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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

JOINT LETTER BRIEF REGARDING DISCOVERY DISPUTE

Honorable Sallie Kim

Close of Discovery: March 29, 2019

The undersigned hereby attest that counsel for Plaintiffs and Defendants met and conferred telephonically on March 11, 2019 concerning Defendants' Objections and Responses to Plaintiffs' Third Set of Requests for Production of Documents ("RFPs" or "RFP"), including RFP No. 5, which forms the basis of this letter. As discussed below, on March 30, 2019, Plaintiffs conveyed a proposed resolution regarding RFP No. 5, to which Defendants responded on April 1, 2019. Plaintiffs' position is that the parties have complied with Section 9 of the Northern District's Guidelines for Professional Conduct regarding discovery before filing this joint letter brief within the permissible timeframe under Rule 37-3. Defendants disagree with that position, as discussed more fully below, but join in this letter brief in the interest of expediency to obtain an efficient resolution to the present discovery dispute.

Dated: April 5, 2019

By: */s/ Kimberly Donaldson-Smith*
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April 5, 2019

Honorable Magistrate Judge Sallie Kim
United States District Court
Northern District of California
450 Golden Gate Avenue
San Francisco, California 94102

Dear Magistrate Judge Kim:

The parties jointly submit this letter concerning a dispute arising from Plaintiffs' Third Set of Requests for Production of Documents. Plaintiffs are seeking to compel a response to one of the Requests. In this action, Plaintiffs allege that Defendants did not provide insurance coverage for comprehensive breastfeeding support and counseling services ("CLS"), which is a preventive care benefit established by the Affordable Care Act (the "ACA"). Plaintiffs allege (among other things) that Defendants not provide coverage for CLS because Defendants did not identify and give insureds meaningful access to network lactation consultants, and, therefore, did not process CLS claims as required by the ACA. Defendants deny Plaintiffs' allegations.

Discovery closed on March 29, 2019. A hearing on Plaintiffs' motion for class certification is set for April 25, 2019 (*see* Dkt. 158). The Court has not set any other case management deadlines or a trial date.

I. PERTINENT PROCEDURAL BACKGROUND

On January 29, 2019, Plaintiffs served on Defendants Plaintiffs' Third Set of Requests for Production of Documents (Exhibit A hereto) consisting of eleven requests for production ("RFPs" or "RFP"). On February 28, 2019, Defendants served their Objections and Reponses to Plaintiffs' RFPs (Exhibit B hereto).

After receipt and review of Defendants' Objections and Responses, the parties held a telephonic meet and confer on March 11, 2019 ("3/11/2019 M&C Call"), during which time the parties addressed RFP No. 5, which is the source of the discovery dispute. RFP No. 5 requests all

claims for providers that appear on the "380 Lists." The reference to "380" in RFP No. 5 pertains to Defendants' specialty code applicable to Lactation Specialists (individuals and groups). The reference to the "380 Lists" pertains to documents produced by Defendants that include the identity of providers identified as 380 Lactation Specialists.

Defendants objected to RFP No. 5 stating that the request "seeks information regarding any and all claims pertaining to services rendered by the providers that appear on the 380 Lists, even those that did not involve coverage of lactation services" and that, to the extent the providers appearing on the 380 Lists billed for services using codes previously agreed to by the parties, such claims already appear in the previously produced claims data, making this request duplicative.

During the 3/11/2019 M&C Call, the parties discussed Defendants' position that the providers that appear on the 380 Lists may provide services other than lactation services; and, thus, pulling all claims for all of the 380 providers on those 380 Lists would be, in Defendants' view, burdensome and not proportional to the needs of the needs of the case. Plaintiffs stated that they disagreed, but suggested that Plaintiffs could undertake: identifying from the 380 Lists the providers who exclusively provide lactation services, and detailing any other limitations or parameters that could be incorporated in the RFP No. 5 request for claims data in an effort to narrow RFP No. 5. Defendants indicated that they would consider a proposal made by Plaintiffs.

Discovery closed on March 29, 2019. In a March 30, 2019 email, Plaintiffs provided Defendants with a proposed revision to the RFP. On April 1, 2019, Defendants responded "that Plaintiffs waited too long to attempt to meaningfully work through the 380 specialist issue" and stated that Defendants would be "happy to find time to further meet and confer." Pursuant to Rule 37-3, requiring that motions to compel discovery be filed within 7 days after the discovery cut-off, Plaintiffs indicated that they would seek relief from the Court.

II. PARTIES' POSITIONS ON THE DISPUTE

a. PLAINTIFFS' POSITION

After the 3/11/2019 M&C Call, in order to address Defendants' objections, Plaintiffs engaged in good faith and diligent efforts to undergo and complete the work and analyses required to narrow the 380 Lists for purposes of the claims data requested to be produced pursuant to RFP No. 5. Specifically, Plaintiffs first undertook to create a compilation of the 380 Lists, and identify duplicates (based on provider last name / entity name). Plaintiffs then researched and reviewed each of the over 750 entries in the 380 Lists to identify the services offered by the providers. Plaintiffs identified that approximately 480 provided exclusive breastfeeding support and counseling services (thereby omitting approximately 35% of the entries); those providers were identified to in the Excel attached to Plaintiffs' March 30, 2019 email. Plaintiffs also prepared the search parameters to be used to further limit the claims requested, for example, by not including claims for breast pumps. Based on Plaintiffs' compiled research, the proposal fairly refines RFP No. 5 and addresses Defendants' objections as discussed during the 3/11/2019 M&C Call.

On March 30, 2019, Plaintiffs provided their substantial work product to Defendants in an email that: (1) requested an update as to when Defendants would produce certain discovery that Defendants had contended, during the 3/11/2019 M&C Call, would be produced; and, (2) conveyed the proposed limitations for a production of claims in Defendants' records, providing a narrowed list of 380 Lactation Specialists and parameters for identification of the claims from Defendants' systems. On April 1, 2019, in a response that is the antithesis of "what is good for the goose is good for the gander", Defendants stated that:

- As to (1), "the parties resolved the Oxford data prior to the close of discovery. That claims pull is still in progress and the data is forthcoming."
- As to (2), "Plaintiffs' proposal below related to the 380 specialist issue is late, coming after the close of discovery. Had we received this prior to the discovery cut off, perhaps the parties could have come to a compromise. At this point, our position is that Plaintiffs

> waited too long to attempt to meaningfully work through the 380 specialist issue described below."

However, Defendants also told Plaintiffs that Defendants "are happy to find time to further meet and confer if you like."

Defendants' entire position is inconsistent with Rule 37-3 and the meet-and-confer process by which the parties were seeking to address Plaintiffs' timely served requests (RFPs were served on January 29, 2019), which is the operative event relative to the discovery cut-off. In Defendants' February 28, 2019 objections and responses, Defendants made boilerplate objections and took the position that they would not produce responsive information to RFP No. 5, but would meet and confer with Plaintiffs. The M&C occurred on March 11, 2019, at which time the parties agreed to Plaintiffs' offer to undertake the burden of conducting the detailed analysis of the previously produced 380 Lists in an effort to narrow the universe of relevant providers in an attempt to reach an agreement on RFP No. 5.

By all accounts, the parties were continuing to work to resolve the outstanding discovery dispute with respect to RFP No. 5, and it was Plaintiffs' understanding that the parties were working cooperatively to potentially resolve the outstanding discovery dispute with respect to RFP No. 5. Indeed, at no point during the 3/11/2019 M&C Call or at any point prior to or on March 30, 2019 did Defendants state, intimate or indicate otherwise. Also, contrary to Defendants' assertion, there was nothing "resolved" about Defendants' purportedly forthcoming production, as Defendants admit, they had not made the agreed-to production prior to the discovery cut-off as Rule 37-3 requires (a "discovery cut-off" is the date by which all responses to written discovery are due).[1] Also, Defendants' stance, that "perhaps" a compromise could have occurred had they received the email less than 24-hours earlier, typifies why Defendants' positon is not countenanced

[1] *See Melian Labs Inc. v. Triology LLC*, No. 13-cv-04791-SBA (KAW), 2014 U.S. Dist. LEXIS 120197, at *4 (N.D. Cal. Aug. 26, 2014) (holding that a party "cannot satisfy its discovery obligation by simply promising that its document production is forthcoming without a specified date of production").

and illogical: It would render meet-and-confers on requests timely-served, near the end of the discovery cut-off, rife with such gamesmanship.

Throughout the litigation, the parties have disputed the "scope" of comprehensive lactation support and counseling services and how providers bill patients and insurance for such services, including the billing codes used as there is not one billing code for CLS. The 380 Lactation Specialists provide breastfeeding support and counseling services and the members of the class received such services from those providers. Thus, fairly and appropriately under these factual circumstances, RFP No. 5 seeks the claims in Defendants' possession from the providers that Defendants identified as 380 Lactation Specialists (as now narrowed by Plaintiffs), and unrestricted by diagnoses code (except to eliminate breast pump claims, which are not at issue). The information sought goes directly to how Defendants provided coverage for and how Defendants processed claims (including how such claims were processed (as denials, with the imposition of cost-sharing, or otherwise)) for CLS. At bottom, Plaintiffs had agreed to undertake the work necessary to address Defendants' objections that the request was overly broad and unduly burdensome. The Plaintiffs diligently and timely did that, and were met with a rejection. Based on the applicable rules, Plaintiffs moved swiftly with the filing of this Letter Brief.

Plaintiffs respectfully request that the Court Order Defendants to produce the documents responsive to RFP No. 5, as modified by Plaintiffs. Further, the proposed comprise proffered by Defendants, below, is too limited and not responsive to RFP No. 5.

b. DEFENDANTS' POSITION[2]

Plaintiffs' request for an order compelling discovery should be denied for several reasons. ***First***, Plaintiffs did not submit their proposal regarding RFP No. 5 to Defendants in a timely

[2] Plaintiffs did not circulate this joint letter to Defendants until the afternoon of April 4, 2019, one day before the letter was due under Local Rule 37-3. The timing of Plaintiffs' circulation deprived counsel for Defendants of adequate time to formulate a response and confer with their client. In light of the time constraints, Defendants reserve the right to supplement this response to the extent necessary.

manner. As indicated above, the parties met and conferred on March 11, 2019, and Plaintiffs indicated that they would formulate a proposed compromise regarding RFP No. 5. Plaintiffs, however, did not convey their proposal to Defendants until the evening of Saturday, March 30, 2019—nearly three weeks later and the day after discovery closed on March 29, 2019. Because Local Rule 37-3 requires the parties to file motions to compel within seven days of the discovery cutoff—*i.e.*, by April 5, 2019—Plaintiffs' decision to wait until after the close of discovery to convey their proposal unduly prejudiced Defendants by forcing Defendants to evaluate Plaintiffs' proposal in in just a few business days. As Defendants indicated in their April 1, 2019 email, Plaintiffs deprived Defendants of the time necessary "to meaningfully work through the 380 specialist issue." Plaintiffs' delay tactics undermine the purpose of discovery cutoffs, which is to provide the parties with certainty regarding their discovery obligations and "to protect the parties from a continuing burden of producing evidence" in perpetuity. *See Whittaker Corp. v. Execuair Corp.*, 736 F.2d 1341, 1347 (9th Cir. 1984); *see also Miller v. Rufion*, No. CIV 08-1233 BTM WMC, 2010 WL 4137278, at *1 (E.D. Cal. Oct. 19, 2010) (explaining same and denying motion to compel responses to tardy discovery requests for this reason). Because Plaintiffs did not communicate their proposal regarding RFP No. 5 to Defendants in a timely manner, the Court should deny their request for an order compelling discovery for this reason alone.[3]

Second, Plaintiffs have failed to comply with the Federal Rules of Civil Procedure, the Local Rules, and this Court's Standing Order by declining to meet and confer with Defendants prior seeking relief from the Court. All three of these authorities require a party to confer in good faith

[3] Contrary to Plaintiffs' assertions above, Defendants' forthcoming production of the Oxford data is irrelevant to the present dispute. Defendants agreed to produce the data before the discovery cutoff and have been working diligently to facilitate that production in a timely manner in light of the burdens and complexities involved in extracting additional claims data. By contrast, here, Plaintiffs did not communicate their proposal regarding RFP No. 5 until after the close of discovery on March 29, 2019. The Court should reject Plaintiffs' effort to infect the present dispute with irrelevant references to other discovery issues, especially in light of the fact that Plaintiffs plainly did not complain about the Oxford data in their March 30, 2019 email to Defendants—they only raise it as an issue now to the Court.

with the opposing party prior to filing a motion to compel. *See* Fed. R. Civ. P. 37(a); Northern District of California Local Rule 37-1; Standing Order of Magistrate Judge Sallie Kim at 4. Here, Defendants offered to meet and confer regarding Plaintiffs' most-recent proposal in their April 1, 2019 email, but Plaintiffs declined to take Defendants up on their offer. Plaintiffs' motivation for foregoing this process is obvious: under Local Rule 37-3, Plaintiffs were required to file this letter by April 5, 2019, and Plaintiffs, therefore, simply did not have time to satisfy their meet-and-confer obligations. But Plaintiffs' time crunch is of their own making given their nearly three-week delay in getting a proposal to Defendants. Because Plaintiffs did not confer with Defendants in good faith prior to seeking relief from this Court, their request to compel discovery should be denied for this reason as well. *See, e.g.*, *Henderson v. Lewis*, No. 17-CV-06977-HSG (PR), 2018 WL 4961661, at *1 (N.D. Cal. Oct. 12, 2018) (denying motion to compel for this reason); *Scheinuck v. Sepulveda*, No. C 09-0727 WHA (PR), 2010 WL 2464822, at *1 (N.D. Cal. June 14, 2010) (same).

Third, Plaintiffs' proposal regarding RFP No. 5 is overly broad, unduly burdensome, and not proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1); *Campbell v. Facebook Inc.*, No. 13-CV-05996-PJH, 2016 WL 7888026, at *1 (N.D. Cal. Oct. 4, 2016) (denying motions to compel for failure to comply with the proportionality standard set forth in Rule 26). Plaintiffs have already sought and obtained substantial volumes of overly broad claims data concerning services provided by the very providers about whom they now seek additional information, including information regarding claims that do not pertain to lactation services. Plaintiffs apparently believe that pulling additional claims information is warranted because the only services Lactation Specialists provide are those related to lactation. That is not the case. A simple Internet search of the names of the providers identified by Plaintiffs as part of their proposal indicates that many of these providers render other, non-lactation-related services to their patients, including cranial-sacral therapy and birthing support as doulas. Further, Plaintiffs identify hospitals as part of their proposal, which

obviously provide services beyond lactation that nevertheless may be associated with the same MPIN number as the hospital for purposes of claims data extraction. Producing all claims information for these providers, therefore, will result in the production of information that has no bearing on the claims at issue in the litigation. For this reason, too, Plaintiffs' request for an order compelling discovery should be denied.

In terms of compromise, Plaintiffs did not circulate this joint letter to Defendants until the late afternoon of April 4, 2019, one day before the letter was due under Local Rule 37-3. The timing of Plaintiffs' circulation deprived counsel for Defendants of adequate time to formulate a response and confer with their client. As noted above, Plaintiffs' proposed compromise is still entirely overbroad and does not consider a vast number of codes that are plainly not related to lactation counseling.[4] Further, Plaintiffs' proposal suggests a number of steps that Defendants are analyzing, but which are complicated and practically cannot be assessed in just a few days. If the Court is inclined to grant Plaintiffs' request, Defendants will need an opportunity to fully work through Plaintiffs' complicated proposal and supplement their response. Defendants anticipate that their response could involve a plan to pull claims for the 380 Providers using a list of lactation-related codes to narrow the results to lactation issues. Defendants believe codes that do not relate to lactation should be excluded, because lactation is the only relevant issue in the case. Defendants also believe such a compromise should exclude codes already used to pull claims for these very same providers as such discovery is duplicative of data Plaintiffs already have in their possession. To be clear, however, Plaintiffs' request for an order compelling discovery should be denied in its entirety, for the reasons discussed above.

[4] By way of example, Plaintiffs' compromise suggests only a subset of breast pump codes that should be excluded, but there are numerous other breast pump codes that should be added to that list (all codes that begin with "A" or "E"). Further, in relation to another code Plaintiffs suggest should be excluded, S9444, there are codes that would fall into the same category that should be excluded. Defendants anticipate that there are numerous other codes that can be excluded, thereby reducing the burden on Defendants of producing wholly irrelevant data.

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ECF ATTESTATION

Pursuant to Civil Local Rule 5-1(i)(3), the filer of this document attests that concurrence in the filing of this document has been obtained from the other signatory above. Executed this 5th day of April, 2019, at Haverford, Pennsylvania.

By: */s/ Kimberly M. Donaldson-Smith*
Kimberly M. Donaldson-Smith