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8
 9 UNITED STATES DISTRICT COURT FOR THE
 EASTERN DISTRICT OF WASHINGTON

10 CYNTHIA HARVEY, individually and
 on behalf of all others similarly situated,

11 Plaintiff,

12 v.

13 CENTENE MANAGEMENT
 14 COMPANY, LLC and COORDINATED
 CARE CORPORATION,
 15

16 Defendants.

NO. 2:18-cv-00012-SMJ

**AMENDED JOINT STATUS
 REPORT AND DISCOVERY
 PLAN AND REQUEST TO SET
 CASE SCHEDULE**

17
 18 In accordance with Federal Rule of Civil Procedure 26(f), counsel for the
 19 parties conferred by telephone on March 5, 2018. Plaintiffs Cynthia Harvey and
 20 Steven A. Milman were represented by attorneys Beth E. Terrell, Elizabeth A.

1 Adams, and Seth Lesser. Defendants Centene Corporation (“Centene”),
2 Coordinated Care Corporation (“Coordinated Care”), and Superior HealthPlan, Inc.
3 (“Superior”) were represented by William Murray, Steven Cady, and Andrew
4 McBride. The parties discussed the topics identified by the Court in its Notice
5 Setting Court’s Telephonic Scheduling Conference dated February 5, 2018. *See*
6 ECF No. 6.

7 After the parties jointly submitted a Joint Status Report and Discovery Plan
8 (ECF No. 13) and exchanged initial disclosures, the defendants moved to dismiss
9 (ECF Nos. 16, 17, and 18). The Court struck the scheduling conference, indicating
10 that it would be reset after resolution of Defendants’ motions to dismiss. ECF No.
11 21. After full briefing on the issues raised in those motions, the original named
12 plaintiffs agreed to dismiss certain claims and sought leave to amend their
13 complaint to narrow the claims, classes, and parties involved in the case. ECF No.
14 37. The Court granted that motion and the remaining plaintiff, Plaintiff Harvey
15 (“Plaintiff”) filed her First Amended Complaint, which dropped one of the original
16 named plaintiffs, dropped claims against Superior, dropped all claims under the
17 Affordable Care Act and under Texas law, and substituted Centene Management
18 Company, LLC as a defendant for Centene Corp. ECF Nos. 39 & 40. Defendants
19 moved to dismiss the First Amended Complaint, and the parties stipulated to
20 Plaintiff filing a Second Amended Complaint. ECF Nos. 47 & 48. Centene

1 Management and Coordinated Care (together “Defendants”) filed a motion to
2 dismiss the Second Amended Complaint, which the Court denied in part and
3 granted in part, ordering Plaintiff to file a Third Amended Complaint (“TAC”) that
4 conformed to the Court’s order, which Plaintiff did on November 28, 2018. On
5 December 12, 2018, Defendants filed an Answer to Plaintiff’s Third Amended
6 Complaint.

7 On January 16, 2019, the parties again conferred telephonically pursuant to
8 Rule 26(f). Seth Lesser and Elizabeth Adams participated in the call on behalf of
9 Plaintiff. Steve Cady participated on behalf of Defendants. The following
10 summarizes the topics the parties discussed and agreements reached during the
11 January 2019 Rule 26(f) discussions.

12 The parties request that the Court issue a scheduling order setting the
13 deadlines proposed by the parties below, or, if the Court deems it necessary, set a
14 scheduling conference.

15 **A. Consent to U.S. Magistrate.**

16 The Clerk’s Office has been notified that the parties do not consent to the
17 case being heard by a U.S. Magistrate Judge.

18 **B. Jurisdiction and Venue.**

19 Plaintiff has alleged that jurisdiction exists in this Court pursuant to 28
20 U.S.C. § 1332(d)(2) and that venue is proper in this district pursuant to 28 U.S.C.

1 §1391(a) and (b) and 18 U.S.C. §1965(a). Defendants do not challenge jurisdiction
2 or venue.

3 **C. Service of Process.**

4 Service of process is complete.

5 **D. Claims and Defenses.**

6 1. Plaintiff's Claims.

7 Plaintiff brings this class action pursuant to Federal Rule of Civil Procedure
8 23(a), (b)(2), and (b)(3), individually and on behalf of all persons in the state of
9 Washington who were insured by Defendants' Ambetter insurance product which
10 was purchased through an ACA HIE from January 11, 2012 to the present. Plaintiff
11 alleges that Defendants are among the nation's largest insurers providing coverage
12 through the ACA. Plaintiff alleges that Defendants target low-income customers
13 who qualify for substantial government subsidies while simultaneously providing
14 coverage well below what is required by law and by its policies. Plaintiff alleges
15 that the provider network Defendants represented was available to policyholders
16 was in material measure fictitious. Plaintiff alleges that members have difficulty
17 finding medical providers who will accept Ambetter insurance. Plaintiff further
18 alleges that Defendants misrepresent the number, location, and existence of
19 purported providers by listing physicians, medical groups, and other providers as
20 participants in their network and by listing nurses and other non-physicians as

1 primary care providers. Plaintiff further alleges that Ambetter policyholders learn
2 of the limitations on available providers only after they commit to the insurance
3 and are locked into the Ambetter policy. Plaintiff alleges that Defendants' sales
4 materials omit to state that Centene and its subsidiaries do not adequately monitor
5 their network of providers nor do they provide required reports of their inadequate
6 network to the Insurance Commissioners in their respective states. Plaintiff alleges
7 the Ambetter documentation also fails to disclose that Defendants do not
8 consistently provide access to "medically necessary care on a reasonable basis"
9 without charging for out-of-network services. Plaintiff alleges that Defendants also
10 fail to reimburse medical providers' legitimate claims, routinely citing "insufficient
11 diagnostic" evidence as the reason. Plaintiff alleges that as a result of Defendants
12 failing to pay providers for legitimate claims, a large number of medical providers
13 reject Ambetter insurance, further reducing the provider network available to
14 Ambetter's members.

15 Based on these allegations, Plaintiff brings the following claims: (1) Breach
16 of Contract (against Defendant Coordinated Care); and (2) Unfair Business
17 Practices under RCW §§ 19.86.010, et seq. (against both Defendants).

18 Plaintiff seeks to certify a Class defined as "All persons in the state of
19 Washington who were insured by Defendants' Ambetter insurance product which
20 was purchased through an ACA HIE from January 11, 2012 to the present.

1 Excluded from the Class are Defendants, Defendants’ employees, Defendants’
2 subsidiaries, the Judge(s) to which this case is assigned and the immediate family
3 of the Judge(s) to which this case is assigned.”

4 Plaintiff further alleges that the elements of Fed. R. Civ. P. 23(a) and
5 23(b)(2) and 23(b)(3) are satisfied. Plaintiff seeks economic and compensatory
6 damages, restitution, actual damages sustained or treble damages, injunctive and
7 declaratory relief, punitive damages where allowed under governing law,
8 reasonable attorneys’ fees, and reimbursement of all costs incurred prosecuting this
9 action.

10 2. Defendants’ Defenses.

11 On December 12, 2018, Defendants filed an Answer to Plaintiff’s Third
12 Amended Complaint. See ECF No. 63. Defendants’ Answer responds to
13 Plaintiff’s allegations and asserts a number of Affirmative Defenses, including that
14 Plaintiff has failed to state a claim for which relief can be granted. Id. Defendants
15 do not believe that this action is appropriate for determination on a class basis.
16 Defendants anticipate opposing any attempt by Plaintiff to pursue this action on a
17 class basis.

18 **E. Constitutionality of Statute.**

19 The constitutionality of a statute is not being challenged.
20

1 **F. Class Action Status.**

2 Plaintiff will seek to certify this case as a class action under Federal Rule of
3 Civil Procedure 23(a) and 23(b)(2) and 23(b)(3). Assuming Plaintiff receives the
4 discovery she will request from Defendants, Plaintiff anticipates she will file her
5 class certification motion in approximately nine months. The parties may involve
6 experts in class certification, and, if they decide to involve experts, the parties will
7 seek agreement among themselves regarding a joint proposal to the Court
8 regarding deadlines for expert work relating to class certification.

9 Defendants do not believe that this action is appropriate for determination on
10 a class basis. Defendants anticipate opposing any attempt by Plaintiff to pursue
11 this action on a class basis.

12 **G. Certification to State Supreme Court**

13 Plaintiff does not anticipate requesting that any future issues be certified to
14 the Washington State Supreme Court. Defendants requested in connection with
15 their motion to dismiss the Second Amended Complaint that the issue relating to
16 the filed-rate doctrine be certified to the Washington State Supreme Court.

17 **H. Deadline for Amending Pleadings.**

18 Plaintiff suggests that the deadline for amending the pleadings be set for
19 June 7, 2019. Though Plaintiff has amended her pleadings more than once, those
20 amendments were made to respond to issues raised in Defendants' motions to

1 dismiss. Plaintiff has not had any opportunity to obtain discovery that could
2 demonstrate that further amendment is appropriate.

3 Defendants believe that the deadline to amend pleadings was November 28,
4 2018, the deadline set by the Court for Plaintiff to file a Third Amended Complaint
5 in response to the Court's ruling on Defendants' third motion to dismiss.

6 Defendants believe that this is consistent with Federal Rule of Civil Procedure
7 15(a) and is reasonable because Plaintiff has filed four complaints; the parties have
8 been through multiple rounds of motions to dismiss; the Court has issued a ruling
9 on Defendants' third motion to dismiss after a hearing; Plaintiff has filed a Third
10 Amended Complaint in response to the Court's ruling; and Defendants have filed
11 an Answer in response to Plaintiff's Third Amended Complaint. Defendants
12 believe that Plaintiff has had a reasonable opportunity to plead her case and,
13 consistent with Federal Rule of Civil Procedure 15(a), Plaintiff should not be
14 permitted to amend her complaint again without filing a motion for leave to amend
15 and without the Defendants having an opportunity to be heard on the issue. For
16 that reason, Defendants believe that pursuant to Federal Rule of Civil Procedure
17 15(a) the time to amend complaints has passed without leave of the Court.

18 **I. Deadline for Adding Additional Parties.**

19 Plaintiff suggests that the deadline for adding additional parties be set for
20 June 7, 2019. Though Plaintiff has amended her pleadings more than once, those

1 amendments were made to respond to issues raised in Defendants' motions to
2 dismiss. Plaintiff has not had any opportunity to obtain discovery that could reveal
3 that additional parties should be joined in this case.

4 Defendants believe that the deadline to amend pleadings (including adding
5 additional parties) was November 28, 2018, the deadline set by the Court for
6 Plaintiff to file a Third Amended Complaint in response to the Court's ruling on
7 Defendants' third motion to dismiss. Defendants believe that this is consistent
8 with Federal Rule of Civil Procedure 15(a) and is reasonable because Plaintiff has
9 filed four complaints; the parties have been through multiple rounds of motions to
10 dismiss; the Court has issued a ruling on Defendants' third motion to dismiss after
11 a hearing; Plaintiff has filed a Third Amended Complaint in response to the
12 Court's ruling; and Defendants have filed an Answer in response to Plaintiff's
13 Third Amended Complaint. Defendants believe that Plaintiff has had a reasonable
14 opportunity to plead her case and, consistent with Federal Rule of Civil Procedure
15 15(a), Plaintiff should not be permitted to amend her complaint again without
16 filing a motion for leave to amend and without the Defendants having an
17 opportunity to be heard on the issue. For that reason, Defendants believe that
18 pursuant to Federal Rule of Civil Procedure 15(a) the time to amend complaints
19 has passed without leave of the Court.

1 **J. Ownership Statements.**

2 Defendant Centene Management will file the necessary ownership statement
3 required by Fed. R. Civ. Proc. 7.1 within two days of the filing of this Amended
4 Joint Status Report.

5 **K. Minor or Incompetent Party.**

6 This case does not involve a minor or incompetent party, and the
7 appointment of a guardian ad litem is not necessary.

8 **L. Issues for Status/Scheduling Conference**

9 1. Discovery Plan.

10 a. Subjects of Discovery.

11 Plaintiff will seek discovery related to class certification, liability, and
12 damages. Plaintiff will serve her First Sets of Interrogatories and Requests for
13 Production within thirty days. The types of information Plaintiff plans to seek in
14 discovery include: (1) Defendants' policies, practices, and procedures for
15 developing, maintaining, and marketing their Ambetter Health Plan; (2)
16 Defendants' policies, practices, and procedures for developing, maintaining, and
17 marketing their Ambetter Health Plan provider network; (3) consumer complaints
18 regarding the Ambetter Health Plan and Defendants' provider network; (3)
19 Defendants' knowledge about problems with their provider network and efforts to
20 monitor; and (4) audits, regulatory investigations, and lawsuits relating to the

1 Ambetter Health Plan and the sufficiency of Defendants’ provider network.

2 Defendants anticipate seeking discovery related to class certification,
3 liability, and damages. Defendants will serve their First Sets of Interrogatories and
4 Requests for Production within 45 days. The types of information Defendants plan
5 to seek in discovery include, among other things: (1) materials relating to
6 Plaintiff’s communications with Defendants; (2) materials relating to Plaintiff’s
7 communications with health care providers; (3) materials relating to Plaintiff’s
8 requests for services covered by the applicable insurance policies; (4) materials
9 relating to Plaintiff’s need for services covered by the applicable insurance
10 policies; (5) materials relating to Plaintiff’s selection of insurance policies for the
11 relevant time period; (6) materials relating to Plaintiff’s damages; and (7) materials
12 relating to Plaintiff’s communications regarding her claims.

13 b. Protocol for Production of Electronic Discovery.

14 Plaintiff’s discovery requests will include requests for electronically stored
15 information (“ESI”). The parties are currently working to agree upon a protocol for
16 the exchange of discoverable ESI.

1 c. Claims of Privilege, Protection of Confidentiality, and Proposed
2 Agreements

3 At this time, the parties agree that no changes should be made to the Federal
4 and Local Civil Rules and federal and state law governing issues of privilege and
5 work-product protection.

6 2. Special Procedures.

7 The parties agree that this case is not appropriate for any special procedures.
8 The parties reserve the right to revisit this assessment as the case progresses.

9 3. Modification of Standard Pretrial Procedures.

10 This case is a proposed class action. Therefore, the parties agree that the
11 deadlines set forth in the Court's Notice Setting Court's Scheduling Conference
12 (ECF No. 28) should be modified to include a briefing schedule for class
13 certification. At this time, the parties propose that the Court set a schedule through
14 class certification. If the Court grants class certification, the parties propose that
15 they propose a schedule that sets deadlines to (1) send notice of the class action to
16 the class if the class is certified, (2) opt out of the class if the class is certified, (3)
17 complete fact discovery, (4) exchange expert disclosures, (5) complete expert
18 discovery, (6) complete pre-trial deadlines and (7) a trial date.

1 4. Bifurcation.

2 a. Plaintiff's Position

3 Plaintiff believes that this case should be bifurcated between liability and
4 damages.

5 b. Defendants' Position

6 Defendants believe that discovery regarding Plaintiff's damages will be
7 necessary to resolve issues that will present themselves early in the case, and
8 therefore oppose bifurcation.

9 5. Modification to Standard Discovery Procedures.

10 The parties agree to make reasonable efforts to work cooperatively and
11 litigate efficiently. The parties have stipulated to the electronic service of all
12 documents, including discovery requests and responses. The parties suggest that
13 the Court permit the parties to bring any discovery disputes that they cannot
14 resolve through the meet and confer process to the Court's attention through
15 informal letter briefs or telephonic hearings.

16 6. Suggested Expert Disclosures.

17 The parties propose that the deadline for expert discovery be set after the
18 Court rules on Plaintiff's motion for class certification. As noted above, the parties
19 may involve experts in class certification, and, if they decide to involve experts,
20 the parties will seek agreement among themselves regarding a joint proposal to the

1 Court regarding deadlines for expert work relating to class certification.

2 7. Suggested Discovery Cut-Off.

3 The parties propose that the deadline to complete discovery be set after the
4 Court rules on Plaintiff's motion for class certification.

5 8. Anticipated Fed. R. Evid. 502 Agreements.

6 The parties proposed on March 8, 2018 an agreed protective
7 order/confidentiality agreement that addresses inadvertent disclosures under FRE
8 502. *See* Exhibit A to the Parties' initial Joint Status Report and Discovery Plan
9 (ECF No. 13-1).

10 **M. Proposed Protective Order.**

11 The parties proposed a protective order, which was attached as Exhibit A to
12 the Parties' initial Joint Status Report and Discovery Plan (ECF No. 13-1). The
13 parties have submitted an updated proposed protective order, attached as Exhibit A
14 to this Amended Joint Status Report. The parties request that the Court enter the
15 proposed protective order.

16 **N. Anticipated Motions and Suggested Dispositive Motion Filing Deadline.**

17 Plaintiff anticipates filing a class certification motion. Plaintiff and
18 Defendants have proposed a briefing schedule in the table below. Plaintiff suggests
19 that the Court set a deadline to hear dispositive motions after the Court has ruled
20

1 on the class certification motion and, if a class is certified, class members have
2 been given an opportunity to opt out.

3 **O. Trial.**

4 The parties propose that the Court set a trial date after it rules on class
5 certification. The parties propose that within ten business days after the class
6 certification ruling, the parties meet and confer and jointly propose a schedule for
7 completing fact and expert discovery, briefing dispositive motions, and completing
8 other pre-trial deadlines.

9 **P. Dispute Resolution.**

10 The parties agree that this case may benefit from private mediation after a
11 sufficient period of discovery has occurred.

12 **Q. Proposed Schedule.**

EVENT	PLAINTIFF'S PROPOSED DEADLINE	DEFENDANTS' PROPOSED DEADLINE (WHERE DIFFERENT FROM PLAINTIFF'S PROPOSED DEADLINE)
Deadline to Add Parties	June 7, 2019	November 28, 2018
Deadline to Amend	June 7, 2019	November 28, 2018
Motion for Class Certification	September 4, 2019	
Response to Class Certification	October 23, 2019	

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EVENT	PLAINTIFF'S PROPOSED DEADLINE	DEFENDANTS' PROPOSED DEADLINE (WHERE DIFFERENT FROM PLAINTIFF'S PROPOSED DEADLINE)
Class Certification Reply	November 20, 2019	
Hearing on Class Certification	To be set by the Court	
Expert Witness Disclosures	To be set after the Court rules on class certification	
Rebuttal Expert Witness Disclosures	To be set after the Court rules on class certification	
Discovery Cut off	To be set after the Court rules on class certification	
Dispositive Motions	To be set after the Court rules on class certification	
Exhibit Lists/Witnesses	To be set after the Court rules on class certification	
Final Status Conference	To be set after the Court rules on class certification	
Objections to Exhibits/witness lists	To be set after the Court rules on class certification	

EVENT	PLAINTIFF'S PROPOSED DEADLINE	DEFENDANTS' PROPOSED DEADLINE (WHERE DIFFERENT FROM PLAINTIFF'S PROPOSED DEADLINE)
Motions in Limine	To be set after the Court rules on class certification	
Pretrial Order	To be set after the Court rules on class certification	
Trial Briefs	To be set after the Court rules on class certification	
Jury Instructions/Voir Dire	To be set after the Court rules on class certification	
Pretrial Conference	To be set after the Court rules on class certification	
Trial	To be set after the Court rules on class certification	

1 **N. Trial Counsel Contact Information.**

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5 STIPULATED TO, DATED AND RESPECTFULLY SUBMITTED this
6 17th day of January, 2019.

7 TERRELL MARSHALL LAW
8 GROUP PLLC

WILLIAMS & CONNOLLY, PLLC

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By: /s/ Steven M. Cady, Pro Hac Vice

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CERTIFICATE OF SERVICE

I, Beth E. Terrell, hereby certify that on January 17, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 17th day of January, 2019.

TERRELL MARSHALL LAW GROUP PLLC

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 9 UNITED STATES DISTRICT COURT FOR THE
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10 CYNTHIA HARVEY, individually and
 on behalf of all others similarly situated,

11 Plaintiff,

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 14 CENTENE MANAGEMENT
 COMPANY, LLC and COORDINATED
 CARE CORPORATION,
 15

16 Defendants.

NO. 2:18-cv-00012-SMJ

**[PROPOSED] STIPULATED
 PROTECTIVE ORDER**

17
 18 Plaintiff Cynthia Harvey (“Plaintiff”), by and through her undersigned
 19 counsel, and Defendants Centene Management Company, LLC and Coordinated
 20 Care Corporation (collectively, “Defendants”), by and through their undersigned

1 counsel, propose the following stipulated protective order to protect personal,
2 private, confidential, or proprietary information which may be produced in this
3 action.

4 **1. Purposes and Limitations**

5 Discovery in this action is likely to involve production of personal, private,
6 confidential, or proprietary information for which special protection may be
7 warranted. Accordingly, the parties hereby stipulate to and petition the court to
8 enter the following Stipulated Protective Order.

9 **2. “Confidential” Material**

10 “Confidential” material shall include, but is not necessarily limited to, the
11 following documents and tangible things produced or otherwise exchanged:
12 medical records, materials relating to medical claims handling, proprietary internal
13 material relating to network development, proprietary internal material relating to
14 medical provider data, proprietary internal material relating to corporate strategy,
15 proprietary internal material relating to pricing, material containing personally
16 identifiable information, and protected health information (PHI) covered by the
17 Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy
18 Rule and other similar protections of sensitive medical and personally identifiable
19 information (PII).

1 **3. Scope**

2 The protections conferred by this agreement cover not only confidential
3 material (as defined above), but also (1) any information copied or extracted from
4 confidential material; (2) all copies, excerpts, summaries, or compilations of
5 confidential material; and (3) any testimony, conversations, or presentations by
6 parties or their counsel that might reveal confidential material.

7 However, the protections conferred by this agreement do not cover
8 information that is in the public domain or becomes part of the public domain
9 through trial or otherwise.

10 **4. Access To and Use of Confidential Material**

11 **4.1 Basic Principles.** A receiving party may use confidential
12 material that is disclosed or produced by another party or by a non-party in
13 connection with this case only for prosecuting, defending, or attempting to settle
14 this litigation. Confidential material may be disclosed only to the categories of
15 persons and under the conditions described in this agreement. Confidential material
16 must be stored and maintained by a receiving party at a location and in a secure
17 manner that ensures that access is limited to the persons authorized under this
18 agreement.

19 **4.2 Disclosure of “CONFIDENTIAL” Information or Items.**

20 Unless otherwise ordered by the court or permitted in writing by the designating

1 party, a receiving party may disclose any confidential material only to:

2 a. the receiving party's counsel of record in this action, as
3 well as employees of counsel to whom it is reasonably necessary to disclose the
4 information for this litigation;

5 b. the officers, directors, and employees (including in house
6 counsel) of the receiving party to whom disclosure is reasonably necessary for this
7 litigation;

8 c. experts and consultants to whom disclosure is reasonably
9 necessary for this litigation and who have signed the "Acknowledgment and
10 Agreement to Be Bound" (Exhibit A);

11 d. the court, court personnel, and court reporters and their
12 staff;

13 e. copy or imaging services retained by counsel to assist in
14 the duplication of confidential material, provided that counsel for the party
15 retaining the copy or imaging service instructs the service not to disclose any
16 confidential material to third parties and to immediately return all originals and
17 copies of any confidential material;

18 f. during their depositions, witnesses in the action to whom
19 disclosure is reasonably necessary and who have signed the "Acknowledgment and
20 Agreement to Be Bound" (Exhibit A), unless otherwise agreed by the designating

1 party or ordered by the court. Pages of transcribed deposition testimony or exhibits
2 to depositions that reveal confidential material must be separately bound by the
3 court reporter and may not be disclosed to anyone except as permitted under this
4 agreement;

5 g. the author or recipient of a document containing the
6 information or a custodian or other person who otherwise possessed or knew the
7 information.

8 **4.3 Filing Confidential Material.** Before filing confidential
9 material or discussing or referencing such material in court filings, the filing party
10 shall confer with the designating party to determine whether the designating party
11 will remove the confidential designation, whether the document can be redacted, or
12 whether a motion to seal or stipulation and proposed order is warranted.

13 **5. Designating Protected Material**

14 **5.1 Exercise of Restraint and Care in Designating Material for**
15 **Protection.** Each party or non-party that designates information or items for
16 protection under this agreement must take care to limit any such designation to
17 specific material that qualifies under the appropriate standards. The designating
18 party must designate for protection only those materials, documents, items, or oral
19 or written communications that qualify, so that non-confidential documents, items,
20 or communications are not swept unjustifiably within the ambit of this agreement.

1 **5.2 Manner and Timing of Designations.** Except as otherwise
2 provided in this agreement (see, e.g., second paragraph of section 5.2(a) below), or
3 as otherwise stipulated or ordered, disclosure or discovery material that qualifies
4 for protection under this agreement must be clearly so designated before or when
5 the material is disclosed or produced.

6 a. Information in documentary form: (e.g., paper or
7 electronic documents and deposition exhibits, but excluding transcripts of
8 depositions or other pretrial or trial proceedings), the designating party must affix
9 the word “CONFIDENTIAL” to each page that contains confidential material.

10 b. Testimony given in deposition or in other pretrial
11 proceedings: the parties and any participating non-parties must identify on the
12 record, during the deposition, hearing, or other pretrial proceeding, whether a
13 transcript is designed confidential, without prejudice to their right to so designate
14 the transcript after reviewing the transcript. Any party or non-party may, within
15 fifteen days after receiving the transcript of the deposition or other pretrial
16 proceeding, designate the transcript or portions thereof, or exhibits thereto, as
17 confidential. If a party or non-party desires to protect confidential information at
18 trial, the issue should be addressed during the pre-trial conference.

19 c. Other tangible items: the producing party must affix in a
20 prominent place on the exterior of the container or containers in which the

1 information or item is stored the word “CONFIDENTIAL.” If only a portion or
2 portions of the information or item warrant protection, the producing party, to the
3 extent practicable, shall identify the protected portion(s).

4 **5.3 Inadvertent Failures to Designate.** If timely corrected, an
5 inadvertent failure to designate qualified information or items does not, standing
6 alone, waive the designating party’s right to secure protection under this agreement
7 for such material. Upon timely correction of a designation, the receiving party
8 must make reasonable efforts to ensure that the material is treated in accordance
9 with the provisions of this agreement.

10 **6. Challenging Confidentiality Designations**

11 **6.1 Timing of Challenges.** Any party or non-party may challenge a
12 designation of confidentiality at any time. Unless a prompt challenge to a
13 designating party’s confidentiality designation is necessary to avoid foreseeable,
14 substantial unfairness, unnecessary economic burdens, or a significant disruption
15 or delay of the litigation, a party does not waive its right to challenge a
16 confidentiality designation by electing not to mount a challenge promptly after the
17 original designation is disclosed.

18 **6.2 Meet and Confer.** The parties must make every attempt to
19 resolve any dispute regarding confidential designations without court involvement.
20 Any motion regarding confidential designations or for a protective order must

1 include a certification, in the motion or in a declaration or affidavit, that the
2 movant has engaged in a good faith meet and confer conference with other affected
3 parties in an effort to resolve the dispute without court action. The certification
4 must list the date, manner, and participants to the conference. A good faith effort to
5 confer requires a face-to-face meeting or a telephone conference.

6 **6.3 Judicial Intervention.** If the parties cannot resolve a challenge
7 without court intervention, the designating party may file and serve a motion to
8 retain confidentiality. The burden of persuasion in any such motion shall be on the
9 designating party. Frivolous challenges, and those made for an improper purpose
10 (e.g., to harass or impose unnecessary expenses and burdens on other parties) may
11 expose the challenging party to sanctions. All parties shall continue to maintain the
12 material in question as confidential until the court rules on the challenge.

13 **7. Protected Material Subpoenaed or Ordered Produced in Other**
14 **Litigation**

15 If a party is served with a subpoena or a court order issued in other litigation
16 that compels disclosure of any information or items designated in this action as
17 “CONFIDENTIAL,” that party must:

18 a. promptly notify the designating party in writing and include a
19 copy of the subpoena or court order;

20 b. promptly notify in writing the party who caused the subpoena
or order to issue in the other litigation that some or all of the material covered by

1 the subpoena or order is subject to this Protective Order. Such notification shall
2 include a copy of this Protective Order; and

3 c. cooperate with respect to all reasonable procedures sought to be
4 pursued by the designating party whose confidential material may be affected.

5 **8. Unauthorized Disclosure of Protected Material**

6 If a receiving party learns that, by inadvertence or otherwise, it has disclosed
7 confidential material to any person or in any circumstance not authorized under
8 this agreement, the receiving party must immediately (a) notify in writing the
9 designating party of the unauthorized disclosures, (b) use its best efforts to retrieve
10 all unauthorized copies of the protected material, (c) inform the person or persons
11 to whom unauthorized disclosures were made of all the terms of this Protective
12 Order, and (d) request that such person or persons execute the “Acknowledgment
13 and Agreement to Be Bound” that is attached hereto as Exhibit A.

14 **9. Inadvertent Production of Privileged or Otherwise Protected
15 Material**

16 When a producing party gives notice to receiving parties that certain
17 inadvertently produced material is subject to a claim of privilege or other
18 protection, the obligations of the receiving parties are those set forth in Federal
19 Rule of Civil Procedure 26(b)(5)(B). This provision is not intended to modify
20 whatever procedure may be established in an e-discovery order or agreement that
may provide for production without prior privilege review.

1 The parties agree to the entry of a non-waiver order under Fed. R. Evid.
2 502(d) as set forth herein.

3 **10. Non-Termination and Return of Documents**

4 Within 60 days after the termination of this action, including all appeals,
5 each receiving party must return all confidential material to the producing party,
6 including all copies, extracts and summaries thereof. Alternatively, the parties may
7 agree upon appropriate methods of destruction.

8 Notwithstanding this provision, counsel are entitled to retain one archival
9 copy of all documents filed with the court, trial, deposition, and hearing transcripts,
10 correspondence, deposition and trial exhibits, expert reports, attorney work
11 product, and consultant and expert work product, even if such materials contain
12 confidential material.

13 The confidentiality obligations imposed by this agreement shall remain in
14 effect until a designating party agrees otherwise in writing or a court orders
15 otherwise.

16 **11. Qualified Protective Order Under HIPAA**

17 This Protective Order shall serve as a qualified protective order under
18 HIPAA and its implementing regulations, and shall serve as an order allowing
19 covered entities to produce un-redacted documents and records requested in this
20 action. For the purposes of this qualified protective order, “protected health

1 information” shall have the same scope and definition as set forth in 45 C.F.R. §
2 160.103 and 164.501, including, but not limited to, information related to: (a) the
3 past, present, or future physical or mental condition of Plaintiffs, (b) the provision
4 of care to Plaintiffs, (c) the payment for care provided to Plaintiffs. All “covered
5 entities,” as defined in 45 C.F.R. § 160.103, are authorized to disclose protected
6 health information requested in this action to all attorneys in this action.

7 The parties and their attorneys shall be permitted to use the protected health
8 information in any manner reasonably connected with the action, including, but not
9 limited to, disclosure to the parties and their attorneys, insurers, experts, and
10 consultants, the court, necessary court personnel, court reporters, copy services,
11 trial consultants, jurors, any appellate court, and other persons and entities
12 involved in the litigation process.

13 All protected health information produced or disclosed in the action shall be
14 used solely for the prosecution or defense (including any appeal therefrom) of the
15 Action, and shall not be used for any other purpose.

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1 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

2 DATED this 17th day of January, 2019.

3 TERRELL MARSHALL LAW
4 GROUP PLLC

WILLIAMS & CONNOLLY, PLLC

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CERTIFICATE OF SERVICE

I, Beth E. Terrell, hereby certify that on January 17, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 17th day of January, 2019.

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