**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 9:16–cv-81180–KAM**

UNITEDHEALTHCARE OF FLORIDA, INC.
and ALL SAVERS INSURANCE COMPANY,

Plaintiffs,

v. JURY TRIAL DEMANDED

AMERICAN RENAL ASSOCIATES LLC and
AMERICAN RENAL MANAGEMENT LLC,

Defendants.
_____/

**Plaintiffs' Motion for Reconsideration or Modification of Omnibus Discovery Order dated August 30, 2017 (DE 290)**

Plaintiffs UnitedHealthcare of Florida, Inc. and All Savers Insurance Company (collectively, "Plaintiffs") respectfully seek reconsideration or modification of the Order dated August 30, 2017 to the extent that the Order grants Defendants American Renal Associates LLC and American Renal Management LLC's (collectively, "ARA") motion to compel, in part, and denies Plaintiffs' motion to compel, in part. Plaintiffs acknowledge that motions for reconsideration are extraordinary. However, the Court's Order establishes a framework that holds the parties to completely different standards on key discovery issues in this case. And the new standards that have been applied solely to Plaintiffs are completely unfair in light of the facts and evidence before the Court.

First, the Court should reconsider or modify its Order granting ARA 16 additional custodians and 12 additional search terms because the Court made no findings that Plaintiffs' production was inadequate in any way that would justify such an extensive amount of additional discovery. Indeed, Plaintiffs' production is not deficient; but even if it were, the Court should nonetheless modify its Order to require any additional custodians and search terms to be limited to what is necessary to address *specific* deficiencies and ensure that they result in a *proportional* and not unduly-burdensome or overbroad set of documents.

Second, the Court should reconsider its refusal to require ARA to produce a privilege log because Plaintiffs did not argue that ARA had waived privilege, as the Court's Order states. DE 290 at 2, ¶ 1.a. Rather, because it has already been *proven* that ARA improperly withheld non-privileged, responsive documents, Plaintiffs are entitled to a mechanism to ensure that ARA is not wrongfully withholding *additional* documents. A privilege log is the only means to provide such assurance.

## ARGUMENT

### I. The Court should reconsider or modify its Order because it did not make any finding that Plaintiffs' production was deficient.

The Court ordered that "Defendants shall be permitted to select an additional sixteen (16) custodians and an additional twelve (12) search terms." DE 290 at 3, ¶ 2.a. This Order should be reconsidered or modified for several reasons.

First, there is absolutely no basis to support the additional discovery. The Court made no finding that Plaintiffs' production was inadequate—nor is there any evidence that would support such a conclusion. Exhibit A to Plaintiffs' opposition brief demonstrates that Plaintiffs produced documents for every category that ARA claimed was deficient. DE 268-1. Indeed, as explained

in their briefing, Plaintiffs have produced over 13,490 documents—just 3,000 fewer than ARA (whose conduct is the focus of this lawsuit). The Court's Order would vastly expand the discovery burdens on Plaintiffs—resulting in 16 custodians (29% increase over what has already been searched) and 12 additional terms (50% more than what had already been searched) for a total of 36 search terms—without a finding that such requirements are necessary to or could be expected to fill in any gaps in Plaintiffs' production.

Second, the Court did not tailor the additional custodians or search terms to any purported inadequacy nor to any proportionality limits required by the recently amended Rule 26(b)(1). ARA sought an additional 47 custodians—17 of which it never requested before. Yet, the Court's Order gave ARA unrestricted discretion to demand any 16 custodians from those 47 with no guidance, limitations, or parameters whatsoever. Likewise, nothing prevents ARA from seeking 12 overbroad, burdensome searches that reach far beyond what could be considered proportional to the case.[1] The Order's lack of boundaries as to the custodians and terms cannot be reconciled with the fact that the Court *denied* ARA's requests for discovery into the very topics that ARA's requested search terms and new custodians were directed at. For example, the Court denied ARA's motion to compel Request for Production Nos. 38-41 finding that "[g]ood cause to renew these requests has not been shown" and that the requests "are overbroad." DE 290 at 3, ¶ 2.b. Yet, ARA's proposed "Additional Search" terms are so overboard that they are intended to capture the very types of documents that this Court has already held—in the same Order—were irrelevant and "overbroad."

Third, the Court should reconsider or modify its Order because it did not provide any mechanism for ensuring that ARA's custodians and search terms do not capture an overwhelmingly burdensome, disproportionate amount of information. Indeed, not only are Plaintiffs required to run the 12 new search terms on 16 new and unknown custodians, but they will have to run those 12 search terms against the 55 other custodians they have already searched. If (as is likely), ARA's proposed search phrases result in an disproportionate number of documents, Plaintiffs have no recourse as the Court's Order only calls for meet and confers if ARA finds it wants *even more documents*. *See* DE 290 at 3, ¶ 2.a. Until now, no party in this case has been allowed to obtain discovery using whatever search terms they desire, and no party has been ordered to accept and run whatever search terms an adverse party comes up with. Had

[1] As of the date of this filing, ARA has not provided Plaintiffs with the names of the 16 custodians or the 12 search terms.

this been the law of the case, Plaintiffs would have obtained much broader (and likely much more complete) discovery from ARA, which refused to use all but the narrowest, most restrictive terms and limiters to search its own documents. It would be unfair to now allow ARA the right to impose on Plaintiffs whatever overbroad and untailored search terms it chooses, when Plaintiffs were not afforded the reciprocal right. If not reconsidered entirely, the Order should, at the very least, be modified to ensure there are limits to what ARA can demand and that there is a meet-and-confer mechanism to ensure that ARA's demands are not unfettered.

Fourth, and most important, the Court's Order is patently unfair. When the Court compelled ARA to produce responsive documents (after ARA refused for months to produce *any* documents), ARA submitted search phrases to the Court that were crafted so narrowly to ensure that responsive documents were not captured. For example, most of its phrases had /5 limiters which would exclude many responsive documents. DE 119. At that point, Plaintiffs submitted a counterproposal (DE 131) setting forth their concern with the narrowness of ARA's proposed terms. *Id.* But the Court declined to require ARA to use any of Plaintiffs' proposed terms and instead required a meet-and-confer process—a requirement the Court did not impose on ARA here. DE 133. If ARA is to be afforded rights to additional custodians and search terms—rights that were never afforded to Plaintiffs—then the Court should at least require the parties to engage in the *same* meet-and-confer process it required when Plaintiffs' proposed terms were at issue.

## II. The Court should reconsider its refusal to compel ARA to provide a privilege log because it withheld responsive, non-privileged documents and there is no other way to ensure that is not withholding more.

Similarly, the Court has held the parties to different, unfair standards regarding privileged materials and the Court should reconsider its refusal to compel ARA to provide a privilege log with respect to withheld documents relating to the John McDonough and Jennifer Cordeiro departures. The Court based its refusal to order a privilege log on a finding that "Defendants have not waived any privilege" in light of L.R. 26.1(3)(2)(C) and relied solely on ARA counsel's representation that all non-privileged documents have been produced. DE 290 at 2, ¶ 1.a. But Plaintiffs had not argued that a privilege log was required because ARA waived privilege—ARA lost the protection that the local rule would otherwise provide by *wrongfully withholding* an indisputably non-privileged document that was directly responsive to Plaintiffs' document requests. *See* DE 251, Ex. 11. Likewise, the Court's complete reliance on ARA counsel's representations should be reconsidered; had it not been for McDonough's counsel informing

Plaintiffs that the document existed, Plaintiffs and the Court never would have known it was being improperly withheld. A privilege log is the only way that Plaintiffs and the Court can ensure that ARA is not wrongfully withholding more non-privileged documents.

In contrast, the Court ordered Plaintiffs to revise their privilege log and will consider reviewing documents *in camera* to ascertain whether they are properly withheld. DE 290 at 3, ¶ 2.d. It did so despite the fact that ARA could point to *no example* where Plaintiffs had wrongfully withheld an indisputably non-privileged document—like ARA verifiably did. There is no reason to apply a different procedure for addressing ARA's privilege claims than for Plaintiffs' privilege claims. Accordingly, Plaintiffs respectfully ask this Court to reconsider its refusal to compel ARA to provide a privilege log for post-complaint documents relating to the Cordeiro and McDonough departures. At the very least, Plaintiffs ask that this Court conduct an *in camera* review of ARA's investigative file to ascertain whether it is properly withheld.

**CONCLUSION**

For the reasons stated above, Plaintiffs respectfully ask this Court to reconsider or modify its August 30, 2017 Omnibus Discovery Order (DE 290) by:

(a) determining that there was no inadequacy of Plaintiffs' production and denying ARA's motion to compel or, in the alternative, modifying the Order so that it requires that any additional custodians and terms must be directed at deficiencies the Court does find and provides a meet-and-confer process as the Court did when ARA's search terms were at issue after Plaintiffs' motion to compel; and

(b) requiring ARA to provide a privilege log for withheld documents relating to the departure of Cordeiro and McDonough to ensure that ARA is not withholding any additional responsive, non-privileged documents as it did until McDonough's counsel informed Plaintiffs of the documents.

Dated: September 12, 2017

By: *s/Michael R. Whitt*

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was electronically filed on September 12, 2017 with the Clerk of Court using the CM/ECF system thereby sending a notice of electronic filing to all counsel of record on the service list below.

*s/Michael R. Whitt*
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