things, Dr. Morton relied on the current AAP/CDC research study, which she referenced in
9 her report. 1/25/2019 Report, at 4. As stated in Dr. Morton's 1/25/2019 Report: "In addition to
10 the sources referenced in the Morton Reports, in 2018 the AAP issued the Physician Education
11 and Training on Breastfeeding Action Plan addressing these significant gaps, including goals to:
12 (1) engage physicians and stakeholders to address the continuing significant gaps in
13 breastfeeding training and education of physicians; and (2) "develop a scope of practice for
14 physicians in breastfeeding and describe other members of the health care team and lay
15 personnel who provide breastfeeding support and how physicians might refer and or consult with
16 them." 1/25/19 Report, at 4 (citing *The Physician Education and Training on Breastfeeding
17 Action Plan is supported by the American Academy of Pediatrics Physician Engagement and
18 Training Focused on Breastfeeding Project, a grant from the Centers for Disease Control and
19 Prevention, Division of Nutrition, Physical Activity, and Obesity, Department of Health and
20 Human Services*; Cooperative Agreement 6 NU38OT000167-04-01. 2018.
21 [https://www.aap.org/en-us/advocacy-and-policy/aap-](https://www.aap.org/en-us/advocacy-and-policy/aap-healthinitiatives/Breastfeeding/Pages/Physician-Education-and-Training-on-Breastfeeding-Action-Plan.aspx)
22 [healthinitiatives/Breastfeeding/Pages/Physician-Education-and-Training-on-Breastfeeding-](https://www.aap.org/en-us/advocacy-and-policy/aap-healthinitiatives/Breastfeeding/Pages/Physician-Education-and-Training-on-Breastfeeding-Action-Plan.aspx)
23 [Action-Plan.aspx](https://www.aap.org/en-us/advocacy-and-policy/aap-healthinitiatives/Breastfeeding/Pages/Physician-Education-and-Training-on-Breastfeeding-Action-Plan.aspx)).

24 As mentioned briefly above, Dr. Morton, together with other colleagues, developed and
25 tested a model breastfeeding curriculum for medical residents because of the general lack of or
26 incompleteness of such instruction in medical schools, the results of which were published in a
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1 study in 2010. Morton 11/14/17 Dep., at 87:7-91:2;¹⁰ Feldman-Winter L, et al., *MD Residency*
 2 *Curriculum Improves Breastfeeding Care* (Published online 7/5/2010) (cited in 12/4/18 Report, at
 3 8 n.14). To Dr. Morton’s knowledge, however, the programs that implemented the model
 4 breastfeeding curriculum as part of the study terminated implementation once the study was
 5 over. Morton 11/14/17 Dep., at 91:13-18.¹¹ And, despite the AAP’s recommendation and
 6 advocacy, few pediatric programs have adopted that or similar curriculum; the time-consuming
 7 nature of the breastfeeding education necessary to inculcate medical residents with the requisite
 8 understanding and capabilities is an obvious obstacle. *Id.* at 91:22-93:11;¹² 12/4/18 Report, at 8.
 9 This is just one of the many instances that illustrate the difference between the AAP’s
 10 aspirational goals and actual physician/staff competency. 12/4/18 Report, at 9. Meanwhile,
 11 based on her research and experience, Dr. Morton has never seen the American College of
 12 Obstetrics and Gynecologists (“ACOG”) recommend, much less mandate, that its members learn
 13 the critical steps to become proficient at providing lactation support. *Id.* at 96:7-97:5. Instead,
 14 “ACOG’s recommendations [are] for quick referral to lactation consultants, again not
 15 pediatricians.” *Id.* at 32:2-33:7, 96:17-98:12.

16 Indeed, the contrast between the AAP and ACOG’s aspirational statements regarding
 17 physician lactation support proficiency and the lack of actual development toward those goals is,
 18 unfortunately, confirmed by the persistent low rate of exclusive breastfeeding in the United
 19 States. 12/4/18 Report, at 9; Bartick, MC, *et al.*, *Suboptimal breastfeeding in the United States:*
 20 *Maternal and pediatric health outcomes and costs*, *Maternal & Child Nutrition* (2017:13(1),
 21 e12366) (cited in 12/4/18 Report, at 10 n.22). Conversely, Dr. Morton is not aware of any peer-
 22 reviewed study or evidence to the contrary—*i.e.*, that “most OB/GYN or pediatric doctors or
 23 staff are competent providers” of comprehensive lactation support. 12/4/18 Report, at 12. Given
 24 all this evidence that most pediatric and OB/GYN physicians are not trained and do not acquire
 25 training to provide comprehensive lactation support, the next logical conclusion that

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 27 ¹⁰ [ECF No. 177-1, at 27-28.]

¹¹ [ECF No. 177-1, at 28.]

¹² [ECF No. 177-1, at 28.]

comprehensive lactation support is generally not within their standard of care. *Id.* at 4.¹³

Such reasoned conclusions based on long-standing experience supported by academic literature easily passes muster under *Daubert*. See, e.g., *Hsingching Hsu v. Puma Biotechnology, Inc.*, No. SACV1500865AGJCGX, 2018 WL 4956520, at *2 (C.D. Cal. Oct. 5, 2018) (expert’s opinion on “industry standards for disclosing clinical trial results” were reliable because he has “sufficient credentials and experience” and his “report and deposition reveal that he carefully draws on this experience”); *Radware, Ltd. v. F5 Networks, Inc.*, No. 13-CV-02024-RMW, 2016 WL 590121, at *21 (N.D. Cal. Feb. 13, 2016) (rejecting reliability challenge on the basis that the expert “employ[ed] no discernable methodology” because “the court f[ou]nd that Mr. Banks bases his opinions on his experience in the networking industry, and that he explains how he reached his conclusions”); *AFL Telecommunications LLC v. SurplusEQ.com Inc.*, 946 F. Supp. 2d 928, 948 (D. Ariz. 2013) (“Duke’s opinion about the possible effects of the modifications found in the 818 splicer is based on his experience repairing splicers, not on ‘subjective belief or unsupported speculation’”) (quoting *Daubert*, 509 U.S. at 589).

II. Dr. Morton’s Opinions Are Relevant

UHC’s other challenge to Dr. Morton’s opinions is that they are purportedly irrelevant, based on Defendants’ arguments that “they are not ultimately opinions about Defendants” but “about healthcare in America *en masse*,” and because of Dr. Morton’s unfamiliarity with Defendants’ provider network and policies and practices. UHC’s relevancy arguments are also absurd and contradictory.

Defendants argued on summary judgment and now on class certification that “every

¹³ As reflected by their inability to mount an actual argument challenging the credibility of Dr. Morton’s opinions, Defendants also assert several trivial arguments, such as the fact that lactation/lactation services are covered on both the pediatrician and OB/GYN board exams, and the datedness of the Taveras study. As to the former, Dr. Morton explained that the board exam questions were few, “very superficial,” and not particularly relevant to providing lactation support. Morton 11/14/17 Dep., at 26:4-19, 101:6-13 [ECF No. 177-1, at 12, 30]. As to the latter, as Dr. Morton explained, there are no other studies, more current or otherwise, that reach a different conclusion with respect to pediatrician and OB/GYN training, which her experience corroborates. Morton 2/11/19 Dep., at 339:17-341:25 [ECF No. 177-1, at 118-19].

1 member of their health plans had meaningful access to in-network lactation services because
 2 [they] have contracted with a large number of pediatricians and OBGYNs . . . and these
 3 providers have the expertise to provide lactation services.” [ECF No. 146, at 3] (order on
 4 summary judgment); [ECF No. 163, at 5-6] (Defendants’ opposition to class certification). Not
 5 only was this argument irrelevant for summary judgment and is likewise irrelevant for class
 6 certification, it is simply not true. [ECF No. 146, at 3] (“Even assuming that some pediatricians,
 7 OBGYNs and their practices provide comprehensive lactation support and counseling, this fact –
 8 absent evidence that pediatricians and OBGYNs in a particular plaintiff’s vicinity were, in fact,
 9 providing those services to their patients and that the defendants made the plaintiff aware of that
 10 – does not create a genuine issue of fact as to whether a particular plaintiff had meaningful
 11 access to lactation support”); [ECF No. 161, at 8] (evidence that Defendants failed to develop a
 12 network of lactation specialists because they rationalized, without any basis, that their in-network
 13 pediatricians and OB/GYNs “already provide this service”) (Plaintiffs’ motion for class
 14 certification). Plaintiffs only proffer Dr. Morton’s opinions on the lactation support capabilities
 15 of pediatricians and OB/GYNs to rebut the assertion that UHC used to try to justify its failure to
 16 retain or identify lactation specialists in its network. [ECF No. 161, at 8 n.13.]

17 In other words, to the extent UHC persists in making the argument that it complied with
 18 its duty under the ACA to provide access for comprehensive lactation support services just
 19 because it had other provider types in-network, like pediatricians and OB/GYNs, Dr. Morton’s
 20 opinions are relevant as rebuttal evidence. If, based on Dr. Morton’s opinions—which are
 21 grounded in extensive, directly relevant experience and supported by academic and professional
 22 studies and literature—pediatricians and OB/GYNs are generally incapable of providing
 23 comprehensive lactation support services, then it is reasonable to infer that UHC’s in-network
 24 pediatricians and OB/GYNs are drawn from the same pool and, thus, similarly incapable.¹⁴

25
 26 ¹⁴ Contrary to Defendants’ assertion, Dr. Morton did not “walk back” from her opinion that “[i]t
 27 is impractical and unrealistic to expect mothers to be able to determine which OB/GYNs,
 28 pediatricians, or other primary care providers can provide [comprehensive lactation services],
 absent guidance from their insurance providers.” 12/18/19 Report, at 12. She only testified that
 she believed that new mothers should also have easy access to referrals to proficient lactation

1 In other words, Dr. Morton's opinions regarding the general lactation support capabilities
 2 of pediatricians and OB/GYNs and their staff establish that UHC does not prove through
 3 reference to such provider-types that providers in their network are actually providing lactation
 4 support services. Indeed, though UHC criticizes Dr. Morton for not conducting a study of the
 5 lactation support capabilities of the pediatricians and OB/GYNs in UHC's network, (Motion, at
 6 10:11-25), UHC failed to do the same throughout the Class Period. Thus, again, to the extent
 7 UHC's argument about the lactation support capabilities of the general population of its network
 8 OB/GYNs and pediatricians is relevant, Dr. Morton's opinions on this issue fit neatly into the
 9 test for relevance. *See* Fed. R. Evid. 401 ("Evidence is relevant if: it has any tendency to make a
 10 fact more or less probably that it would be without the evidence"); *see, e.g., Moussouris v.*
 11 *Microsoft Corp.*, 311 F. Supp. 3d 1223, 1237 (W.D. Wash. 2018) ("Dr. Farber's opinions are
 12 relevant, despite the fact that Dr. Farber's statistical analysis aggregates data across the entire
 13 population and does not reach any conclusion regarding [Microsoft's 'pay and promotions
 14 process']"); *Stathakos v. Columbia Sportswear Co.*, No. 15-CV-04543-YGR, 2017 WL 1957063,
 15 at *4 (N.D. Cal. May 11, 2017) ("Defendants themselves have placed such comparison at issue
 16 by arguing that all they need show to escape liability is that the Outline SMU Builds were similar
 17 enough to their Inline counterparts such that the reference prices used were accurate and valid.
 18 Ms. Goldaper's opinion directly addresses such issue, and is therefore relevant").¹⁵

19 Finally, Defendants argue that "Dr. Morton's views on the services that the Plaintiffs
 20 received is not relevant because she does not dispute that Plaintiffs' physicians provided them
 21 support providers from hospital staff or their children's pediatricians. Morton 11/14/17 Dep., at
 22 124:9-20 [ECF No. 177-1, at 124]. She also testified that, "if a member calls up [her insurance
 23 company] and says who's listed [that can provide comprehensive lactation support], that they
 24 should get more than 'we don't have anybody.'" *Id.*
 25 ¹⁵ The authorities that Defendants cite as examples where the court excluded an expert based on
 26 relevancy are easily distinguishable. In *Bakst v. Cmty. Mem'l Health Sys., Inc.*, the court found
 27 that the expert's "damages calculation [was] based on factual assumptions that are entirely
 28 unsupported in the record." No. CV0908241MMMFFMX, 2011 WL 13214315, at *20 (C.D.
 Cal. Mar. 7, 2011). Similarly, the expert's "model for calculating actual damages" in
ThermoLife Int'l, LLC v. Gaspari Nutrition Inc. relied on an excluded report. 648 F. App'x 609,
 614 (9th Cir. 2016). Here, Dr. Morton's opinions do not rest on any "factual assumptions that
 are entirely unsupported in the record"; they rest on her experience and the studies she cites.

1 with lactation support and counseling.” This argument is, in the first instance, contrary to the
 2 Court’s holdings, discussed *supra*, and, as this Court previously found, “absurd.” The Court
 3 previously rejected UHC’s argument in support of its motion to dismiss that “the existence of
 4 some in-network lactation counseling (for example, Hoy’s 15-minute session in the hospital
 5 shortly after she gave birth) . . . proves compliance with the [ACA].” [ECF No. 68, at 3] (Order
 6 on motion to dismiss). Instead, the Court held that the “service must be available in a
 7 meaningful way”; in other words, Defendants do not comply with the ACA simply because
 8 Plaintiffs received some, though ultimately incomplete, lactation support. *Id.*

9 In addition, the opinions with respect to the Plaintiffs’ experiences in Dr. Morton’s
 10 January 2019 Rebuttal Report were offered in rebuttal to Dr. Lee’s opinions about them.¹⁶ In
 11 opposing Plaintiffs’ Motion for Class Certification, Defendants have not offered Dr. Lee’s
 12 opinions with respect to Ms. Carroll and Ms. Endicott.

13 CONCLUSION

14 For the foregoing reasons, the Court should deny Defendants’ Motion.

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23 ¹⁶ Dr. Morton opined that: it is “not the standard of care for physicians and their staff to provide
 24 [CLS] for the breastfeeding dyad, especially those at high risk or with complications” (Ex. 43,
 25 1/25/19 Morton Report at 3); “it is not the standard of care for physicians to assume primary
 26 responsibility for the management of CLS” (*id.*); “Dr. Lee’s assessment of the
 27 care...demonstrates his misunderstanding of the critical need for lactation specific care during
 28 the outpatient post-partum period and the value of CLS provided by lactation experts, such as
 physicians skilled in breastfeeding medicine and [IBCLCs]” (*id.* at 5); and, Plaintiffs “did not
 receive CLS from their primary care providers” (*id.* at 9). Dr. Morton’s rebuttal was based on a
 standard methodology utilized by physicians, the S.O.A.P. note (12/4/2018 Report at 4-5;
 1/25/2019 Report, at 6).

1 DATED: April 4, 2019

**SHEPHERD, FINKELMAN, MILLER AND
SHAH, LLP**

2 By: /s/ Kolin C. Tang

3 Kolin C. Tang (CA Bar No. 279834)
4 1401 Dove Street, Suite 540
5 Newport Beach, CA 92660
6 Phone: (323) 510-4060
7 Fax: (866) 300-7367
8 ktang@sfmslaw.com

9 Nicholas E. Chimicles (admitted *pro hac vice*)
10 Kimberly Donaldson Smith (admitted *pro hac vice*)
11 Stephanie E. Saunders (admitted *pro hac vice*)

**CHIMICLES SCHWARTZ KRINER &
DONALDSON-SMITH LLP**

12 361 W. Lancaster Avenue
13 Haverford, PA 19041
14 (610) 642-8500
15 NEC@Chimicles.com
16 KMD@Chimicles.com
17 SES@Chimicles.com

18 Nathan Zipperian (admitted *pro hac vice*)

**SHEPHERD, FINKELMAN, MILLER AND
SHAH, LLP**

19 1625 N. Commerce Pkwy. #320
20 Ft. Lauderdale, FL 33326
21 (954) 515-0123
22 nzipperian@sfmslaw.com

23 Marc A. Goldich (admitted *pro hac vice*)

24 Noah Axler (to seek admission *pro hac vice*)

AXLER GOLDICH LLC

25 1520 Locust Street
26 Suite 301
27 Philadelphia, PA 19102
28 Phone: (267) 534-7400
Fax: (267) 534-7407
mgoldich@axgolaw.com
naxler@axgolaw.com

1 James E. Miller (CA Bar No. 262553)
2 Laurie Rubinow (to seek admission *pro hac vice*)
3 **SHEPHERD, FINKELMAN, MILLER AND**
4 **SHAH, LLP**
5 65 Main Street
6 Chester, CT 06412
7 Phone: (860) 526-1100
8 Fax: (866) 300-7367
9 jmillersfmslaw.com
10 lrubinowsfmslaw.com

11 Jonathan W. Cuneo (to seek admission *pro hac vice*)
12 Pamela B. Gilbert (to seek admission *pro hac vice*)
13 Monica E. Miller (to seek admission *pro hac vice*)
14 Katherine Van Dyck (to seek admission *pro hac vice*)
15 **CUNEO GILBERT & LADUCA, LLP**
16 4725 Wisconsin Ave. NW, Suite 200
17 Washington, DC 20016
18 Phone: (202) 789-3960
19 Fax: (202) 789-1813

20 *Attorneys for Plaintiffs and the Proposed Classes*

CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2019, I served the foregoing **PLAINTIFFS'**
MEMORANDUM OF POINTS & AUTHORITIES IN OPPOSITION TO DEFENDANTS'
DAUBERT MOTION CONCERNING THE EXPERT TESTIMONY AND OPINIONS OF
JANE MORTON, M.D., IN CONNECTION WITH PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION. on the following counsel of record via email:

Martin J. Bishop
Rebecca R. Hanson
Thomas C. Hardy
Abraham J. Souza
Reed Smith LLP
10 S. Wacker Drive, 40th Floor
Chicago, IL 60606
mbishop@reedsmith.com
rhanson@reedsmith.com
thardy@reedsmith.com
asouza@reedsmith.com

Karen A. Braje
Reed Smith LLP
101 Second Street, Suite 1800
San Francisco, CA 94105
kbraje@reedsmith.com

Dianna C. Wyrick
Reed Smith LLP
Reed Smith Centre
225 Fifth Avenue
Pittsburgh, PA 15222
dwyrick@reedsmith.com

Janet H. Kwuon
Reed Smith LLP
355 S. Grand Ave., Suite 2900
Los Angeles, CA 90071
jkwuon@reedsmith.com

Attorneys for Defendants

/s/ Kolin C. Tang

Kolin C. Tang

Kristen Law Sagafi (Bar No. 222249)
TYCKO & ZAVAREEI LLP
483 Ninth Street, Suite 200
Oakland, CA 94607
Phone: (510) 254-6808
Fax: (202) 973-0950
ksagafi@tzlegal.com

Attorney for Plaintiffs

**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

**DECLARATION OF KOLIN C. TANG
IN SUPPORT OF PLAINTIFFS'
MEMORANDUM OF POINTS &
AUTHORITIES IN OPPOSITION TO
DEFENDANTS' *DAUBERT* MOTION
CONCERNING THE EXPERT
TESTIMONY AND OPINIONS OF JANE
MORTON, M.D., IN CONNECTION
WITH PLAINTIFFS' MOTION FOR
CLASS CERTIFICATION**

Date: April 25, 2019

Time: 10:00 am

Place: Courtroom 4

Honorable Vince Chhabria

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

2 1. I am an associate at Shepherd, Finkelman, Miller & Shah, LLP, and am one of the
3 attorneys representing Plaintiffs, Rachel Condry, Jance Hoy, Christine Endicott, Laura Bishop,
4 Felicity Barber, and Rachel Carroll, in the above-captioned matter. I am a member of the bar of
5 the State of California.

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

8 3. I respectfully support this Declaration in Support of Plaintiffs' Memorandum of
9 Points & Authorities in Opposition to Defendants' *Daubert* Motion Concerning the Expert
10 Testimony and Opinions of Jane Morton, M.D. in connection with Plaintiffs' Motion for Class
11 Certification.

12 4. Attached hereto as Exhibit "A" is a true and correct copy of an excerpt of the
13 transcript of the Video Deposition of Expert Henry Lee, M.D., dated January 21, 2019.

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

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

17
18 /s/ Kolin C. Tang
19 Kolin C. Tang
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EXHIBIT A

1 UNITED STATES DISTRICT COURT

2 NORTHERN DISTRICT OF CALIFORNIA

3 SAN FRANCISCO DIVISION

4 RACHEL CONDRY, JANICE HOY,)
CHRISTINE ENDICOTT, LAURA)
5 BISHOP, FELICITY BARBER,)
and RACHEL CARROLL, on) Case No.:
6 behalf of themselves and) 3:17-CV-00183-VC
all others similarly)
7 situated,)

8 Plaintiff,)

9 vs.)

10 UNITEDHEALTH GROUP, INC.,)
UNITEDHEALTHCARE, INC.,)
11 UNITED HEALTHCARE)
INSURANCE COMPANY, UNITED)
12 HEALTHCARE SERVICES, INC.,)
& UMR, INC. ,)

13 Defendants.)
14 _____)

15 CONFIDENTIAL TRANSCRIPT

16 VIDEO DEPOSITION OF EXPERT

17 HENRY LEE, M.D.

18 January 21, 2019

19 9:08 a.m.

20
21 101 Second St., Ste 1800

22 San Francisco, California 94105

23
24 REPORTED BY:

25 Tammy Moon, CSR No. 13184

<p>Page 2</p> <p>1 APPEARANCES:</p> <p>2</p> <p>3 FOR PLAINTIFF:</p> <p>4 SHEPHERD FINKELMAN MILLER & SHAH LLP</p> <p>5 BY: JAYNE E. GOLDSTEIN, ESQ.</p> <p>6 1625 N. Commerce Parkway, Ste 320</p> <p>7 Fort Lauderdale, FL 33326</p> <p>8 954.515.0123</p> <p>9</p> <p>10 FOR DEFENDANT:</p> <p>11 REEDSMITH LLP</p> <p>12 BY: JANET H. KWUON, ESQ.</p> <p>13 355 South Grand Ave., Ste 2900</p> <p>14 Los Angeles, California 90071</p> <p>15 213.457.8013</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>14 ALSO PRESENT: LYNN MARI, CLVS</p>	<p>Page 4</p> <p>1 INDEX TO EXHIBITS</p> <p>2 HENRY LEE, M.D.</p> <p>3 Monday, January 21, 2019</p> <p>4 Tammy Moon CSR No. 13184, RPR, CRR</p> <p>5</p> <p>6 MARKED DESCRIPTION PAGE</p> <p>7 Exhibit 1 Report dated 8/21/2017; 12</p> <p>8 Exhibit 2 Report dated 12/11/2018 12</p> <p>9 (Confidential: Exhibits 4-6)</p> <p>10 Exhibit 3 Nutritional Support of the Very 12</p> <p>11 Low Birthweight Infant: Quality</p> <p>12 Improvement Toolkit</p> <p>13 Exhibit 4 Nutritional Support of the Very 108</p> <p>14 Low Birthweight Infant: Quality</p> <p>15 Improvement Toolkit</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p>Page 3</p> <p>1 INDEX TO EXAMINATION</p> <p>2</p> <p>3 WITNESS: HENRY LEE, M.D.</p> <p>4</p> <p>5 EXAMINATION PAGE</p> <p>6 By MS. GOLDSTEIN 6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11 INFORMATION REQUESTED:</p> <p>12 PAGE LINE</p> <p>13</p> <p>14 DOCUMENTS REQUESTED</p> <p>15 PAGE LINE</p> <p>16</p> <p>17</p> <p>18 WITNESS INSTRUCTIONS NOT TO ANSWER:</p> <p>19 PAGE LINE</p> <p>20 NONE</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>Page 5</p> <p>1 SAN FRANCISCO, CALIFORNIA</p> <p>2 Monday, January 21, 2019, 9:08 a.m.</p> <p>3 THE VIDEOGRAPHER: Good morning. We're on the</p> <p>4 record. This is the video recorded deposition of Dr.</p> <p>5 Henry Lee in the matter of Rachel Condry, et al., versus</p> <p>6 UnitedHealthGroup, Inc., et al., case number</p> <p>7 3:17-CV-00183-VC. In the United States District Court,</p> <p>8 Northern District of California, San Francisco division,</p> <p>9 taken on behalf of plaintiff.</p> <p>10 This deposition's taking place at 101 Second</p> <p>11 Street, 18th floor, San Francisco, California, 94105, on</p> <p>12 January 21st, 2019, at 9:09 a.m.</p> <p>13 My name is Lynn Mari, CLVS. I'm the</p> <p>14 videographer with US Legal Support. Video and audio</p> <p>15 recording will be taking place unless all counsel have</p> <p>16 agreed to go off the record.</p> <p>17 Would all present please introduce themselves,</p> <p>18 beginning with the witness.</p> <p>19 THE WITNESS: My name is Henry Lee.</p> <p>20 MS. KWUON: Janet Kwon on behalf of</p> <p>21 UnitedHealth.</p> <p>22 MS. GOLDSTEIN: Jayne Goldstein, Shepherd</p> <p>23 Finkelman Miller & Shah on behalf of the plaintiffs.</p> <p>24 THE VIDEOGRAPHER: The certified court reporter</p> <p>25 is Tammy Moon.</p>

<p style="text-align: right;">Page 26</p> <p>1 Q. And that's in California, correct?</p> <p>2 A. Yes.</p> <p>3 Q. And do you have any knowledge of how lactation</p> <p>4 consultants are used nationwide?</p> <p>5 A. I think I have some knowledge of that.</p> <p>6 Q. And what is your knowledge of that?</p> <p>7 A. I think that it -- it must vary according to</p> <p>8 region and by hospital. But I think that many NICUs</p> <p>9 across the country do have lactation consultants as part</p> <p>10 of their healthcare team.</p> <p>11 Q. What, if anything, did you do to prepare for</p> <p>12 your deposition today?</p> <p>13 A. I spent some time reviewing the case with</p> <p>14 the -- with the counsel, Janet Kwon.</p> <p>15 Q. And please don't tell me anything that you</p> <p>16 discussed with your counsel. That -- that's</p> <p>17 attorney-client privilege. I'm not going to be asking</p> <p>18 you anything that was said, so I'm going to ask you some</p> <p>19 questions so try to answer those if you can without</p> <p>20 revealing that.</p> <p>21 Did you review your expert report?</p> <p>22 A. Yes.</p> <p>23 Q. How -- how long did you meet with Ms. Kwon?</p> <p>24 A. About seven hours total.</p> <p>25 Q. And when was that meeting or meetings?</p>	<p style="text-align: right;">Page 28</p> <p>1 Q. Did you review any of the depositions taken</p> <p>2 from the other experts in this case?</p> <p>3 A. No.</p> <p>4 Q. For your preparation today, did you review the</p> <p>5 judge's summary judgment order?</p> <p>6 A. I have read that order, but I have not read</p> <p>7 that recently.</p> <p>8 Q. Do you know any of the other experts in this</p> <p>9 case?</p> <p>10 A. Yes.</p> <p>11 Q. And who do you know?</p> <p>12 A. I know doctor -- Dr. Jane Morton.</p> <p>13 Q. And how do you know Dr. Morton?</p> <p>14 A. She has been my colleague when she was at</p> <p>15 Stanford. She was also the pediatrician of my wife and</p> <p>16 I's first child.</p> <p>17 Q. Did Dr. Morton assist your wife with</p> <p>18 breastfeeding services?</p> <p>19 A. She did.</p> <p>20 Q. Do you consider Dr. Jane Morton to be an expert</p> <p>21 in breastfeeding?</p> <p>22 A. Yes.</p> <p>23 Q. Did you do any additional research to prepare</p> <p>24 for your deposition today?</p> <p>25 A. Could you expand that a little bit?</p>
<p style="text-align: right;">Page 27</p> <p>1 A. It was yesterday and the day before.</p> <p>2 Q. Prior to the day before, which was Saturday,</p> <p>3 did you have any meetings with Ms. Kwon?</p> <p>4 A. No.</p> <p>5 Q. Have you had any telephone conversations with</p> <p>6 Ms. Kwon?</p> <p>7 A. Yes.</p> <p>8 Q. How many of those had you had -- did you have?</p> <p>9 A. Three.</p> <p>10 Q. And were all three recently or were they</p> <p>11 scattered throughout the period of when you wrote your</p> <p>12 report?</p> <p>13 MS. KWON: Objection. Vague and ambiguous,</p> <p>14 but you can answer it if it makes sense.</p> <p>15 THE WITNESS: It was scattered.</p> <p>16 MS. GOLDSTEIN:</p> <p>17 Q. Did you review the attachments and exhibits to</p> <p>18 your report in preparation for your deposition today?</p> <p>19 A. No.</p> <p>20 Q. Have you seen the reports from any of the other</p> <p>21 experts for either side in this case?</p> <p>22 A. Yes.</p> <p>23 Q. Whose expert reports have you seen?</p> <p>24 A. I've seen Dr. Jane Morton's. I do not remember</p> <p>25 if I have seen others. At least not recently.</p>	<p style="text-align: right;">Page 29</p> <p>1 Q. When you've reread your reports, did you then</p> <p>2 go and look something up or check something to see if</p> <p>3 maybe some new guideline came down or any other</p> <p>4 research?</p> <p>5 A. No.</p> <p>6 Q. Now you said you met with counsel for about</p> <p>7 seven hours in total. How many hours on Saturday?</p> <p>8 A. Three and a half.</p> <p>9 Q. And Sunday the same amount of time?</p> <p>10 A. Yes.</p> <p>11 Q. Was anyone else present at that meeting?</p> <p>12 A. There was another counsel who was remotely</p> <p>13 partially attending the meeting.</p> <p>14 Q. Do you know the name of that counsel?</p> <p>15 A. Yes. It was Rebecca Hansen.</p> <p>16 Q. Prior to her listening in on the deposition,</p> <p>17 had you ever spoken to Rebecca Hansen before?</p> <p>18 A. Yes.</p> <p>19 Q. On how many occasions?</p> <p>20 A. I think about three.</p> <p>21 Q. Other than your lawyers, have you spoken to</p> <p>22 anyone else about this case?</p> <p>23 A. No.</p> <p>24 Q. Have you discussed this case with any of your</p> <p>25 colleagues?</p>