

**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,

vs.

AMERICAN RENAL ASSOCIATES
LLC and AMERICAN RENAL
MANAGEMENT LLC,

Defendants.

_____ /

**DEFENDANTS AMERICAN RENAL ASSOCIATES LLC AND AMERICAN RENAL
MANAGEMENT LLC'S SURREPLY TO PLAINTIFFS' MOTION FOR
RECONSIDERATION**

Defendants American Renal Associates LLC and American Renal Management LLC (collectively, “ARA”) file this Surreply to Plaintiffs UnitedHealthcare of Florida, Inc. and All Saver Insurance Co.’s (collectively, “United”) motion for reconsideration. Plaintiffs’ reply raises arguments for the first time, including attacking the custodians and search terms ARA selected in accordance with this Court’s Order¹ and submitting an affidavit purporting to demonstrate the “burden” United will face in complying with its discovery obligations, but which is actually unmoored to the particulars of this case and simply recites the process for any party conducting e-discovery. ARA respectfully requests the Court consider this surreply in ruling on Plaintiffs’ motion for reconsideration and deny Plaintiffs’ motion.

Though United pleads burden, had United put the same energy and resources into complying with this Court’s Order and its discovery obligations in the first instance as it has in avoiding them (the briefing on ARA’s motion to compel and United’s unfounded motion for reconsideration is nearly 1000 pages), ARA would already have access to the documents it needs to prepare for depositions and properly defend this case. But United’s discovery posture to date has prevented that and severely prejudiced ARA.

United’s protestations are not founded on evidence or actual burden, but rather its desire to avoid producing relevant, responsive documents demonstrating that United systematically discriminated against chronically ill patients with end-stage renal disease. ARA further believes that such documents will demonstrate that United brought suit not because the purported ban against charitable assistance was material to United—the limited documents produced so far clearly show that it was not—but rather to further its lobbying efforts and to boost its bottom line.

Despite its voluminous briefing, United ignores a simple reality – it is a well-funded plaintiff that chose to file suit more than one year ago against a much smaller defendant, and yet it still has not provided the documents its adversary is entitled to in this litigation. United has provided no basis for its improper request to be shielded from the same discovery obligations it has foisted upon ARA.

¹ Because United rushed to file its motion for reconsideration, and due to Hurricane Irma, ARA had not submitted the selected custodians or search terms when United filed its motion. United now attacks those selections, notwithstanding the substantial record evidence (more than 700 pages of briefing and exhibits and more than 2 hours of argument) underpinning the Court’s decision.

A. The Custodians and Search Terms are Supported by Substantial Record Evidence, Relevant to the Dispute, and Proportional to the Needs of the Case

In moving to compel, ARA, based on a thorough review of the documents produced by United to date, identified 47 additional custodians from whom United’s production demonstrated documents should have been collected. *See* DE 245, Ex. B, B-1-B-7. Based on that evidence, the Court agreed and allowed ARA to identify 16 additional custodians. United claims, with no evidentiary support, that the custodians identified by ARA are tangential and unlikely to have responsive documents. This notion is belied not only by the record which shows that the custodians selected by ARA were directly involved in United’s claims and are likely to have evidence relevant to ARA’s defenses, but also by United’s own privilege log, which identifies *more than 100 employees* as having been involved in the issues relevant to this case.

United also argues, with no evidentiary support, that the search terms selected by ARA are “burdensome,” “unrestricted,” and “unfocused.” They are not. For example, United takes issue with using the search term “IEX /15 AKF.”² Reply at 4. However, this search term will return exactly the documents United was *already ordered to produce*, namely documents regarding ACA plans and the AKF (among other charities). In fact, this term is even narrower than United’s obligations:

Plaintiffs . . . shall produce Documents and Communications relating to United’s acceptance or rejection of Third Party Premium Assistance *for United Individual Market Plan Members*. Plaintiffs shall not limit this Request to assistance provided by charitable organizations nor shall they limit this Request to the American Kidney Fund. Further, except as set forth below, *Plaintiffs agree not to limit this Request to the Members at issue.*

See Order Regarding Defendant’s Motion to Compel, DE 196 at 5, Request 3 (emphasis added). United’s only objection is that this term *may* include information regarding ARA’s competitors. Reply at 4. That this search may identify responsive documents involving persons receiving AKF assistance treating with other dialysis providers is no objection at all, because United was already

² As established by ARA’s motion to compel, IEX is a term almost exclusively used by United’s employees when referring to ACA plans and United’s ban on third party premium assistance, including assistance offered by the AKF that is at the heart of this dispute. *See* DE 254, Ex. B-2

[REDACTED]

ordered to produce exactly that information. *See* DE 196 at 5, Request 3 (the Request is not limited to the members at issue). More fundamentally, United offers no evidence to support this assertion (nor any of its other complaints about the search terms) and even goes so far as to contend it cannot “begin to run the proposed new 12 search terms to get a sense of the magnitude of the documents the terms will capture until the collection is complete.” This is nonsense. United certainly could have run analytics regarding ARA’s search terms across the custodians from whom United has already collected (which ARA did when United submitted unreasonable search terms, some of which resulted in hundreds of thousands of hits), to bolster its position. In fact, this Court invited United to do so at the lengthy hearing it held. United did not do so in opposing the motion to compel, it did not do so in its motion for reconsideration, and it still has not done so. This failure to provide basic information on the alleged burden of the search terms is no doubt because the terms carefully selected by ARA, and supported by the record, will return responsive documents that ARA is entitled to receive.

B. The Affidavit Submitted by United is Irrelevant and Should be Disregarded

For the first time, United submits an affidavit purporting to demonstrate how burdensome complying with this Court’s order would be. But discovery is burdensome for all litigants in complex litigation. United, the largest insurance company in the country with reported revenue of ***\$50.05 billion last quarter***, certainly has the resources to bear that burden, particularly in a lawsuit that it initiated. And it is appropriate for United to expend those resources to comply with its discovery obligations. Indeed, United’s revenues are sixty-six times greater than that of ARA, which has expended a disproportionate effort to respond to discovery in this case. ARA has collected from over 120 custodians – 50 more custodians than United – and ARA has produced thousands more responsive documents than United.

Moreover, United’s affidavit simply recites its generalized e-discovery process and provides no particulars related to *this case* [REDACTED]

[REDACTED] But United is involved in thousands of lawsuits a year, so without context as to this action and the limitations placed by this Court, this number is meaningless. Likewise, United argues that [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] Reply at

2; Ex. 4 at ¶ 4. This assertion is a red-herring as the Court has limited discovery in this case to October 1, 2014 to the present, and therefore, United would not need to [REDACTED]

[REDACTED] *Id.* at 3. A company as litigious as United and with its resources is certainly capable of collecting data from 16 custodians, for a finite period of time, and reviewing those documents within a one month period—something United should have done at the start of this case. ARA should not be prejudiced because United has repeatedly shirked its discovery obligations.

C. Conclusion

For the foregoing reasons, ARA respectfully requests the Court deny United's motion and order United to complete its production, including searching the 16 additional custodians and employing the additional search terms across all custodians, by October 14, 2017 and grant any other such relief as this Court deems proper.

Dated: September 27, 2017

Respectfully Submitted,

/s/ Matthew Menchel

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on September 27, 2017 via electronic mail to all counsel of record on the service list below.

/s/ Matthew Menchel
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