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.

AMERICAN RENAL ASSOCIATES, LLC, and AMERICAN RENAL MANAGEMENT LLC,

Defendants.
_____/

OPPOSITION TO MOTION FOR RECONSIDERATION

Defendants American Renal Management LLC and American Renal Associates LLC (collectively, "Defendants") respectfully submit this Opposition to Plaintiffs UnitedHealthcare of Florida, Inc., and All Savers Insurance Company's (collectively "United") Motion for Reconsideration or Modification of Omnibus Discovery Order dated August 30, 2017 (DE 291) (the "Motion").

In its Motion, United rightly acknowledges that a motion for reconsideration—especially in the discovery context—is "extraordinary." Mot. at 1. Equally extraordinary is the manner in which United has framed its arguments and characterized this Court's August 30 Order granting, in part, Defendants' motion to compel (the "Order") (DE 290). The gravamen of United's Motion is that the Court's Order has "absolutely no basis" and is "patently unfair". *Id.* at 1, 3. With regard to the first of these contentions, United ignores the hundreds of pages of briefing, evidence, and exhibits submitted and the more than two hours of oral argument the Court permitted that form the basis for the Court's decision. With regard to the second contention, that the decision is patently unfair (which it is not), United ignores the legal standard, which does not provide that "patent unfairness" is a permissible ground for granting a reconsideration motion in this Circuit. *See, e.g.*, *Smith v. Ocwen Fin.*, 488 F. App'x 426, 428 (11th Cir. 2012) ("The only grounds for granting a motion for reconsideration are newly-discovered evidence or manifest errors of law or fact.");

Duval v. Law Office of Andreu, Palma & Andreu, PL, No. 09-22636-CIV, 2010 WL 2293138, at *1 (S.D. Fla. June 8, 2010) (denying motion for reconsideration regarding motion to compel and explaining only grounds for reconsideration are intervening change in controlling law, the availability of new evidence, or the need to correct clear error or manifest injustice). Indeed, United has not cited any authority at all in its motion, let alone one setting forth the applicable standard. Nor has United met the applicable legal standard: United has not presented new evidence, new authority, or demonstrated a manifest error by the Court.

Apart from providing no grounds on which its Motion can lawfully be granted, United also misstates the current state of discovery in several respects. Some examples include the following:

- United claims that its productions practically match ARA's. Mot. at 2. They do not. ARA has produced almost 50% more documents than United (19,500 compared to 13,500). Of the slightly more than 8,300 documents produced by United since ARA's motion to compel, 99.4% are claim forms or other generic forms from a custodian labeled "EDDS & IDRS Databases", which are not the documents at the heart of ARA's motion to compel nor the documents ARA's search terms are designed to capture. *See* Ex. 1, UHC-ARA-0023622-27; Ex. 2 UHC-ARA-0023649-69; Ex. 3, UHC-ARA-0024404-05. Indeed, these forms make up more than 60 percent of United's total production.

- United complains that running new search terms "against the 55[1] other custodians they have already searched" and collecting from a mere 16 additional custodians would "vastly expand the burden" of litigating a case United, the largest insurance company in the country, chose to bring. Mot. at 2. Even with the additional 16 custodians, United will have still collected from *50 fewer custodians* that ARA.

- What United fails to say is that, to date, it still ***has not run its existing searches*** on, nor produced documents from, all of ***those original 56 custodians***—despite telling ARA and the Court that it would. *See* DE 268 at 4 ("Plaintiffs have searched, or are in the process of searching, 54 custodians"); at 5 ("Plaintiffs have already agreed to search 55 custodians"). In fact, ARA still ***does not have a single document from 23 of the original 56 custodians.*** During meet and confers since this Court's Order, United has taken the position that it is entitled to ***"hit pause" on substantially completing its original production*** from the 56 custodians with the original search terms, until after ARA provided United with its list of additional custodians and search terms pursuant to the Order. Even then, United stated it would not review or produce documents from the original custodians, using the original search terms, much less the additional custodians and search terms, until *after* this Court rules on any forthcoming motion for reconsideration.

[1] United told this Court and ARA that it would collect from, search, and produce documents from ***56*** custodians prior to Defendants' motion to compel. *See* DE 268, Ex. I (listing 56 custodians "United has collected from or is in the process of collecting from").

- With respect to its demand for a privilege log, United asserts in its motion that ARA has knowingly withheld responsive, non-privileged documents. ARA has not and, respectfully, United knows this. Prior to producing documents responsive to the requests at issue, ARA and United agreed as to the custodians to be searched and the terms to be used. *See* DE 268, Ex. B at 10-11 (identifying the custodians); *id.* at 10, response from United ("We are fine with the custodians . . ."); *id.* at 1 (ARA providing search terms); *id.* at 3, (United responding "[T]his is fine."). ARA carried out the parties' agreement to the letter and reviewed more than 6,000 documents. The documents that United now cries foul about were not within the scope of review agreed to by the parties and therefore not withheld from the documents reviewed. Requiring ARA to produce a privilege log runs not only contrary to the rules of this Court, *see* L.R. 26.1(e), but is illogical as the document that United uses to prop up its infirm request would not even have appeared on such a log because it was not withheld in the first instance nor has ARA ever claimed that that document is privileged.

United now seeks to have the Court mandate further meet and confers that—if past practice is any indicator—would allow United to run down the clock on discovery such that, if and when United does produce the documents ordered by the Court, they will be of lesser use to ARA than if they had been produced timely.[2] With the deadline to complete fact discovery three months away and depositions fast approaching, every day that passes without a production from United reduces the time that ARA has to identify the appropriate United deponents, prepare to examine them, and formulate its defenses.

For the reasons stated above, ARA respectfully requests that the Court deny the Motion for Reconsideration, and set a date certain by which United must complete its entire production. ARA further submits that a reasonable date would be one month from the date on which ARA provided United with its list of additional custodians and search terms per the Court's Order, or **October 14, 2017**.

Dated: September 18, 2017

Respectfully Submitted,

/s/ Matthew Menchel

Matthew I. Menchel (Florida Bar No. 12043)
matthew.menchel@kobrekim.com

[2] In fact, ARA engaged in extensive meet and confers for two months with United about its production and search terms prior to bringing its motion to compel. *See*, *e.g.*, DE 222, 247, DE 254 at Ex. C (demonstrating meet and confers spanning June 3, 2017 to July 25, 2017); DE 268 Ex. B-E.

Andrew C. Lourie (Florida Bar No. 87772)
andrew.lourie@kobrekim.com
Adriana Riviere-Badell (Florida Bar No. 30572)
adriana.riviere-badell@kobrekim.com
Laura M. Gonzalez (Florida Bar No. 74358)
Laura.Gonzalez@kobrekim.com
Kobre & Kim LLP
201 South Biscayne Boulevard
Suite 1900
Miami, Florida 33131
T: +1 305 967 6100
F: +1 305 967 6120

Danielle S. Rosborough, admitted *pro hac vice*
danielle.rosborough@kobrekim.com
Kobre & Kim LLP
1919 M Street, NW
Washington, D.C. 20036
T: +1 202 664 1984

Clinton J. Dockery, admitted *pro hac vice*
clinton.dockery@kobrekim.com
Joseph W. Slaughter, admitted *pro hac vice*
joe.slaughter@kobrekim.com
Kobre & Kim LLP
800 3rd Avenue
New York, NY 10022
T: +1 212 488 1200

Attorneys for Defendants American Renal Associates LLC and American Renal Management LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on September 18, 2017 via electronic mail to all counsel of record on the service list below.

/s/ Matthew Menchel
Matthew I. Menchel (Florida Bar No. 12043)

SERVICE LIST

Michael R. Whitt
mwhitt@robinskaplan.com
Robins Kaplan LLP
711 Fifth Avenue South, Suite 201
Naples, Florida 34102

Martin R. Lueck
Thomas C. Mahlum
Jeffrey S. Gleason
Jamie R. Kurtz
William Bornstein
Anne M. Lockner
Randall Tietjen
Robins Kaplan LLP
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015
mlueck@robinskaplan.com
tmahlum@robinskaplan.com
jgleason@robinskaplan.com
jkurtz@robinskaplan.com
wbornstein@robinskaplan.com
alockner@robinskaplan.com
rtietjen@robinskaplan.com

Attorneys for Plaintiffs UnitedHealthcare of Florida, Inc., and All Savers Insurance Company