**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF WISCONSIN**

JULIE A. SU,
Acting Secretary of Labor,
United States Department of Labor,

Plaintiff,

v.

UMR, INC.,

Defendant.

CIVIL ACTION NO. 3:23-CV-00513

**FRCP 26(f) JOINT DISCOVERY PLAN AND PRELIMINARY PRETRIAL CONFERENCE REPORT**

Pursuant to Fed. R. Civ. P. 26(f) and the Court's Standing Order Governing Preliminary Pretrial Conferences, the parties conferred and submit the following Preliminary Pre-Trial Conference Report and discovery plan:

**1. Nature of the Case**.

This action arises out of Plaintiffs' allegations that Defendant violated the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq. Specifically, whether Defendant violated Title I of the ERISA, including any statutes incorporated therein and any regulations promulgated thereunder, in connection with its administering of hospital emergency services claims ("ER Claims") and urinary drug screening claims ("UDS Claims"), and any adverse benefit determinations associated with the denial of ER Claims and UDS Claims for thousands of participants covered by at least 2,136 ERISA-covered health plans.

Defendant denies the allegations. The complaint asserts backward-looking claims (seeking an order requiring Defendant to readjudicate the claims at issue), as well as forward-looking claims

(seeking an order requiring Defendant to reform its procedures and enjoining Defendant from violating ERISA). Defendant has moved to dismiss only Plaintiff's relief sought with regard to the backward-looking claims. The parties anticipate that Defendant's motion to dismiss will be fully briefed on November 6, 2023.

**2. Related Cases**. The parties are not aware of any pending related cases.

**3. Factual and Legal Issues To Be Resolved At Trial**.

The Court's ruling on Defendant's motion to dismiss and/or dispositive motions could impact the parties' positions. However, currently, the following are issues that may need to be resolved at trial:

Plaintiff's Position:

- Whether UMR is a fiduciary under ERISA with respect to its review, processing, and adjudication of ER Claims and UDS Claims.
- Whether UMR's procedures for adjudicating ER Claims and UDS Claims violated the prudence provisions of ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B) and the adherence to plan documents provisions of ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).
    - Specifically, if UMR's procedures for adjudicating ER claims using diagnosis code lists violated the "prudent layperson" standard established under the Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 et seq. ("ACA"), which is incorporated in ERISA.
    - Whether UMR's procedures for adjudicating UDS claims by categorically denying all UDS claims (until August 25, 2018) and then denying all UDS claims not in an emergency room setting (after August 25, 2018) violated the "medical necessity" standard established under the ACA.
- With respect to ER Claims and UDS Claims, whether UMR violated the claims procedures regulation in 29 C.F.R. 2560.503-1(b) and (b)(3) when issuing adverse benefit determinations that did not provide the specific reason for the denial.
- If UMR violated ERISA as described herein, whether the Secretary is entitled to the requested relief in the form of UMR reforming its procedures for adjudicating ER Claims and UDS claims; re-adjudicating all ER Claims and UDS Claims that were denied or

partially denied from January 1, 2015, to present to be in compliance with ERISA; and enjoining UMR from future ERISA violations.

Defendant's Position:

- Whether Defendant is a fiduciary under ERISA with respect to its review, processing, and adjudication of ER Claims and UDS Claims.
- Has Plaintiff satisfied her burden of proving that Defendant violated ERISA, including the "prudent layperson" standard, when it denied certain healthcare benefits claims for certain emergency room services? *See* 42 U.S.C. § 18001 *et seq*.
- Has Plaintiff satisfied her burden of proving that Defendant violated claims procedures regulations related to its explanation of benefits for certain emergency room services claims that were denied? *See* 29 C.F.R. 2560.503-1(b) & (b)(3).
- Has Plaintiff satisfied her burden of proving that Defendant violated ERISA, including its prudence provisions and the adherence to plan documents provisions, when it denied certain healthcare benefits claims for urinary drug screenings? 29 U.S.C. § 1104(a)(1)(B); *id.* § 1104(a)(1)(D).
- Has Plaintiff satisfied her burden of proving that Defendant violated claims procedures regulations related to its explanation of benefits for certain urinary drug screening claims that were denied? *See* 29 C.F.R. 2560.503-1(b) & (b)(3).
- Has Plaintiff established facts sufficient to establish the elements of their claims?
- Has Defendant established facts sufficient to support its affirmative defenses to Plaintiff's claims?
- If Defendant violated ERISA, whether Plaintiff is entitled to the requested relief in the form of Defendant reforming its procedures for adjudicating ER Claims and UDS claims; re-adjudicating all ER Claims and UDS Claims that were denied or partially denied from January 1, 2015, to present to be in compliance with ERISA; and enjoining Defendant from future ERISA violations.

**4. Amendment of Pleadings**.

Plaintiff does not currently intend to make any amendments to the pleadings. The Plaintiff reserves the right to seek an amendment, if necessary, at a later date. The parties agree

that any proposed amendments should be made by stipulation or by motion in accordance with Fed. R. Civ. P. 15.

**5. New Parties**. None.

**6. Length of Trial**. 14 days. The parties provide this estimate in good faith, though as noted above, this Court's rulings on the motion to dismiss and/or dispositive motions could substantially impact the scope and contours of any trial.

**7. Other Considerations**.

**a. Settlement Discussion/ADR Plans**:

The parties engaged in settlement discussions before Plaintiff filed this suit, but the parties were not able to reach a settlement. At the Rule 26(f) conference, both parties agreed that they will renew their discussions as appropriate as the case proceeds. Because the parties have an open dialogue and have already discussed these issues, the parties request the preliminary pretrial order not include a deadline for submitting to court-mediation services a mandatory settlement letter. If, however, the Court determines it is prudent to include a deadline for submission of settlement letters, the parties agree that the deadline should be the same day as the close of discovery.

**8. Proposed Discovery Plan and Case Schedule**.

The parties were unable to agree on the same proposed schedule, so two proposed schedules are provided below:

| EVENT | PLAINTIFF'S PROPOSED DEADLINE[1] | DEFENDANT'S PROPOSED DEADLINE |
|---|---|---|
| Rule 26(a)(1)(A) initial disclosures | November 16, 2023 | November 16, 2023 |
| Affirmative Rule 26(a)(2) expert disclosures | April 3, 2024 | April 3, 2024 |
| Expert reports exchanged | May 3, 2024 | April 3, 2024 |
| Close of Fact Discovery | June 3, 2024[2] | October 21, 2024 |
| Rebuttal Rule 26(a)(2) expert disclosures and reports | June 3, 2024 | May 3, 2024 |
| Dispositive Motions | August 5, 2024 | June 3, 2024 |
| Oppositions to Dispositive Motions | September 5, 2024 | July 5, 2024 |

[1] Plaintiff's position is that the complexity of the issues, the number of ERISA plans involved (at least 2,136), and the likelihood of expert discovery may require a longer discovery period than that of a typical case.

[2] This deadline for the close of fact discovery is under the assumption that the parties are moving forward with discovery with no limitations on discovery on all the claims (notwithstanding the pending decision on the Motion to Dismiss).

| EVENT | PLAINTIFF'S PROPOSED DEADLINE[1] | DEFENDANT'S PROPOSED DEADLINE |
|---|---|---|
| Replies in Support of Dispositive Motions | September 26, 2024 | July 26, 2024 |
| Close of Discovery | Close of all other discovery by December 23, 2024 | October 21, 2024 |
| Rule 26(a)(3) disclosures | N/A | October 21, 2024 |
| Motions in limine and *Daubert* motions | January 8, 2025 | October 28, 2024 |
| Responses to motions in limine | January 29, 2025 | November 11, 2024 |
| Final pretrial conference | February 5, 2025 | November 18, 2024 |
| Trial ready | February 12, 2025 | December 2, 2024 |

**MODIFICATIONS TO LIMITATIONS ON DISCOVERY IMPOSED BY THE FEDERAL RULES.**

At this time, the parties do not propose any changes to discovery limitations under the Federal Rules of Civil Procedure, subject to the following clarifications. Both sides reserve the right to seek discovery from any third parties.

The parties have discussed a potential issue related to discovery while Defendant's motion

to dismiss is pending. Each side's position on this issue is below.

**Plaintiff's Position:** Plaintiff intends to proceed with discovery pursuant to the Court's Standing Order Governing Preliminary Pretrial Conferences, which states, "The court no longer stays discovery when a defendant files a motion to dismiss before the preliminary pretrial conference. Pursuant to F.R. Civ. Pro. 26(d)(1), discovery may begin after the parties have held their Rule 26(f) conference." Defendant proposes limiting discovery to only prospective relief because Defendant claims that success on its motion to dismiss, which challenges the retrospective relief sought in the complaint, would make discovery into retrospective claims moot. Plaintiff disagrees with that characterization. Defendant's motion to dismiss is limited to the remedies the Acting Secretary is entitled to seek under ERISA. The issue of Defendant's liability under ERISA is not affected by its pending motion to dismiss. Before reaching the issue of the appropriate remedy, the Acting Secretary has to first establish Defendant's liability under ERISA with respect to its adjudication of ER Claims and UDS Claims during the entire period alleged in the complaint. Plaintiff therefore should be able to do discovery into Defendant's practices for these Claims for the entire period alleged in the Complaint. Limiting discovery to "prospective relief" to the period of the past three months would needlessly hamper Plaintiff's ability to litigate this case and unfairly prejudice Plaintiff. For example, under Defendant's proposal to limit discovery to "prospective relief," Plaintiff would be unable to conduct discovery into Defendant's actions with respect to at least 2,160 ERISA-covered plans in order to establish Defendant's liability under ERISA.

Moreover, Defendant's proposal to conduct discovery only into the "prospective relief" would cover less than 3% of the nearly nine-year relevant period (January 1, 2015, to present) (ECF 1 ¶¶ 14, 19, 21-23, 57, 61).. Limiting Plaintiff's discovery to a three-month period is prejudicial and unnecessary.

**Defendant's Position:** Defendant has filed a motion to dismiss Plaintiff's backward-looking claims, and if that motion is successful no more discovery into these claims will be needed. Defendant has not moved to dismiss Plaintiff's forward-looking claims. Accordingly, discovery into Plaintiff's forward-looking claims should be prioritized while Defendant's motion to dismiss is pending. At this time, Defendant is not seeking a stay of discovery while its motion is pending, but simply prioritization of Plaintiff's forward-looking claims in the interest of efficiency and for other reasons outlined below. If Defendant's motion to dismiss is denied or remains pending as discovery deadlines approach, then discovery into Defendant's backward-looking claims could proceed at that time. If it is granted, prioritization will minimize the costs of unnecessary discovery.

*Prejudice.* Prioritizing discovery into Plaintiff's forward looking-claims will not prejudice Plaintiff. The parties are proposing fact discovery deadlines several months away, so there is no immediate pressure for Plaintiff to begin discovery on the backward-looking claims. Additionally, Defendant has already produced over 130,000 pages of documents to the Department of Labor as part of the Department's pre-litigation investigation. Thus, Plaintiff will not be starting from scratch in gathering information about its backward-looking claims should the motion to dismiss be denied. Any further formal discovery into these backward-looking claims can be deferred for at least a few months or until the motion to dismiss is decided. And, if Defendant's motion is successful, it may obviate the need for it entirely.

*Simplification of Issues.* Prioritizing discovery in this matter would greatly simplify matters for the parties, permitting them to focus on Plaintiff's forward-looking claims for relief while the Court resolves Defendant's motion to dismiss. Like in *Xirum v. U.S. Immigration and Customs Enforcement*, Plaintiff has not argued that discovery is necessary to respond to Defendant's motion to dismiss—nor would it be, as Defendant's arguments are strictly legal in

nature, and, in any event, Plaintiff has already filed an opposition to Defendant's motion. 2023 WL 5956867, at *4 (S.D. Ind. Sept. 13, 2023).

*Reduction to Burden of Litigation.* Prioritizing discovery into Plaintiff's forward-looking claims would promote efficiency and reduce the burden of the litigation because, if the Court grants in whole or in part Defendant's motion to dismiss, those backward-looking claims would be eliminated from the case, making discovery into those claims unnecessary. As a result, the "burden or expense" of conducting discovery into backward-looking claims while the motion to dismiss is pending "outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1).

Balancing all of these factors, therefore, Defendant respectfully submits that the parties should prioritize discovery into Plaintiff's forward-looking claims while Defendants' motion is pending or for at least for at least the next few months.

DATE: October 27, 2023

Respectfully submitted,

/s/Lydia Faklis

SEEMA NANDA
*Solicitor of Labor*
CHRISTINE Z. HERI
*Regional Solicitor*
KEVIN M. WILEMON
*Senior Trial Attorney*
LYDIA J. FAKLIS
*Trial Attorney*
U.S. DEP'T OF LABOR
OFFICE OF THE SOLICITOR
230 S. Dearborn St. Room 844
Chicago, IL 60604
Tel: (312) 353-6973
Wilemon.kev@dol.gov
Faklis.lydia.j@dol.gov

*Attorneys for Plaintiff Julie A. Su, Acting Secretary of Labor, United States Department of Labor*

/s/Geoffrey M. Sigler
GEOFFREY M. SIGLER (admitted *pro hac vice*)
MATTHEW S. ROZEN (admitted *pro hac vice*)
ANDREW G.I. KILBERG (admitted *pro hac vice*)
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave. NW
Washington, DC 20036
Tel: (202) 955-8500
gsigler@gibsondunn.com
mrozen@gibsondunn.com
akilberg@gibsondunn.com

KEVIN ST. JOHN
BELL GIFTOS ST. JOHN LLC
5325 Wall Street, Suite 2200
Madison, WI 53718
Tel: (608) 216-7990
kstjohn@bellgiftos.com

*Counsel for Defendant UMR, Inc.*