

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

MELVIN SMITH and STAN FOWLER,

Plaintiffs,¹

v.

No. 15-cv-1153 SMV/GBW

AUTO-OWNERS INSURANCE COMPANY,

Defendant.

ORDER RESULTING FROM PRETRIAL CONFERENCE

Pursuant to a Pretrial Conference held on February 7, 2018, the following rulings are made:

Exhibits²

- The Court admits Exhibits 1–11, 14, 29, 31, 32, 35.
- Subject to the Court’s rulings on the objections to the deposition designations, Exhibits 18–23 are admitted.
- Considering the Court’s rulings on the objections to the designations of Ms. Donald’s deposition, counsel will attempt to agree on the admissibility of Exhibit 34. If they are unable to agree and if a ruling is needed from the Court, counsel must advise **no later than February 19, 2018**.
- The Court excludes Exhibits 12, 13, 15, 16, 17, 25, 27, 28, 33.

¹ Judgment was entered in favor of Plaintiff Stan Fowler on November 2, 2016, after he accepted Defendant’s offer of judgment. [Doc. 84]. Melvin Smith is the sole remaining Plaintiff in this case.

² The Court has considered each side’s Contested Exhibit List [Docs. 156, 149], each sides objections to the other’s Contested Exhibit List [Docs. 160, 164], along with argument presented at the pretrial conference, the relevant portions of the record, and the relevant law.

- The Court will allow counsel to attempt to admit at trial Exhibits 24, 26, 30.
 - As to Exhibit 24 (Various Health Insurance Claims Forms), the forms may be admitted at trial if Plaintiff lays the proper foundation.
 - As to Exhibit 26 (photographs), there is no dispute that these photographs were not disclosed to Defendant. However, depending on the purpose for which Plaintiff attempts to utilize them, the Court may allow them. For example, if they are utilized merely for demonstrative purposes, they may be permissible.
 - As to Exhibit 30 (Email string between Frederick Sherman and Kim Barrick from April 23, 2015 to May 11, 2016), Defendant may attempt to lay adequate foundation for admission at trial.

Witnesses³

- The transcripts of the **depositions of Dr. Anthony D'Angelo, Jr., and Michelle Franklin, D.C.**, have been admitted subject to the Court's rulings on Defendant's objections to Plaintiff's designations. If these witnesses appear at trial to testify live, neither may offer evidence or testimony beyond the scope of Fed. R. Evid. 701.
- **Susan Appleby** may testify, but her testimony may not exceed the scope of Fed. R. Evid. 701.
- Plaintiff's expert economist, **Stan V. Smith, Ph.D.**, may testify, subject to the Court's previous Memorandum Opinion and Order [Doc. 128]. Although Dr. Smith may offer testimony about hedonic damages in general, he may not offer an opinion on the quantification of such damages. *Id.* at 10–11.

³ The Court has considered each side's Witness List [Docs. 153, 151], each sides objections to the other's Witness List [Docs. 161, 163], along with argument presented at the pretrial conference, the relevant portions of the record, and the relevant law.

- **Plaintiff Melvin Smith** may not offer any evidence or testimony that goes to phase 2. Mr. Smith, however, may offer testimony related to causation, but it may not exceed the scope of Fed. R. Evid. 701.
- Former Plaintiff **Stanley Fowler** may testify as to facts of the vehicle accident and Plaintiff Melvin Smith's damages, but Mr. Fowler may not testify regarding any admissions of Defendant, allegations in the Complaint, or Mr. Fowler's own damages.
- Defendant's Claims Representative, **Kim Barrick**, may not offer testimony that goes to phase 2, including but not limited to "bad faith failure to pay a first party claim[,] bad faith failure to settle[,] violations of the Insurance Practices Act[, and] violations of the Unfair Practices Act[.]" [Doc. 153] at 6. Moreover, Ms. Barrick may not offer testimony that exceeds the scope of Fed. R. Evid. 701. Other than Plaintiff's objection to Ms. Barrick's offering expert testimony, which is sustained, Plaintiff's objections are overruled. *See generally* [Doc. 163] at 1 (Plaintiff's objections).
- Defendant's expert economist, **Allen Parkman, Ph.D., J.D.**, may not offer testimony beyond that which was disclosed in his expert report. The Court may revisit this ruling depending on the scope of testimony offered by Plaintiff's expert economist, Dr. Stan Smith.
- Defendant's medical expert, **G. Theodore Davis, M.D.**, may testify consistent with the Court's Memorandum Opinion and Order [Doc. 129].
- Defendant may call **Kimberly Donald, DNP**, by deposition, subject to the Court's rulings on the objections to the deposition designations.

Deposition Designations⁴

Defendant's objections [Doc. 162] to Plaintiff's Designations of **Dr. Boardman**'s Deposition [Doc. 155]

- 8:1-8:25: No objection to lines 8:1-8:21 (up to "...section."). Remainder is expert testimony under Rule 702 and has been excluded by Doc. 146, Memorandum Opinion and Order. **Sustained.**
- 9:1-9:25: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 10:1-10:9: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 10:23-10:25: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 11:4-11:7: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 11:14-11:18: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 12:25: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Sustained.**
- 13:1-13:5: Object. Expert testimony under Rule 702 and excluded by Doc. 146 and lack of foundation. **Sustained.**

⁴ The Court has considered each side's Deposition Designations [Docs. 155, 152], each sides objections to the other's Deposition Designations [Doc. 162] and [Doc. 163] at 2, along with argument presented at the pretrial conference, the relevant portions of the record, and the relevant law.

- 14:9-14:13: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Overruled.**
- 14:19-14:25: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 15:1: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 15:9-15:12: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 15:14-15:20: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 16:22-16:25: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 17:1-17:19: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 18:1-18:4: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Overruled.**
- 18:10-18:16: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Overruled.**
- 18:19-18:21: Object. Expert testimony under Rule 702, excluded by Doc. 146, lack of foundation and hearsay. **Overruled.**
- 19:16-19:19: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Overruled.**

- 19:22-19:25: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 20:1: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 20:8-20:9: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 20:12-20:25: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 21:1-21:8: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 21:11-21:19: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 22:5-22:17: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Overruled.**
- 22:20-22:25: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Overruled.**
- 23:1-23:4: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Overruled.**
- 23:6-23:9: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Overruled.**
- 24:24-24:25: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Sustained.**

- 25:1-25:25: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Sustained.**
- 26:1-26:6: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Sustained.**
- 28:5-28:8: Object. Expert testimony under Rule 702, excluded by Doc. 146, lack of foundation and hearsay. **Overruled.**
- 28:10-28:12: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**

Defendant's objections [Doc. 162] to
Plaintiff's Designations of **Dr. D'Angelo's** Deposition [Doc. 155]

- 8:1-8:5: No objection to 8:1-8:2. Remainder is expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 8:12-8:16: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 8:18-8:24: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 9:3-9:25: Objection to 9:3-9:23 on the grounds it is expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.** No objection to remainder.
- 11:24-11:25: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 12:1-12:10: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**

- 12:17-12:25: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 13:1-13:8: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 14:24-14:25: Objection, lack of foundation and outside scope of 701. **Overruled.**
- 15:1: Objection, lack of foundation and outside scope of 701. **Overruled.**
- 15:18-15:20: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Sustained.**
- 15:23: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Sustained.**
- 15:25: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Sustained.**
- 16:1-16:6: Object. Expert testimony under Rule 702, excluded by Doc. 146, lack of foundation and hearsay. **Sustained.**
- 16:8-16:10: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 16:12-16:25: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 17:1-17:14: Object. Expert testimony under Rule 702, excluded by Doc. 146, lack of foundation and hearsay. **Sustained.**

- 17:16-17:22: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 17:24-17:25: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 18:1-18:21: Objection to 18:1-18:10 on the grounds it is expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.** No objection to remainder.
- 19:18-19:25: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 20:1-20:8: Object. Expert testimony under Rule 702, excluded by Doc. 146, lack of foundation and hearsay. **Sustained.**
- 20:9-20:25: Object. Expert testimony under Rule 702, excluded by Doc. 146, lack of foundation and hearsay. **Sustained.**
- 21:1-21:17: Object. Expert testimony under Rule 702, excluded by Doc. 146, lack of foundation and hearsay. **Sustained.**
- 23:22-23:23: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Sustained.**
- 24:2: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Sustained.**
- 24:4: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Sustained.**
- 24:15-24:18: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Sustained.**

- 24:19: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Sustained.**
- 24:21-24:25: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Sustained.**
- 25:1-25:6: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Sustained.**
- 25:13-25:25: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 26:1: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 26:3-26:4: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 26:7-26:16: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 27:1-27:8: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 27:10-27:22: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 28:3-28:25: No objection to 28:3-28:11. Object to remainder as expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 29:1-29:3: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**

Defendant's objections [Doc. 162] to
Plaintiff's Designations of **Dr. Franklin's** Deposition [Doc. 155]

- 4:23-4:25: Objection, relevancy. **Overruled.**
- 5:1-5:25: Objection, relevancy. **Overruled.**
- 6:1-6:19: No objection to 6:1-6:17. Object to 6:18-6:19 because it is expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Overruled.**
- 6:21-6:25: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Overruled.**
- 7:1-7:13: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Overruled.**
- 7:20-7:25: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Overruled.**
- 8:1-8:25: Object to 8:1-8:18 as expert testimony under Rule 702 and excluded by Doc. 146. **Overruled.** No objection to 8:19-8:25.
- 10:1-10:9: Object to 10:1-10:2 as expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.** No objection to 10:3-10:9.
- 10:15-10:25: No objection to 10:15-10:18. Object to 10:19-10:25 as expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 11:1-11:3: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 12:1-12:25: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Sustained.**

- 13:1-13:5: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Sustained.**
- 13:7: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Sustained.**
- 13:9: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Sustained.**
- 13:12-13:25: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Sustained.**
- 14:1-14:25: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Objection to 14:23–25 was withdrawn at the Pretrial Conference. Otherwise, the objection is sustained.**
- 15:1-15:25: No objection to 15:1-15:5. Object to remainder as expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Sustained.**
- 16:1-16:25: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **The Court finds that the designation of 16:22–25 is moot because the question was not answered. Otherwise, the objection is sustained.**
- 17:2-17:4: Object. Expert testimony under Rule 702, excluded by Doc. 146 and relevancy. **Sustained.**
- 17:6: Object. Expert testimony under Rule 702, excluded by Doc. 146 and relevancy. **Sustained.**
- 17:8-17:9: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Sustained.**

- 17:16-17:18: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Sustained.**
- 18:22-18:24: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Sustained.**
- 19:2-19:21: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Sustained.**
- 21:24-21:25: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 22:1-22:25: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 23:1-23:6: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 24:1-24:25: Object to 24:1-24:11 as expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.** No objection to 24:12-24:19. Object to 24:20-24:25 as expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 25:1-25:9: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 25:11: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 25:13-25:16: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 25:20-25:25: Object. Expert testimony under Rule 702 and excluded by Docs. 130 and 146. **Sustained.**

- 26:1-26:16: Object. Expert testimony under Rule 702 and excluded by Docs. 130 and 146. **Sustained.**
- 31:10-31:25: Objection lack of foundation. **Sustained.**
- 32:1-32:12: Objection lack of foundation. **Sustained.**
- 34:5-34:15: Object because excerpt is incomplete. No objection provided 33:24-35:14 are also admitted for context and completeness. **Sustained. The additional lines will be admitted.**
- 35:9-35:14: Object because excerpt is incomplete. No objection provided 33:24-35:8 are also admitted for context and completeness. **Sustained. The additional lines will be admitted.**
- 35:21-35:23: Object because excerpt is incomplete. No objection provided 35:24-36:9 are also admitted for context and completeness. **Sustained. The additional lines will be admitted.**
- 35:25: Object because excerpt is incomplete. No objection provided 35:21-36:9 are also admitted for context and completeness. **Sustained. The additional lines will be admitted.**
- 36:1-36:6: Object because excerpt is incomplete. No objection provided 35:21-37:10 are also admitted for context and completeness. **Sustained. The additional lines will be admitted.**
- 36:10-36:25: Object because excerpt is incomplete. No objection provided 35:21-37:10 are also admitted for context and completeness. **Sustained. The additional lines will be admitted.**

- 37:1-37:2: Object because excerpt is incomplete. No objection provided 35:21-37:10 are also admitted for context and completeness. **Sustained. The additional lines will be admitted.**
- 37:19-37:20: Objection because outside scope of testimony permitted by Doc. 146. **Sustained.**
- 37:24-37:25: Objection because outside scope of testimony permitted by Doc. 146. **Sustained.**
- 38:1-38:24: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Sustained.**
- 39:6-39:22: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Sustained.**
- 40:3-40:21: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **As to 40:3–40:12, sustained. As to 40:13–40:21, overruled.**
- 42:3-42:18: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Sustained.**
- 42:21-42:25: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Sustained.**
- 43:2-43:13: Object. Expert testimony under Rule 702, excluded by Doc. 146 and lack of foundation. **Sustained.**
- 43:15-43:25: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**

- 44:1-44:9: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 44:13-44:15: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 44:18: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 44:22-44:25: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 45:8-45:10: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 45:12-45:13: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 45:15: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**
- 45:18-45:19: Object. Expert testimony under Rule 702 and excluded by Doc. 146. **Sustained.**

Defendant's objections [Doc. 162] to
Plaintiff's Designations of **Mr. Hanson's** Deposition [Doc. 155]

- 12:1-12:25: Objection to lines 12:9-12:15 based on hearsay and lack of foundation. **Sustained.** No objection to remainder.
- 13:1-13:25: Objection to lines 13:1-13:5 based on hearsay. **Objection to 13:1–13:5 was withdrawn at the Pretrial Conference.** No objection to remainder.
- 15:1-15:25: Objection to lines 15:23-15:25 based on lack of foundation. **Sustained.** No objection to remainder.

- 16:1-16:25: Objection to lines 16:7-16:24 based on lack of foundation and relevancy. **Counsel clarified at the Pretrial Conference that the objection is to 16:1–16:24. Sustained.** No objection to remainder.
- 17:1-17:25: Objection to 17:24-17:25 based on hearsay. **Objection to 17:24–17:25 was withdrawn at the Pretrial Conference.** No objection to remainder.
- 18:1-18:10: Objection based on hearsay. **Objection to 18:1–18:10 was withdrawn at the Pretrial Conference.**
- 22:9-22:10: Objection based on relevancy and lack of foundation. **Sustained.**
- 25:24-25:25: Objection based on relevancy and lack of foundation. **Sustained.**
- 29:19-29:20: Objection based on relevancy. **Sustained.**

Defendant’s objections [Doc. 162] to
Plaintiff’s Designations of Ms. Roberts’ Deposition [Doc. 155]

- 12:1-12:10: No objection provided 12:1-12:13 are included for context and completeness. **At Pretrial Conference, counsel clarified that 12:11–12:13 were required for context and completeness. Sustained.**
- 12:14-12:25: No objection provided 12:1-12:13 are included for context and completeness. **At Pretrial Conference, counsel clarified that 12:11–12:13 were required for context and completeness. Sustained.**
- 26:10-26:15: No objection provided line 26:16 is included for completeness. **Sustained.**
- 29:3-29:8: Object. Leading and misstates testimony. **Overruled.**
- 29:10: Object. Leading and misstates testimony. **Overruled.**

- 32:3-32:25: No objection to 32:3-32:6 and 32:13-32:25. Objection based on lack of foundation to 32:7-32:12. **Sustained.**
- 35:1-35:25: No objection to 35:1-35:8. Object to 35:9-35:19 as leading and repetitive of testimony from Walter and anticipated testimony from Smith. **Overruled.** Object to 35:20-35:25 based on relevancy as questions relate to *right* shoulder. **Overruled.**
- 36:1-36:25: Object to 36:1 to 36:21 based on relevancy. **Overruled.** No objection to 36:22-36:25.
- 37:1-37:25: No objection to 37:1-37:10. Object to 37:11-37:20 as leading. **Overruled.** No objection to 37:21-37:25.
- 41:10-41:12: Objection based on lack of foundation. **Overruled.**
- 41:14-41:18: Objection based on lack of foundation. **Overruled.**
- 42:2-42:8: No objection to 42:2-42:7. Objection to 42:8 based on lack of foundation. **Sustained.**
- 42:10-42:15: Objection based on lack of foundation. **Sustained.**

Defendant's objections [Doc. 162] to
Plaintiff's Designations of Mr. Walter's Deposition [Doc. 155]

- 7:1-7:25: No objection to 7:1-7:23. Objection based on lack of foundation to 7:24-7:25. **Objection to 7:24–7:25 was withdrawn at the Pretrial Conference.**
- 8:1-8:25: Objection to 8:1-8:23 based on lack of foundation and relevance. **Objection to 8:1–8:4 was withdrawn at the Pretrial Conference. Otherwise, the objection to 8:5–8:23 is sustained.** Objection to 8:24-8:25 based on relevance and duplicative of Plaintiff's anticipated testimony. **The objection to 8:24–8:25 is overruled.**

- 9:1-9:25: Objection to 9:1-9:19 based on relevance, duplicative of Plaintiff's anticipated testimony, lack of foundation and hearsay. **Overruled.** No objection to 9:20-9:25.
- 10:1-10:25: No objection to 10:1-10:20. Objection to 10:21-10:25 based on relevance. **Sustained.**
- 11:1-11:22: Objection based on relevance, duplicative of Plaintiff's anticipated testimony, and hearsay. **The objection to 11:1–11:12 is sustained. The objection to 11:13–11:22 was withdrawn at the Pretrial Conference.**
- 12:1: Objection because duplicative of Plaintiff's anticipated testimony and hearsay. **Overruled.**
- 12:3-12:17: No objection to 12:3-12:14. Objection to 12:15-12:17 based on relevance and lack of foundation. **Sustained.**
- 13:1-13:20: No objection 13:1-13:19. Objection to 13:20 based on lack of foundation, relevancy and hearsay. **Sustained.**
- 13:24-13:25: Objection based on lack of foundation, relevancy and hearsay. **Sustained.**
- 14:1-14:25: Objection to 14:1-14:10 based on lack of foundation, relevancy and hearsay. **Sustained.** No objection to 14:11-14:12. Objection to 14:13-14:17 based on lack of foundation, relevancy and hearsay. **Overruled.** Objection to 14:18-14:25 based on relevancy. **Overruled.**
- 15:1-15:18: Objection to 15:1-15:13 based on relevancy and hearsay. **Overruled.** No objection to remainder.
- 16:18-16:25: Objection based on relevance. **Sustained.**

- 17:1-17:25: Objection to 17:1-17:23 based on relevance. **Sustained.** Objection to 17:24-17:25 based on relevance and lack of foundation. **Sustained.**
- 18:1-18:5: Objection based on relevance and lack of foundation. **Sustained.**
- 18:11-18:25: No objection to 18:11-18:22. Objection to 18:23-18:25 based on relevance and lack of foundation. **Sustained.**
- 19:1-19:25: No objection to 19:1-19:19. Objection to 19:20-19:25 based on lack of foundation and relevance. **Sustained.**
- 20:1-20:12: Objection to 20:1-20:4 based on lack of foundation and relevance. **Sustained.**
- 29:25: Objection based on relevance and lack of foundation. **Sustained.**
- 46:8-46:12: Objection based on relevance and lack of foundation. **Sustained.**
- 46:17-46:18: Objection based on relevance, leading and lack of foundation. **Sustained.**
- 46:20-46:25: Objection based on hearsay and lack of foundation. **Sustained.**
- 47:1-47:2: Objection to 47:1 based on relevance. **Sustained.** Objection to 47:2 based on lack of foundation. **Sustained.**
- 47:6-47:12: Objection based on lack of foundation. **Sustained.**
- 51:8-51:11: Object because excerpt is incomplete. No objection provided 51:3-51:11 are also admitted. **Sustained. The additional lines will be admitted.**

Parties' Proposed Pretrial Order [Doc. 144]

- At the pretrial conference, Plaintiff withdrew his challenge to personal jurisdiction. *See generally* [Doc. 144] at 2.
- “Plaintiff seeks discovery as to Motion for Remand and supplementation of treating doctors.” *Id.* at 15. The request is **denied**.
- Exceptions section, *id.* at 25–26.
 - Plaintiff Smith objected to evidence at trial regarding the amount of his May 15, 2015 settlement demand to AOI. Defendant believes the evidence is relevant and admissible. **Plaintiff’s objection is overruled. The letter has been stipulated to as an exhibit at trial.**
 - Defendant denied that Plaintiff might call Terren Klein, MD or David Lucero to testify at trial as these individuals had not been identified prior to the proposed pretrial order. **Neither witness may testify at trial. However, Plaintiff may make a tender at the time of trial as to what he thinks the witnesses would say.**
 - Defendant takes exception to any portion of the AOI Policy being excerpted at trial without the Court having the opportunity to review the entire contract for context and relevance. **The Court has read the entire contract.**

Daily Trial Schedule and Management

- Each side may have 30 minutes for opening statements and 45 minutes for closing arguments.
- Trial will commence each day at 9:00 a.m. and terminate at or around 5:00 p.m., with breaks in the morning, for lunch, and in the afternoon.

Defendant's pending request to exclude any "theories of liability not pleaded in Plaintiff's Complaint and outside the Scope of Phase 1." [Doc. 146], [Doc. 139] 9–10.

In Defendant's Motion in Limine, it requested the exclusion of any theories of liability not pleaded in the Complaint and outside the scope of phase 1. [Doc. 139] at 9–10. In the Court's Memorandum Opinion and Order, ruling was reserved on that request until the Pretrial Conference. [Doc. 146] at 10. The issue, however, was not raised at the Pretrial Conference. **Plaintiff may not mention or allude to any theory or act of negligence not pleaded and not fully disclosed in Plaintiff's discovery responses. Plaintiff may not introduce evidence or argument outside the scope of, and not relevant to, Phase 1 of this litigation, which is focused on Plaintiff's claim for breach of contract.**

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the parties' objections to each other's exhibit lists, witness lists, and deposition designations [Docs. 160, 161, 162, 163, 164] are **SUSTAINED IN PART and OVERRULED IN PART** as detailed herein.

IT IS FURTHER ORDERED that the requests for pretrial relief set out in the Proposed Pretrial Order [Doc. 144] are decided herein.

IT IS FURTHER ORDERED that Defendant's request to exclude reference to theories of liability not pleaded in Plaintiff's Complaint and outside the Scope of Phase 1, [Doc. 139] at 9–10, is **GRANTED**.

IT IS SO ORDERED.



STEPHAN M. VIDMAR
United States Magistrate Judge
Presiding by Consent