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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION  
HONORABLE DAVID O. CARTER, U.S. DISTRICT JUDGE

DUAL DIAGNOSIS TREATMENT CENTER, )  
INC., et al., )  
 ) **Certified**  
Plaintiffs, )  
 )  
vs. ) Case No.  
 ) 8:15-cv-00736-DOC-RNB  
BLUE CROSS OF CALIFORNIA, et al., )  
 )  
Defendants. )  
 )

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REPORTER'S TRANSCRIPT OF  
JOINT MOTIONS TO DISMISS CASE  
TUESDAY, MAY 31, 2016  
6:17 P.M.  
SANTA ANA, CALIFORNIA

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1                   **SANTA ANA, CALIFORNIA; TUESDAY, MAY 31, 2016**

2                                   **6:17 P.M.**

3                                   - - -

4                   THE COURT:   Calling the matter of Dual Diagnosis  
06:17PM 5   Treatment Center versus Blue Cross of California.  It's  
6   15-0736.

7                   Counsel, Mr. Stris, you're present; correct?

8                   MR. STRIS:   Yes.

9                   THE COURT:   Get your hands out of your pockets, sir.  
06:17PM 10   Thank you.

11                  And you're Rachana -- is it Pathak?

12                  MS. PATHAK:   Pathak.

13                  THE COURT:   Pleasure.  How are both of you?

14                  The defendants are represented by Hillary Erin Feybush,  
06:18PM 15   Alltech, Inc., Benefit Plan and eHealth Insurance Service.  Is  
16   that person present?

17                  MS. FEYBUSH:   Yes, Your Honor.

18                  THE COURT:   And just for the moment, is Robert  
19   Humphreys, Independent Blue Cross & Bricklayers and Allied  
06:18PM 20   Craftworkers here?

21                  MR. HUMPHREYS:   Yes, Your Honor.

22                  THE COURT:   Thank you very much, sir.  It's a  
23   pleasure.

24                  Keith Beauchamp -- is it "Beauchamp"?  Keith Beauchamp,  
06:18PM 25   Blue Cross/Shield of Arizona and Tucson Electric Power.

1                   **(No audible response.)**

2                   THE COURT: Okay. Do we have a number for the  
3 gentleman, and did he check in?

4                   Now the reason you're at 5:30 tonight is I didn't want  
06:18PM 5 another court inconvenienced, and I'm not going to call the  
6 matter and get 20 calls from attorneys who say they can't  
7 appear. So we're going to wait for Mr. Beauchamp for a moment.

8                   MR. BEAUCHAMP: Your Honor, I'm Keith Beauchamp. I  
9 just went to the rest room during the break.

06:19PM 10                   THE COURT: Okay. Thank you very much.

11                   Carol Lewis. Carol Lewis.

12                   MR. VON BEHREN: Your Honor, this is Bill  
13 von Behren. She's my partner. She's outside --

14                   THE COURT: She's here? That's all I need is the  
06:19PM 15 representation. Thank you.

16                   Eileen Ridley.

17                   MS. RIDLEY: I'm here, Your Honor.

18                   THE COURT: Thank you very much. It's a pleasure.  
19 Good evening.

06:19PM 20                   Nicole -- is it Diller?

21                   MS. DILLER: Yes, Your Honor.

22                   THE COURT: Thank you very much. It's a pleasure.

23                   Nicole -- and you represented multiple defendants without  
24 calling them out.

06:19PM 25                   MS. DILLER: That's correct.

1 THE COURT: David Levin, Time Warner.

2 MR. LEVIN: I'm here.

3 THE COURT: Thank you very much.

4 Maynard Buck.

06:19PM 5 MR. BUCK: Yes, Your Honor.

6 THE COURT: Thank you, sir. Pleasure.

7 Christopher Rillo.

8 MR. RILLO: Yes, Your Honor.

9 THE COURT: Representing Hartford?

06:19PM 10 MR. RILLO: Yes, sir.

11 THE COURT: Thank you.

12 Alexandria Young, L. Brands, Health and Welfare Benefits

13 Plan.

14 MS. YOUNG: Good evening, Your Honor.

06:20PM 15 THE COURT: William von Behren.

16 MR. VON BEHREN: Yes, Your Honor. William von

17 Behren.

18 THE COURT: Keith Wesley.

19 MR. WESLEY: Yes, Your Honor.

06:20PM 20 THE COURT: Gary Pancer.

21 MR. PANCER: Yes. Good evening, Your Honor.

22 THE COURT: Hong-An Vu.

23 MS. VU: Yes, Your Honor. Good evening.

24 THE COURT: And you represent Vertical Search Works?

06:20PM 25 MS. VU: That's correct, Your Honor.

1 THE COURT: Thank you.

2 Nathan McClellan, Rocket Software Group.

3 MR. McCLELLAN: Yes, Your Honor.

4 THE COURT: Thank you.

06:20PM 5 Dan Woods, Alliant Insurance Services.

6 MR. WOODS: Good evening, Your Honor.

7 THE COURT: Good evening, sir.

8 Christopher -- is it Dueringer? Am I pronouncing that  
9 correctly?

06:20PM 10 MR. DUERINGER: "Dueringer," Your Honor.

11 THE COURT: Thank you very much. MediaNews Group  
12 Welfare Benefits Plan.

13 Ronald Kravitz, Wells Fargo.

14 MR. KRAVITZ: Yes, Your Honor.

06:20PM 15 THE COURT: Thank you.

16 Melissa Cowan.

17 MS. COWAN: Yes, Your Honor.

18 THE COURT: Thank you very much. Milton Hershey  
19 Medical Center Health and Welfare Plan.

06:20PM 20 Neil Barker.

21 MR. BARKER: Yes, Your Honor.

22 THE COURT: Blue Cross Alabama and Michigan; is that  
23 correct? Are you local counsel?

24 MR. BARKER: Yes. It's -- plans related to them.

06:21PM 25 THE COURT: Okay. Are you from this area or having



1 to fly out?

2 MR. BARKER: Pasadena.

3 THE COURT: Well, it's flying out. I'm just  
4 kidding. It's a long ways. Okay.

06:21PM 5 Patrick -- apologize -- de Gravelles.

6 MR. DE GRAVELLES: "de Gravelles," yes, Your Honor.

7 THE COURT: de Gravelles?

8 MR. DE GRAVELLES: de Gravelles.

9 THE COURT: My apologies. Thank you. Group  
06:21PM 10 Hospitalization?

11 MR. DE GRAVELLES: Yes.

12 THE COURT: Raymond Collins, Kilgore and Brian  
13 Boyle.

14 MR. COLLINS: Yes, Your Honor.

06:21PM 15 THE COURT: Thomas Gilbert, Yates Petroleum.

16 MR. GILBERT: Present, Your Honor.

17 THE COURT: Lauren Daming, Ascension SmartHealth.

18 MS. DAMING: Yes, Your Honor.

19 THE COURT: Thank you.

06:21PM 20 Todd Wozniak, BayHealth Medical Center Plan.

21 MR. WOZNIAK: Yes, Your Honor.

22 THE COURT: Thank you.

23 Michael Sandner, U.S. LBM Holdings Employee Benefit Plan.

24 MR. SANDNER: Yes, Your Honor.

06:21PM 25 THE COURT: Thank you.

1 Susan Graham Lovelace.

2 MS. LOVELACE: Yes, Your Honor.

3 THE COURT: And who do you represent? Is it Cal --

4 MS. LOVELACE: Southern California IBEW Health Trust  
06:22PM 5 Fund.

6 THE COURT: Thank you very much.

7 I think it's Elise "Clem", VFW?

8 MS. KLEIN: Elise Klein, Your Honor.

9 THE COURT: Elise, thank you very much. Apologize.

06:22PM 10 My pronunciation is not so good. Local 555.

11 Now, let me ask Deb for just a moment. Does that cover,  
12 Deb, according to your records all of the defendants? And are  
13 they all present with counsel? Because if I'm missing  
14 something, I'm going to issue an OSC re contempt. You want to  
06:22PM 15 sort that out later on?

16 THE COURTROOM DEPUTY: Yeah, we'll have to go  
17 through those.

18 THE COURT: Okay. I want to go through those. I  
19 want to see who's not here.

06:22PM 20 Okay. First of all, I want to thank all of you folks.  
21 Thank you very much. We normally -- oh, who else is here?

22 MS. JAFEE: Sorry. I'm Jill Jaffe from Nossaman --

23 THE COURT: Come up here for just a moment.

24 What's your name?

06:22PM 25 MS. JAFEE: Sorry. This is Jill Jaffe for Nossaman

1 appearing on behalf of HL Financial Services.

2 THE COURT: Great. We're going to get you on a  
3 piece of paper right here. Anybody else who represents anybody  
4 else, come on up here for a moment. It's going to save a whole  
06:23PM 5 bunch of contempt citations. I'm getting all you good folks to  
6 show up on time.

7 MS. ZI: Good evening, Your Honor. Monica Zi from  
8 Reed Smith. And we represent a handful of defendants.

9 THE COURT: It's a pleasure. Thank you very much.

06:23PM 10 Could you sign -- come on up here, both of you. Make sure we  
11 don't make a mistake and all of a sudden you receive a  
12 nastygram from the Court. That's not fair to you.

13 Anybody else here who's representing any party who hasn't  
14 checked in with Debbie?

06:23PM 15 I'm going to assume, Deb, by default, that any party we  
16 find who's not here is not present. Okay.

17 Or if you see somebody come in even if they were late,  
18 there was an accident on the freeway, a couple folks called, so  
19 if some of you folks see somebody checking in, for goodness  
06:23PM 20 sakes, I don't want them harmed, but some of the folks are  
21 going to get a little e-mail.

22 How would you like to conduct the arguments this evening?  
23 Let me just say it's my understanding that both of you are --  
24 well, Mr. Stris and Ms. Pathak, apparently you're arguing for  
06:24PM 25 all plaintiffs, but I don't intend to restrict plaintiffs from

1 argument. So if somebody wants to join in with your argument,  
2 that's fine. How many other plaintiffs' counsel are here? Are  
3 there any others?

4 MR. STRIS: There are some other individuals from  
06:24PM 5 our firm here, Your Honor.

6 THE COURT: Oh, that's fine. But there are no other  
7 plaintiffs' counsel present that are going to be arguing this  
8 evening?

9 MR. STRIS: No one will be arguing other than  
06:24PM 10 Ms. Pathak and myself.

11 THE COURT: Look around for a moment. Turn around  
12 and look at who's ready against you.

13 MR. STRIS: You know, I'm used to being the  
14 underdog.

06:25PM 15 THE COURT: Now for the defense, I don't know who's  
16 arguing for the defense, but I don't intend to preclude any of  
17 you who want to add or speak on the record this evening. And  
18 that --

19 MS. RIDLEY: If I may Your Honor, Eileen Ridley. I  
06:25PM 20 represent Anthem and the Anthem affiliated list of entities.  
21 The defense group discussed the possible method by which to  
22 present the argument. The agreement was that I would present  
23 with regard to the Omnibus Motion as a whole.

24 THE COURT: Okay.

06:25PM 25 MS. RIDLEY: And then there's some idiosyncratic

1 issues regarding Anthem. There were two issues that I'll deal  
2 with. And then there are six other addenda that deal with what  
3 I would call idiosyncratic issues as to those six entities.  
4 And the individual counsel for those will deal with those  
06:25PM 5 issues.

6 THE COURT: Okay. Now for all of you other folks  
7 out there, if you hear something that you don't agree with or  
8 that you want to add to, you've got carte blanche. I think  
9 it's unfair to some of you who might want to add a nuance, but  
06:26PM 10 that's counsel by agreement. Apparently you're taking the  
11 leadership role in the sense of trying to bring this together.

12 Who are the other six counsel?

13 MS. RIDLEY: If they are here --

14 THE COURT: Well, there you are. I won't get your  
06:26PM 15 names now, six of them or seven.

16 Okay. How long would you like to argue?

17 MS. RIDLEY: Your Honor, typical lawyer, as long as  
18 you'd like to hear us; however --

19 THE COURT: Go ahead. How long would you like?

06:26PM 20 MS. RIDLEY: Given the issues just for the Omnibus  
21 Motion and the issue with regard to Anthem, I would say 15, 20  
22 minutes on that. There may be obviously additional time on the  
23 separate six other addenda.

24 THE COURT: Counsel.

06:27PM 25 MR. STRIS: I resisted answering because it depends

1 on kind of the arguments that are made on the motion. But if  
2 Ms. Ridley's argument is at that length, I would request that  
3 ours would be approximately the same amount of time.

4 THE COURT: First of all, I'm not placing time  
06:27PM 5 restrictions on you, okay. We're not trying to rush you in and  
6 out of court, so let me set my record for a moment. There's a  
7 defendants' joint notice of motion to dismiss this case, which  
8 I'll refer to as the Omnibus Motion. At one point there were  
9 147 defendants in this matter. That number has decreased  
06:27PM 10 slightly.

11 In addition to the Omnibus Motion, the following  
12 defendants filed separate addenda to the Omnibus Motion which  
13 raised additional arguments. And I'll call those out slowly.  
14 If we made a mistake, please correct us:

06:28PM 15 Defendant Eaton Corporation Medical Plan for U.S.  
16 Employers, the Anthem defendants' addendum, Time Warner Cable  
17 Benefits Plan, U.S. LBM Holdings, LLC Employee Benefit Plan,  
18 Blue Cross/Shield of Arizona and Tucson Electric Power Company  
19 Group Insurance Plan, Liberty Mutual Medical Plan, BayHealth  
06:28PM 20 Medical Center , Inc., Health and Welfare Benefits Plan, Geico  
21 Corporation Consolidated Welfare Benefits Program, Mercy Health  
22 Services, Inc., and Subsidiaries Medical Plan, Owens-Illinois,  
23 Inc., Hourly Employees Welfare Benefit Plan for Active  
24 Employees, Defendant HCSC and Bimbo Bakeries USA Health and  
06:28PM 25 Welfare Plan.

1           In the Omnibus Motion, defendants seek to dismiss all of  
2 plaintiffs' four claims, first seeking to recover benefits  
3 pursuant to 29 U.S.C. 1132(a)(1)(B); second, seeking removal of  
4 breaching fiduciary pursuant to 29 U.S.C. Section 1132(a)(2);  
06:29PM 5 third, seeking injunctive and declaratory relief pursuant to  
6 29 U.S.C. Section 1132(a)(3) and for unfair competition under  
7 California law.

8           The threshold issue in the motion and related filings is  
9 standing, specifically whether the patients have assigned their  
06:29PM 10 rights under their healthcare plans to their healthcare  
11 providers.

12           So in a few moments, we're going to start argument. I  
13 want to apologize for the disjointed nature. I need to get a  
14 couple medical folks on the way. I'm not sure whether some  
06:29PM 15 folks are going up the highway with marshals tonight and coming  
16 back later or not. We're not going to know for a few moments,  
17 so I just apologize to you for the disruption.

18           I know now it's been confirmed that Peter Stris and  
19 Rachana Pathak will speak on behalf of plaintiffs; Eileen  
06:30PM 20 Ridley will be speaking on behalf of defendants along with six  
21 or maybe seven other counsel or any other counsel who wants to  
22 join in.

23           So here's a few questions I'd like you to specifically  
24 address sometime during your argument. I want you to present  
06:30PM 25 your argument in the logical fashion that you've already

1 prepared. I'm not going to break in, but somewhere along the  
2 way I'm interested in the following: First, if this Court  
3 finds a valid assignment that plans can be considered by the  
4 incorporation by reference doctrine, then will this court have  
06:30PM 5 to evaluate each individual anti-assignment provision? And can  
6 any assignment provisions be grouped in any way? And I'm happy  
7 to repeat that. In fact, let me do so for a moment.

8 If this court finds a valid assignment and that plans can  
9 be considered by the incorporation by referenced doctrine, then  
06:31PM 10 will the Court have to evaluate each individual anti-assignment  
11 provision? Can the anti-assignment provisions be grouped in  
12 any way?

13 Now, you don't have to address it right off the bat. Just  
14 at some point I'd like to hear from each of you on that.

06:31PM 15 The second general question is on Page 14 of the  
16 opposition, the plaintiffs listed four requirements for a valid  
17 anti-assignment provision. I'd like the parties to somewhere  
18 address and argue whether there is support for these four  
19 requirements in the case law. I'm looking for support for  
06:31PM 20 those four requirements you mentioned in your opposition.  
21 That's on Page 14.

22 The third general question is have all the defendants  
23 submitted their relevant plan language for this Court to  
24 evaluate, or have only some of the defendants included their  
06:32PM 25 plain language? Because I'm not going to do this seriatim.



1 We're going to wrestle with this tonight. I'm trying not to  
2 bring you back and back and back, and I'm not going to take it  
3 piecemeal. We're all assembling again as a family and hearing  
4 arguments if somebody doesn't propose them tonight.

06:32PM 5 So once again, have all the defendants submitted the  
6 relevant plan language for the Court to evaluate, or have only  
7 some of the defendants included their plan language? And I'm  
8 going to want to know which defendants those are.

9 I think lastly at some point I'd like to hear argument on  
06:32PM 10 whether plaintiffs put defendants on notice of the valid  
11 assignments. In other words, was there notice here.

12 Now before we get started and potentially, you know,  
13 you're cut off by disruption --

14 **(Another matter was heard; reported,**  
06:32PM 15 **and not transcribed herein.)**

16 THE COURT: So Counsel, who would like to begin?

17 MR. STRIS: Your Honor, may we sit?

18 THE COURT: Certainly.

19 MS. RIDLEY: I guess I'll begin. Thank you,  
06:33PM 20 Your Honor, for the time and for wading through the large  
21 amount of paper that we know the Court has received on this. I  
22 will try to be brief and not repeat what's in the papers. I  
23 note the questions -- I actually think I'll go through the  
24 questions and sort of spin from those questions with regard to  
06:34PM 25 the argument in general.

1           Before I do that, it is the defendant's position that we  
2 have -- we essentially have two different claim assignment  
3 forms, Form A and Form B. And the two forms are substantially  
4 different. I don't think anyone in the courtroom would  
06:34PM 5 disagree with that.

6           THE COURT: Right.

7           MS. RIDLEY: With regard to the Form A, it is  
8 defendant's position that that is not an assignment. What that  
9 is is a -- an acknowledgment and a mere statement with regard  
06:34PM 10 to how payments may be made. There's no language regarding  
11 assignment. There's no revealed intent with regard to an  
12 assignment of rights within that particular form. And  
13 consequently, we don't believe that that form provides the  
14 proper standing for the plaintiffs to bring the claims that  
06:35PM 15 they have brought in this action. I will note that with regard  
16 to Form A, that that particular document, other than saying at  
17 the top that it's an assignment, has literally no language  
18 saying it's assigning any right.

19           I will also note that the providers by themselves don't  
06:35PM 20 have standing as beneficiaries under ERISA, that their rights  
21 would be at most derivative depending upon what assignment, if  
22 any, they receive from the patients that they have provided  
23 services to.

24           Form B is a completely different type of document. There,  
06:35PM 25 there is some assignment language. It is notable in its

1 difference in that regard, but its wording in and of itself is  
2 quite blunderbuss, but also does not include provisions for the  
3 assignment to remove fiduciaries or for equitable claims. And,  
4 therefore, does not provide the basis upon which plaintiffs  
06:36PM 5 could bring either their second or third claim.

6 Now, the Court had asked, and hopefully I have this  
7 question correctly, but if the Court finds that there is a  
8 valid assignment, must it evaluate the anti-assignment  
9 provisions presented by a variety of defendants. And yes, I  
06:36PM 10 would say that the Court does have to evaluate them. And, in  
11 fact, we believe those assignment provisions are enforceable  
12 and has been recognized by a number of courts as being  
13 enforceable, the most recent of which came down in the *Mbody*  
14 case that we noted. Those provisions state that any assignment  
06:37PM 15 that a provider has is given force if it's within the terms of  
16 the plans. And if the plans themselves have anti-assignment  
17 provisions, those provisions apply ab initio, from the  
18 beginning.

19 And, in fact, that is appropriate through the  
06:37PM 20 incorporation clause to look at plan documents. And, in fact,  
21 if we take a look at case law including the most recent case in  
22 *Mbody*, district courts have frequently looked at SBD's, plan  
23 documents, et cetera, to determine the existence of  
24 anti-assignment provisions and their application.

06:37PM 25 You asked if the assignment could be grouped in any way.

1 There is some standard language. I would suggest to the Court  
2 that they might be able to be grouped. I think there may be  
3 six or seven different variations that I've seen just looking  
4 at the plan documents that have been provided. I imagine that  
06:38PM 5 they could be grouped according to similar language,  
6 Your Honor.

7 I think the Court also asked -- I think this is the third  
8 question -- as to whether or not all the defendants have  
9 submitted relevant plan language. I will tell you that not  
06:38PM 10 every defendant has submitted relevant plan language. Some  
11 plans, to our knowledge, do not have any assignment provisions.  
12 I believe each defendant attempted to present the language with  
13 regard to anti-assignment provisions that they had. I do not  
14 know if there are any defendants who have anti-assignment  
06:38PM 15 provisions that they have not presented. My belief is those  
16 plans that had them, presented them to the Court by way of this  
17 motion.

18 THE COURT: Okay.

19 MS. RIDLEY: The Court's fourth question as to  
06:39PM 20 whether or not the plaintiffs put the defendants on notice with  
21 regard to the assignments, it is defendant's contention that,  
22 in fact, they did not. And with regard to this, I would note  
23 that the plaintiffs' sole argument with regard to notice is the  
24 argument that they've checked off the box in the claim  
06:39PM 25 submittal form.

1           The issue with that, however, is that that box, even by  
2 the organization that created the form, is not identified as a  
3 box that says that the provider has an assignment. That box  
4 merely reflects that there is some agreement between the  
06:39PM 5 provider and the patient or member with regard to payment. It  
6 does not necessarily reflect an assignment or more to the point  
7 the terms of the assignment. Because not all, quote-unquote,  
8 "assignments are equal" both with regard to the type of  
9 language they have specifically and under law especially in the  
06:40PM 10 Ninth Circuit, for example, the *Spinedex*. The actual language  
11 is important as to what was intended to be conveyed. Here we  
12 have an example of that --

13                           **(Brief interruption.)**

14           THE COURT: I'm sorry, Counsel.

06:40PM 15           MS. RIDLEY: Here we have an example of the fact  
16 that not all claimed assignments are equal. For example, we  
17 have the Form A and Form B, clearly different documents. We  
18 would contend Form A is not, in fact, an assignment. And so  
19 merely checking the box is not tantamount to notice. More to  
06:41PM 20 the point -- not only because it doesn't reflect an actual  
21 assignment, but it also does not provide notice of the terms of  
22 whatever agreement that the provider believes it is relying  
23 upon has with regard to issues as to what's been assigned and  
24 the nature of what's been assigned.

06:41PM 25           The remaining question -- I think your second question

1 referred to Page 14, the opposition, whether or not the four  
2 listed requirements is reflected in case law. It is our  
3 position that it is not. And in point of fact, we believe that  
4 it is not based on any case law or any statutory provision. It  
06:41PM 5 is plaintiffs' argument, but, in fact, has never been followed  
6 by any -- has not been, in fact, a test, so to speak, that a  
7 court has typically applied with regard to the issues as to  
8 whether or not the planned documents are appropriate or an  
9 anti-assignment provision is applicable. And, in fact, we  
06:42PM 10 believe that courts have regularly looked at the agreement  
11 themselves and applied language which we contend is appropriate  
12 for this matter as well, Your Honor.

13 I believe I've hit each one of the questions the Court  
14 asked me to address. I would also note that with regard to the  
06:42PM 15 Form B, we do believe that it is an unconscionable adhesion  
16 contract. I think it is apparent that what we have is, in  
17 fact, a somewhat extreme use of language that attempts to  
18 convey rights. And, in fact, plaintiffs argue that it conveys  
19 essentially an irrevocable assignment with regard to all claims  
06:43PM 20 that might be related. And this is interesting when you have,  
21 for example, plans that are not individual plans.

22 For example, if you had, for example, the Home Depot and  
23 you have one plan that the Home Depot has, and it covers more  
24 than one beneficiary, if the argument is that assignment is  
06:43PM 25 such that it should -- it is in force and there's an

1 irrevocable assignment including the right, for example, to --  
2 for a reformation or to permanently change the fiduciary of the  
3 plan, if that's the case, then what will happen is that plan  
4 would be changed not only for the member who allegedly assigned  
06:43PM 5 the rights, but for all the other subscribers or members under  
6 that plan who never even provided -- or obtained services from  
7 the provider, because there is one plan.

8 And to suggest that that kind of language would be able to  
9 affect members who come under the plan who never even obtained  
06:44PM 10 services and frankly had no conception that the assignment  
11 would somehow alter the plan as they obtained it and/or changed  
12 the actual fiduciary is extreme and is not supported either by  
13 the facts or the law. It's actually counter to the system of  
14 healthcare that we have it.

06:44PM 15 Finally with regard to the issue of the plaintiff's claim  
16 for 17200, it is our contention that that is preempted and  
17 that, in fact, the plaintiffs have failed to establish even the  
18 prongs that would require a 17200 claim, either a borrowed law  
19 under the unlawful prong or the anti-competitive claims  
06:44PM 20 particularly given the fact that the provider itself is neither  
21 a competitor nor consumer.

22 That would be my brief argument with regard to the  
23 Omnibus. As I said, I have idiosyncratic issues with regard to  
24 the Anthem addendum. I don't know if you would like me to  
06:45PM 25 address that now.

1           There are two issues for the Anthem addendum. The two  
2 issues are that we have a number of plaintiffs -- or excuse me,  
3 a number of claims that the plaintiffs have brought that relate  
4 to individual plans, literally plans that are purchased by an  
06:45PM 5 individual, not plans that are subject to ERISA. This action  
6 sounds an ERISA. And given that fact, we believe that the  
7 claims related to those patients, which we specifically  
8 identify in the addendum, should be dismissed.

9           Further, the second point, there are a number of claims  
06:45PM 10 which were submitted by an entity called MedLink. MedLink has  
11 its own unique identifier number as a biller and submitter of  
12 bills for services it rendered. MedLink is not a named party  
13 and, in fact, has not presented a claim in this suit at all.  
14 It is our contention that those claims should also be  
06:46PM 15 dismissed.

16           Now, plaintiffs argue that MedLink is somehow an agent of  
17 theirs. The problem here, though, Your Honor, is multifold:  
18 First, it has its own individualized number and submitted the  
19 charges as an individual biller and provider of services.

06:46PM 20 Moreover, given that that is, in fact, the case, the  
21 contentions that the plaintiff somehow have assignments  
22 regarding those services based on the allegation that they  
23 provided services is just not representative of the actual  
24 relationship that is, in fact, the case under the documentation  
06:47PM 25 for those specific claims.



1           Because plaintiffs cannot state that they are, in fact, in  
2 receipt of any assignment or even provided services to those  
3 plaintiffs, we believe those claims should also be dismissed.

4           THE COURT: Okay. Now there's going to be two  
06:47PM 5 rounds, so you have a number of other colleagues who wanted to  
6 argue at this time. I think it would be wise to ask them to  
7 come forward and then I'll hear the Omnibus response.

8           Which of counsel would like to come forward? There's no  
9 particular order, but there's six or seven of you, I think.

06:47PM 10 Would you be kind to introduce yourself once again to me.

11           MR. BEAUCHAMP: Good evening, Your Honor. Keith  
12 Beauchamp. I represent Blue Cross/Blue Shield plans of Arizona  
13 and Tucson Electric, which is a plan administered by Blue  
14 Cross.

06:47PM 15           THE COURT: All right. Just a minute.

16           **(Pause in proceedings.)**

17           THE COURT: Please.

18           MR. BEAUCHAMP: Your Honor, we joined in the -- the  
19 plans that are administered by my clients all have identical  
06:48PM 20 anti-assignment language. So when you're asking about  
21 grouping, you can group my three clients and the four people  
22 who sued them together. We all have identical language. It's  
23 very strong, express anti-assignment language. We briefed that  
24 issue in our addendum to the Reply, so I'm not going to cover  
06:48PM 25 it again here.

1           What I did -- the nuance that I wanted to cover with you  
2 was venue. The planned booklets for my clients also had  
3 express venue provisions that make clear that venue is proper  
4 only in Arizona. The plaintiff here bears the burden of  
06:48PM 5 showing that the venue provision should not be enforced. They  
6 are unable to do that.

7           They make two arguments: One is that the venue provision  
8 is not in the plan documents, but, in fact, it is, and there  
9 are citations to that in our Reply. The second argument they  
06:49PM 10 make is that it is illegal to have venue provisions in ERISA  
11 plans, but the reality is courts routinely enforce these.

12           The two authorities they cite are a dissent from the Sixth  
13 Circuit in which the Sixth Circuit decision squarely supports  
14 our argument, and the 2006 district court case from Texas that  
06:49PM 15 has not been followed by the district courts and has expressly  
16 been rejected by a number of district courts including a number  
17 of district courts in the state of California as well as in  
18 Arizona that have enforced venue provisions. So we would ask  
19 that the claims against my client be dismissed for improper  
06:49PM 20 venue in addition to the other arguments that Eileen has made.

21           THE COURT: Mr. Beauchamp, thank you.

22           And another colleague of yours?

23           MR. LEVIN: Your Honor, good evening. My name is  
24 David Levin, and I represent Time Warner Cable Benefits Plan.

06:49PM 25           THE COURT: Just a moment, sir. Thank you, sir.

1 MR. LEVIN: First I'd like to say that I concur in  
2 the arguments that have been presented thus far by my  
3 colleagues.

4 I would like to address -- and I'd like to say that's  
06:50PM 5 true, also, with respect to the four questions of the Court --  
6 that the Court presented. I'd like to address what's been  
7 referred to as some idiosyncratic points that are true with  
8 respect to my client's plan.

9 First of all, with respect to the Assignments A and  
06:50PM 10 Assignment B, one of them --

11 THE COURT: Just a moment.

12 If you don't mind, I'd like to start over with your  
13 argument so your argument is not interrupted. I apologize for  
14 my discourtesy. If you'd like to have a seat.

06:51PM 15 And Counsel, if you'd like to move back.

16 **(Another matter was heard; reported,**  
17 **and not transcribed herein.)**

18 THE COURT: Mr. Levin, my apologies, sir. If you'd  
19 like to start all over again before the interruption. I humbly  
07:28PM 20 apologize for the interruption.

21 MR. LEVIN: Good evening and thank you again. My  
22 name is David Levin, and I represent the Time Warner Cable  
23 Benefits Plan.

24 And again, as I said before, I concur in the statements  
07:28PM 25 that were made by my colleagues before me. The primary claim

1 in this case is under 1132(a)(1), which is for benefits, and  
2 that is to enforce the terms of a benefits plan.

3 In the First Amended Complaint of nearly 300 pages,  
4 nowhere is there a reference to any benefit plan provision that  
07:28PM 5 entitles the plaintiffs to the money that they seek. It's not  
6 referenced either in words or substance, certainly not with  
7 respect to my client's plan.

8 And the statements that were made about the  
9 anti-assignment provision, I concur and I've briefed them and I  
07:29PM 10 don't really have anything to add to them except that our  
11 anti-assignment provision is not only in the plan itself, it's  
12 also in the summary plan description, which was also provided  
13 to the Court as well as in the claim payment statement, which  
14 says these monies, the payment that's being made now and the  
07:29PM 15 services that were provided were provided by an out-of-network  
16 provider and that you, the participant, are responsible for  
17 paying the out-of-work service provider.

18 So as I say, there's nothing affirmative in the First  
19 Amendment Complaint as an entitlement to receive the monies.

07:29PM 20 And the anti-assignment provision in the plan is one that has  
21 been -- the anti-assignment provisions have been recognized as  
22 to make an assignment invalid.

23 In addition, with respect to the particular -- the  
24 assignments, the alleged assignment, Assignment A and  
07:29PM 25 Assignment B, apparently based on an affidavit that was

1 provided by the plaintiffs, it appears that our patient, 140,  
2 is the participant in our plan, and apparently signed Exhibit A  
3 or Assignment A, which authorizes the payment of insurance  
4 company benefits. Our plan is not insured. We have no  
07:30PM 5 insurance company that pays benefits. So that by the terms  
6 of -- even if this were an assignment, it actually doesn't  
7 assign benefits under our plan.

8 And if for some peculiar reason it turned out that our  
9 patient 140 signed the second one, Assignment B, Assignment B  
07:30PM 10 actually has a place for a policyholder. We don't have any  
11 insurance so there's no -- there isn't any policyholder,  
12 there's a place for the patient.

13 The document itself says that what's assigned is being  
14 assigned by the policyholder. But the assignment is not signed  
07:30PM 15 by the policyholder, it's signed by the patient. So whatever  
16 this document is or isn't, it is certainly not an entitlement  
17 to the assignment of benefits from our plan, and I'm only  
18 speaking on behalf of the Time Warner Cable Benefits Plan.

19 In addition, our plan has a forum selection provision.

07:31PM 20 And there are two district courts in the United States, one in  
21 Texas and one in the Northern District of Illinois, that have  
22 refused to enforce anti-assignment provisions within the Fifth  
23 Circuit which is where Texas is, the other district courts  
24 have, in fact, enforced.

07:31PM 25 In the Ninth Circuit, this Court -- this Court and the

1 Central District and in the Northern District have repeatedly  
2 enforced forum selection provisions.

3 And in the Sixth -- I argued this case to the Sixth  
4 Circuit on forum selection in the *Smith v. Aegon Pension Plan*.

07:32PM 5 And the petition writ of certiorari was sought in the case.  
6 And the solicitor general did agree that the case should not be  
7 heard by the Supreme Court. So there is only one circuit in  
8 the United States that's ruled on this, and it has ruled that  
9 forum selection clauses are enforced.

07:32PM 10 I realize the district courts within any district don't  
11 have to follow what another district court did, but the  
12 precedent within the district courts in California is very  
13 strong for enforcement. And in the Northern District of  
14 Illinois, the only -- the one court that didn't enforce, that  
07:32PM 15 court recognized in its opinion that it was an outlier. And  
16 its analysis is actually considered -- was considered by the  
17 Sixth Circuit and rejected by the Sixth Circuit.

18 In addition to these idiosyncratic issues that are germane  
19 to my client's plan, we have a limitation of action provision  
07:33PM 20 which says that from the final denial of the -- the final  
21 adverse determination with respect to the benefit that within  
22 one year a claim has to be filed. No one has asserted in this  
23 case, the plaintiffs haven't said, one year is insufficient.  
24 And in the United States Supreme Court in the *Heimeshoff* case  
07:33PM 25 looked at and considered one year to be adequate.

1           The language itself in the Complaint and in the brief  
2 filed by the plaintiffs, first of all, says that what they call  
3 the adverse benefit determination was the refusal to pay them.  
4 We know that they -- that the participant was paid. It's part  
07:33PM 5 of the claim. And as part of the claim, it was submitted to  
6 the Court.

7           The Complaint in this case -- the Complaint was filed more  
8 than a year after that date. My client was not a defendant in  
9 the case until the First Amended Complaint was filed, which was  
07:34PM 10 in an even later date, more than a year after. So the -- in  
11 point of fact, there is a limitation of action that would apply  
12 here.

13           And I realize it's an affirmative defense, but on the face  
14 of the Complaint itself, one can tell that the year has -- more  
07:34PM 15 than the year has run because plaintiffs take the position that  
16 they didn't have to exhaust administrative remedies, and that  
17 when the payment was made, that was -- and their assignment  
18 wasn't recognized that that was the adverse benefit  
19 determination. And that's plain on the face of the First  
07:34PM 20 Amended Complaint.

21           In addition, I would like to point out one other thing,  
22 and that is that there is a claim in here under 1132(a)(3) for  
23 breach, but the duty that's breached is never clear from the  
24 First Amended Complaint. Fiduciaries have duties -- there are  
07:35PM 25 four duties under 1104(a), and they are to act only in the

1 interest of participants to use the assets of the plan for the  
2 participants.

3 No one can say the money here wasn't paid to the  
4 participants, and it's not alleged. One of them is to act  
07:35PM 5 prudently. There's no allegation. I don't think there's an  
6 allegation here of prudence in the payment. There's a  
7 requirement to diversify assets, which wouldn't be applicable  
8 here. And the fourth requirement, 1104(a)(1)(D), says that the  
9 plan documents must be complied with except to the extent that  
07:35PM 10 they're inconsistent with Title I of ERISA, which has language  
11 of paying benefits.

12 And so I submit to you that there isn't any real breach  
13 alleged here except the refusal to comply with the assignments,  
14 if they are assignments. And the plans themselves require the  
07:36PM 15 fiduciary not to comply with the assignments because that's  
16 what the language of the plan says. Thank you.

17 THE COURT: Okay. Thank you very much.

18 Who's the next colleague that you have?

19 MR. BUCK: Good evening, Your Honor. Maynard Buck  
07:36PM 20 for the Eaton Corporation Medical Plan for U.S. employees.

21 Your Honor, we filed separately to raise the specific  
22 provision that appears in the Eaton Plan after a very, very  
23 complete and unequivocal anti-assignment plan similar to what  
24 exists in most of the plans at issue here.

07:36PM 25 The Eaton Plan also has a very, very clear statement.



1 That in the case of services rendered by providers out of  
2 network, that the payments will be sent to the participant. So  
3 there can be no question under this Eaton Plan that in the  
4 context at issue here, everybody was unquestionably on notice  
07:37PM 5 that the payment was going to the participant, which is, in  
6 fact, what happened.

7 If I might, Your Honor, I'd also like to address the  
8 question -- one of the questions that you raised, and that's  
9 about the four-part test that the plaintiff has asserted. And  
07:37PM 10 in the context of the Eaton Plan, only the fourth element of  
11 that test would be at issue. Because even if the test -- the  
12 first three elements did exist, which we agree with Ms. Ridley,  
13 they do not, there's no support for that. But in the case of  
14 the Eaton Plan, even plaintiffs admit the Eaton Plan satisfied  
07:38PM 15 the first three.

16 The fourth element is that the plaintiff asserts that the  
17 defendants must prove that an SPD was sent to the participant  
18 assignee, the plaintiff, as required by ERISA. This assumes  
19 that the provider with an assignment rises to the level of a  
07:38PM 20 participant or a beneficiary. Those are the only parties under  
21 ERISA that are entitled to distribution of SPD's under the  
22 statute.

23 Now, in terms of a participant, ERISA is very specific, it  
24 defines a participant as either an employee, a former employee  
07:39PM 25 or a union member who is or may become eligible for benefits.

1 That's in 29 U.S.C., Section 1002(8). Clearly a provider is  
2 not an employee, a former employee or a union member. Neither  
3 can a provider, such as the plaintiffs, be a beneficiary. The  
4 courts that have addressed that case have all said "no," that a  
07:39PM 5 provider is not a beneficiary.

6 And I would point the Court to the *Grasso Enterprises* case  
7 out of the Eighth Circuit, the *Hermann* case out of the Fifth  
8 Circuit, the *Rojas* case out of the Second Circuit all cited in  
9 the briefing. But it's very clear the courts have said  
07:40PM 10 providers are not beneficiaries under ERISA. So if they're not  
11 a participant and they're not a beneficiary, there is no basis  
12 on which to suggest that there was any duty to, in the first  
13 instance, send the plaintiffs a summary-plan description being  
14 that in this case of the Eaton Plan, that's the only element  
07:40PM 15 that would be in dispute of their four-part test. It's very  
16 clear that that fourth aspect does not exist, cannot exist  
17 under the statute, and therefore, even under the plaintiff's  
18 theory of this case, the anti-assignment language is, indeed,  
19 enforceable in terms of the Eaton Plan.

07:40PM 20 Now that four-part test they talked about, they described  
21 as procedural deficiencies. They also went to this -- what  
22 they called a substantive deficiency. And in that point with  
23 respect to the Eaton Plan, the only thing they cite as a  
24 problem with the Eaton Plan is the failure to state that the  
07:41PM 25 anti-assignment language applies to providers. They are

1 suggesting that there is somehow a requirement that  
2 anti-assignment language affirmatively state this applies to  
3 service providers.

4 Now, we would submit, Your Honor, there's no basis in the  
07:41PM 5 case law for that. But in the case of the Eaton Plan, that  
6 language that I mentioned first which specifically says that in  
7 the case of an out-of-network provider, the payments are going  
8 to be directed to the participant, clearly puts the provider,  
9 the participant and anybody else on notice that the payments  
07:42PM 10 are going to the individual participant, not the provider. So  
11 even in this kind of creative substantive deficiency argument  
12 that the plaintiff has asserted, even under that, this language  
13 would satisfy that requirement.

14 So in the case of the Eaton Plan, we think there clearly  
07:42PM 15 is a -- is cause to dismiss. Even under the plaintiffs' own  
16 theories, the anti-assignment language is there in addition to  
17 the out-of-network provider language. And we would  
18 respectfully request that the motion be granted as to the Eaton  
19 Plan. Thank you.

07:43PM 20 THE COURT: Thank you.

21 Counsel, next colleague.

22 MS. DILLER: Good evening, Your Honor. Nicole  
23 Diller on behalf of Bimbo Bakeries Health and Welfare Plan, the  
24 Geico Consolidated Welfare Benefits Program, Mercy Health  
07:43PM 25 Services Health and Welfare Plan and the Owens-Illinois

1 Employees Welfare Benefit Plan, which I'll collectively refer  
2 to as "the plans."

3 Initially I would like to concur in my colleague's  
4 arguments and the responses to the questions that were posed by  
07:43PM 5 Your Honor. We have briefed the plan's anti-assignment  
6 language which nullifies the purported assignment of benefits  
7 on which plaintiffs' statutory standing rests. I don't want to  
8 reiterate the language of those anti-assignment provisions, but  
9 I'm available if the Court has any questions regarding them;

07:44PM 10 otherwise, I'd like to point out that plaintiffs' waiver  
11 argument is unavailing because the First Amended Complaint does  
12 not allege an intentional relinquishment of a known right.

13 Rather what plaintiffs allege is that they ask the  
14 question to Blue Cross as to whether or not the plans permitted  
07:44PM 15 assignment and mark down either "yes" or "no." There's no  
16 reason that they couldn't have alleged what that answer was,  
17 because that's within their information. And we believe that  
18 this is *Twombly* deficient certainly to allege a waiver which  
19 requires that intentional relinquishment.

07:44PM 20 And like the Eaton Plan, the plans each contained language  
21 permitting payment directly to participants in the event that  
22 the services are received by a nonparticipating provider. So  
23 all of the arguments that were just made relating to the  
24 payment directly to the participant and the event of a  
07:45PM 25 nonparticipating provider which plaintiffs admit they were, I

1 concur in.

2 I also wanted to briefly join in the *Twombly*  
3 considerations that were raised by Mr. Levin. On the  
4 1132(a)(1)(B) claim, plaintiffs identified plan provisions  
07:45PM 5 entitling them to relief, and they don't even articulate what  
6 services were performed. Rather they just say mental health  
7 and/or substance abuse services were rendered. That's  
8 insufficient in our view to satisfy the notice of pleading  
9 results by failing to plead what exactly is at issue. And they  
07:45PM 10 also failed to allege any plan terms that require payment to a  
11 service provider. And, in fact, the plans belie any such  
12 terms.

13 On the breach of fiduciary duty claim under 1132(a)(3),  
14 plaintiffs have not identified a fiduciary or which ERISA  
07:46PM 15 fiduciary obligation was allegedly breached. They assert the  
16 claims against planned defendants. Plans are not fiduciaries  
17 and, therefore, claim for breach of fiduciary duty cannot lie  
18 against them.

19 And further, the mishandling of a single claim for  
07:46PM 20 benefits, which is all that is alleged as to the plans at issue  
21 here is not sufficient to allege a breach of fiduciary duty  
22 under the *Amalgamated Clothing and Textile Workers vs. Murdock*,  
23 which is a Ninth Circuit case that's cited in our briefs.

24 Unless the Court has any questions that's all I wanted to  
07:46PM 25 add.

1 THE COURT: Okay. Thank you very much.

2 And the next colleague, please.

3 MR. SANDNER: Good evening, Your Honor. Mike  
4 Sandner on behalf of the U.S. LBM Plan. I, too, would like to  
07:47PM 5 concur in the arguments that --

6 THE COURT: I'm sorry. Is it Michael Sandner?

7 MR. SANDNER: Sandner.

8 THE COURT: S-a-n-d-n-e-r?

9 MR. SANDNER: Correct.

07:47PM 10 I, too, would like to concur in the arguments that have  
11 been advanced by my colleagues. Our addendum to the motion to  
12 dismiss was submitted in anticipation of the Court's first  
13 question, that being would the Court need to look at the  
14 individual policy language of the different anti-assignment  
07:47PM 15 provisions. In our case, we do have an anti-assignment  
16 provision that we do believe is controlling and warrants  
17 dismissal.

18 The argument against our plan was that the SPD had not  
19 been submitted based upon the law that we cited in our brief.  
07:48PM 20 The SPD, we do not believe, is controlling and would not  
21 determine the language of the anti-assignment provision. There  
22 was another argument made that there was an administrative  
23 services agreement that should have been submitted.

24 And while that administrative services agreement may be  
07:48PM 25 part of the contract between U.S. LBM and the administrator,

1 it's not part of the plan. The plan is actually a defined term  
2 in the benefits booklet that says it is defined as described in  
3 that booklet. The booklet is what we have submitted. The plan  
4 contains an anti-assignment provision that requires written  
07:48PM 5 consent. There is no allegation in the First Amended Complaint  
6 that there is any written consent or approval. And in summary,  
7 it's essentially the same language that was just recently found  
8 dispositive in the *Mbody* case that was submitted as  
9 supplemental authority. And based on that, we ask that the  
07:48PM 10 motion be granted as to the U.S. LBM plan.

11 THE COURT: Thank you, Counsel.

12 MR. BOYLE: Your Honor, Brian Boyle for the Health  
13 Care Service Corporation, its subsidiaries and plans it  
14 administers. I think the good news is I think I'm the last  
07:49PM 15 one.

16 THE COURT: Just one moment. I must have skipped  
17 your name. You're Brian Boyle?

18 MR. BOYLE: Yes, Your Honor.

19 THE COURT: I saw you stand up. I called the names  
07:50PM 20 earlier and apparently I don't have you on this master sheet as  
21 having checked in, so that's my responsibility. Who do you  
22 represent?

23 MR. BOYLE: It's a long list, Your Honor, but the  
24 core defendant is the Health Care Service Corporation  
07:50PM 25 subsidiary plan. So Blue Cross of Illinois, Texas, Montana and

1 a number of plans that Health Care Service Corporation  
2 subsidiaries provide claim administrative services.

3 THE COURT: How do I spell your first name?

4 MR. BOYLE: Brian, B-r-i-a-n.

07:51PM 5 THE COURT: Last name B-o-y-l-e?

6 MR. BOYLE: B-o-y-l-e.

7 THE COURT: Give me the main person -- once again, I  
8 apologize -- that you represent.

9 MR. BOYLE: The core -- I guess the hub is Health  
07:51PM 10 Care Service Corporation or HCSC. And it owns several Blue  
11 Cross plans around the country.

12 THE COURT: Just a moment. Thank you. Please, your  
13 argument.

14 MR. BOYLE: I just wanted to call attention to a set  
07:51PM 15 of plan provisions that we have identified to Your Honor as  
16 containing anti-assignment clauses. These are for -- I'll read  
17 the patients aloud here: Patients 24, 25, 128, 164, 183, and  
18 113. They are unusual forms of language in the sense that they  
19 actually permit assignments on their face, but they say an  
07:52PM 20 assignment is going to be honored only if the patient or the  
21 provider in this case submits the assignment form, the actual  
22 signed assignment form along with the claim.

23 And so we're -- since the Complaint does not allege that  
24 the providers here did anything more than check the box on the  
07:52PM 25 claim form, that they had some form of patient-signed



1 authorization back at the facility, we are contending that the  
2 providers haven't met the literal requirements of this  
3 assignment provision. They didn't present the assignment form  
4 along with the claim.

07:53PM 5 And so I just wanted to call attention to that unique form  
6 of language. It actually derives from a provision in Texas law  
7 that was enacted to favor providers, allow them to -- or to  
8 acquire insurers to honor assignments that providers had under  
9 certain circumstances whether or not the plan had an  
07:53PM 10 anti-assignment clause, an insured plan. But the law in  
11 question specifically requires the provider to submit the  
12 assignment form in order to have the assignment form honored.

13 I want to call attention to this to reinforce the larger  
14 point that this -- as Ms. Ridley argued -- that these providers  
07:53PM 15 have alleged they did nothing more than check the box in a  
16 claim form, which is perfectly consistent with the provider  
17 simply having a direction of payment from the patient or the  
18 member, an authorization for the insurer to remit the payment  
19 directly to the provider and not an assignment of any legal  
07:54PM 20 rights whatsoever and an assignment of the right to the  
21 payment. And that's all I have, Your Honor.

22 THE COURT: Mr. Boyle, thank you very much.

23 Counsel.

24 MR. VON BEHREN: Your Honor, we did not file an  
07:54PM 25 addendum, but I wanted to address a few points that you raised

1 and inquired of the group, if I may.

2 THE COURT: What's your name?

3 MR. VON BEHREN: William von Behren. I represent 60  
4 defendants, 23 Blue plans and 37 ERISA plans. I have a list if  
07:54PM 5 that would assist the Court.

6 THE COURT: It would eventually, but we can hear  
7 your argument.

8 MR. VON BEHREN: Thank you, Your Honor.

9 The argument is primarily addressing and clarifying a few  
07:54PM 10 points the Court raised. Specifically with regard to your  
11 first question, Your Honor, you inquired as to whether there is  
12 a -- any means by which the anti-assignment provisions may be  
13 grouped. We, of course, having -- representing 23 plans and 37  
14 of the ERISA welfare plans, have attempted to undertake that.

07:55PM 15 And I should point out that it's our view that there are  
16 certain groupings that may be an outlier here or there. But  
17 for the most part, if it would assist the Court, we'd like to  
18 offer to provide a more concise basis upon which we can group  
19 those.

07:55PM 20 And we filed the addendum to the Omnibus Motion that  
21 consisted of a chart with all of the plans that we're moving on  
22 that point as well as the language that was referenced in the  
23 particular plans. And we can reorganize that in such a way to  
24 make it clear that it's grouped in those -- whatever number  
07:56PM 25 that is. I agree that it's probably going to be in the

1 neighborhood of six to eight large groupings with a few  
2 outliers. So if that assists the Court, we'll be happy to do  
3 that, Your Honor.

4 And then the other point I wanted to make was you  
07:56PM 5 specifically asked whether all the plans have submitted the  
6 relevant plan language. We have identified one of our clients  
7 for which we did not have the declaration filed with the  
8 relevant plan language. That is the Regence Oregon Blue Cross  
9 Blue Shield plan.

07:56PM 10 Regence also has a plan in Washington, and that was  
11 submitted. And it also has a plan in Utah, and those documents  
12 were submitted. The Oregon documents were not submitted. We  
13 would like the opportunity to submit them.

14 I should also point out we've recently substituted in  
07:57PM 15 subsequent debriefing on behalf of other ERISA welfare benefit  
16 plans, and we don't know if those plans were submitted with the  
17 original briefing, and we'd like the opportunity to verify that  
18 is the case.

19 All of those -- all the language is included in the  
07:57PM 20 addendum. This is simply a matter of submitting the  
21 Declaration from which that language is -- would be  
22 authenticated.

23 THE COURT: Okay. Thank you.

24 MR. VON BEHREN: Thank you, Your Honor. Unless  
07:57PM 25 there's any further questions --

1 THE COURT: No, sir.

2 Hillary Erin Feybush, is there anything you'd like to add?

3 MS. FEYBUSH: No, Your Honor.

4 THE COURT: Robert Humphreys, anything else you wish  
07:57PM 5 to add?

6 MR. HUMPHREYS: No, Your Honor. We join in the  
7 arguments that were made before.

8 THE COURT: Carol Lewis?

9 MS. LEWIS: No, Your Honor.

07:58PM 10 THE COURT: I just want to be courteous and make  
11 certain if there is.

12 Christopher Rillo?

13 MR. RILLO: No, Your Honor. Thank you.

14 THE COURT: Alexandria Young?

07:58PM 15 MS. YOUNG: No, Your Honor.

16 THE COURT: Keith Wesley, WebMD?

17 MR. WESLEY: No, Your Honor.

18 THE COURT: Okay. Thank you.

19 Gary Pancer?

07:58PM 20 MR. PANCER: Just really one quick comment,  
21 Your Honor. One of the clients I represent -- I represent  
22 three defendants -- one is Sierra Nevada Brewing Company.

23 THE COURT: Is there a conflict that my son used to  
24 work there as a bartender?

07:58PM 25 MR. PANCER: I don't think so, Your Honor.

1 THE COURT: Well, I'll disclose that to you. Chico  
2 State, biggest party school in the world. Never missed a  
3 party.

4 MR. PANCER: I just thought it was ironic that I  
07:58PM 5 represented Sierra Nevada Brewing Company at this late time.  
6 We just wanted to point out in our Declaration we did not point  
7 out the specific reference to the plan that I wanted to make  
8 the Court aware of for your convenience. So it's for Sierra  
9 Nevada, the Prudent Buyer Benefit Booklet that we attached,  
07:59PM 10 which is Document 684-3. It's No. 20 -- Page 20228 has the  
11 specific anti-assignment reference.

12 THE COURT: Okay.

13 MR. PANCER: Thank you.

14 THE COURT: Hong-An Vu?

07:59PM 15 MS. VU: Nothing, Your Honor.

16 THE COURT: Nathan McClellan, Rocket Software Group?

17 MR. McCLELLAN: I'd like to add one brief point,  
18 Your Honor. This is in response to your Question 3 regarding  
19 whether all the relevant language has been submitted.

08:00PM 20 THE COURT: I can't hear you. I'm sorry.

21 MR. McCLELLAN: In regards to your Question No. 3  
22 regarding whether all of the relevant plan language has been  
23 submitted. The plan language for Rocket Software has indeed  
24 been submitted, but it has not been submitted by Rocket  
08:00PM 25 Software. It was attached to a Declaration that was filed by

1 Blue Cross Blue Shield of Massachusetts, and that's Docket  
2 No. 678-3.

3 THE COURT: So Rocket Software, your plan language  
4 is located where?

08:00PM 5 MR. McCLELLAN: Docket 678-3.

6 And in addition, plaintiffs made the argument in their  
7 papers that the SPD must also contain the relevant language and  
8 anti-assignment provision. The SPD with respect to Rocket  
9 Software has not been submitted; however, we do have an SPD,  
08:01PM 10 and it does contain an anti-assignment provision.

11 To the extent the Court would like to see that, we'd be  
12 happy to file that and give you a chance to take a look at that  
13 as well.

14 THE COURT: Okay.

08:01PM 15 MR. McCLELLAN: That's all I have.

16 THE COURT: Thank you.

17 Dan Woods?

18 MR. WOODS: Nothing to add, Your Honor. Thank you.

19 THE COURT: Thank you, sir.

08:01PM 20 Christopher Dueringer?

21 MR. DUERINGER: Nothing to add, Your Honor.

22 THE COURT: Melissa Cowan -- I'm sorry. My  
23 apologies. Ronald Kravitz with Wells Fargo.

24 MR. KRAVITZ: Nothing to add, Your Honor.

08:01PM 25 THE COURT: Melissa Cowan with Milton?

1 MS. COWAN: Nothing to add, Your Honor.

2 THE COURT: Neil Barker with Blue Cross Alabama and  
3 Michigan.

4 MR. BARKER: Nothing to add, Your Honor.

08:01PM 5 THE COURT: Patrick De Gravelles?

6 MR. DE GRAVELLES: Yes, Your Honor. Nothing on the  
7 merits. I would note I have a small housekeeping issue to  
8 raise after the Court -- after the discussion on the merits.

9 THE COURT: I don't understand.

08:02PM 10 MR. DE GRAVELLES: Sorry, Your Honor. You issued an  
11 order on Friday about a pro hac motion that I submitted. I  
12 just wanted to clarify what I intend to do with that because  
13 the order said I had to resubmit by today, but there's a flaw  
14 that I can't cure, and I just wanted to make the Court aware of  
08:02PM 15 that.

16 THE COURT: Okay. Do you want to remain afterwards  
17 and discuss that?

18 MR. DE GRAVELLES: Yes. If that suits the group.

19 THE COURT: So we don't hold up the group, that's  
08:02PM 20 fine. Just remain after.

21 Raymond Collins Kilgore, Brian Boyle.

22 MR. KILGORE: No, Your Honor.

23 MR. BOYLE: We've spoken Your Honor. Thank you.

24 THE COURT: Mr. Boyle, I apologize. The way it was  
08:02PM 25 listed, I had you listed, and it was on the same line. So my

1 apologies. I had you before.

2 Thomas Gilbert on behalf of Yates Petroleum.

3 MR. GILBERT: Nothing more at this time, Your Honor.

4 THE COURT: Lauren Daming, Ascension SmartHealth.

08:02PM 5 MS. DAMING: Nothing to add, Your Honor.

6 THE COURT: Todd Wozniak of BayHealth Medical Center  
7 Plan.

8 MR. WOZNIAK: Nothing to add, Your Honor.

9 THE COURT: Susan Graham Lovelace.

08:03PM 10 MS. LOVELACE: Nothing to add, Your Honor.

11 THE COURT: And Elise Klein.

12 MS. KLEIN: Nothing to add, Your Honor.

13 THE COURT: And then there may have been a couple  
14 more folks that Debbie just didn't get the name to me. Is  
08:03PM 15 there anybody else who's here whose name I didn't call?

16 I apologize. Come up here again. Debbie took your name  
17 and she didn't attach it to the sheet. She decided to go home  
18 at 8 o'clock.

19 MS. JAFFE: I have my card, Your Honor.

08:03PM 20 THE COURT: That's okay. What's your name?

21 MS. JAFFE: Jill Jaffe.

22 THE COURT: Jill "Gaffney"?

23 MS. JAFFE: J-a-f-f-e.

24 THE COURT: Great. Who do you represent?

08:03PM 25 MS. JAFFE: HL Financial Services.



1 THE COURT: I saw you before and Debbie took your  
2 name.

3 MS. JAFFE: Yes.

4 THE COURT: It's someplace, so you want to just  
08:03PM 5 leave it right here on the corner. Do you have anything else  
6 you'd like to add?

7 MS. JAFFE: No, Your Honor.

8 THE COURT: Anybody else who I've neglected? Come  
9 up. I saw you before, also, and --

08:04PM 10 MS. ZI: Good evening, Your Honor. Monica Zi from  
11 Reed Smith.

12 THE COURT: And how do I spell your last name?

13 MS. ZI: Z-i. "Z" like zebra, "i" like ice cream.

14 THE COURT: Do it again.

08:04PM 15 MS. ZI: "Z," like zebra, "i," like ice cream.

16 THE COURT: And who do you represent?

17 MS. ZI: I represent a variety of defendants, and I  
18 presented Debbie with the list already.

19 THE COURT: Okay. Give me your main core defendant.

08:04PM 20 MS. ZI: We represent a variety of plans, Blue  
21 Cross --

22 THE COURT: Just give me one.

23 MS. ZI: Blue Cross and Blue Shield.

24 THE COURT: Of who?

08:04PM 25 THE WITNESS: Minnesota.

1 THE COURT: Okay. Minnesota. Okay. Anything else  
2 you'd like to add?

3 MS. ZI: No. I have nothing to add.

4 THE COURT: Anybody else?

08:04PM 5 Okay. Plaintiffs.

6 MR. STRIS: Peter Stris on behalf of the plaintiffs.  
7 I'm going to address the Omnibus Motion and the Anthem  
8 addendum, and then my colleague, Ms. Pathak, is going to  
9 address some of the individual motions.

08:05PM 10 Now with regard to the Omnibus Motion, Ms. Ridley  
11 essentially covers what I view as eight major issues, and I'd  
12 like to take them in turn. The first issue is essentially is  
13 Form A an assignment? And what Ms. Ridley tells you is that  
14 it's not an assignment, because other than the title, there's  
08:05PM 15 nothing in the document that indicates that it's an assignment  
16 of ERISA benefits. Frankly that surprises me, because if you  
17 take a look at Form A, which is attached as Exhibit A to the  
18 First Amended Complaint, this is a document that has under 150  
19 words before the notary section, and it ends with a signature  
08:05PM 20 line that says, "In witness whereof, I have executed this  
21 assignment of benefits."

22 Now the reason I think that is significant is because if  
23 you take that language and couple it with the direct payment  
24 language above, it's essentially materially identical to the  
08:06PM 25 assignment of benefits in *Spinedex*, the 2014 Ninth Circuit case

1 where the parties and the Court agreed there was a valid  
2 assignment of benefits.

3 It's essentially materially identical to the assignment in  
4 the *North Jersey Brain* case that we cite in our opposition, the  
08:06PM 5 Third Circuit case, where the Court found that that language  
6 was a valid assignment of benefits. And it's pretty much  
7 identical to the language in a 2009 Eleventh Circuit case that  
8 was discussed in *North Jersey*. That case is *Connecticut State*  
9 *Dental Association* where one of the defendants here,

08:06PM 10 Connecticut Blue, advanced this argument, and it was rejected.

11 The only contractual authority, in fact, that defendants  
12 can cite for the proposition that somehow this is not an  
13 assignment of ERISA benefits are two district court cases that  
14 they repeat in their Reply. One is a New Jersey District Court  
08:07PM 15 case called *MHA*, which was abrogated by the Third Circuit in  
16 *North Jersey*, and the other is a Middle District of Tennessee  
17 case called *Brown*, which is on appeal to the Sixth Circuit, but  
18 more importantly it relies only on other district court cases  
19 that have all since been overruled.

08:07PM 20 So with all due respect to my colleagues, this particular  
21 argument about how a direct payment authorization is not an  
22 assignment of ERISA rights is one that payors have been  
23 pedaling in court after court around the country, and I think  
24 correctly it's being rejected seriatim, and it should be  
08:07PM 25 rejected here.

1 I'll say one last thing on this before I move on to the  
2 second issue, which is, if you disagree and you're inclined to  
3 view this as something other than an assignment of ERISA  
4 benefits, I would urge Your Honor that any ambiguity cannot be  
08:07PM 5 resolved on the pleadings. And as authority for that, I would  
6 point to the *Spinedex* case itself, which as one of the  
7 peripheral issues involved both the assignments and Article III  
8 standing and an anti-assignment provision.

9 And what happened in that case was the Ninth Circuit was  
08:08PM 10 reviewing a grant of summary judgment. And if you look at that  
11 case, what the district court allowed were affidavits from the  
12 individual patients as to what their intent was in signing the  
13 form, and even a linguistics expert. So I think it can be  
14 determined just on the language of Form A. But if you think  
08:08PM 15 that there's some sort of ambiguity, I think that's a fight  
16 that has to happen another day after we're able to develop a  
17 record about the intent of the parties.

18 That brings me to the second major issue that Ms. Ridley  
19 addressed, which is essentially what is the scope of the Form A  
08:08PM 20 assignment? And I admit that this is a more complex question,  
21 and it's one that pervades a lot of the other arguments, so I  
22 want to confront it.

23 Our position is fairly straightforward, and I want to make  
24 it clear in case it was not from the briefs. Our position is  
08:09PM 25 that Form A's assignment of benefits necessarily includes the

1 right to seek those benefits through any provisions of ERISA  
2 that would have been available to the patient assignor. And I  
3 want to walk through this argument because it will resurface in  
4 a number of other contexts. So since 1986 in a Ninth Circuit  
08:09PM 5 case called *Misic* that both sides have cited, it has been  
6 well-settled law in the circuit that ERISA health benefits can  
7 be assigned.

8 Now, it's also well settled that there's no need to  
9 mention in your assignment the specific ERISA remedies  
08:09PM 10 provision that your -- that you have the right to use. And as  
11 authority for that, Your Honor, I would urge that you look at  
12 *Spinedex* and *North Jersey* and *Connecticut Dental*. All of these  
13 cases where an ERISA assignment was found and where the right  
14 to sue for benefits was found, none of the contracts mentioned  
08:10PM 15 ERISA, mentioned Section 502(a) or any of the subprovisions.  
16 What all of those courts have held, which I think is sensible,  
17 is that if you assign someone irrevocably your benefits under  
18 ERISA, that logically entails the right to use the remedies  
19 under ERISA to actually get paid those benefits.

08:10PM 20 Now here's why this matters. Usually in most cases such  
21 as *Misic*, the way you obtain those benefits is a lawsuit under  
22 Section 502(a)(1)(B) of ERISA. And that is our primary claim  
23 here, it's Count 1 of the First Amended Complaint.

24 Sometimes, however, and this case is a good example of  
08:10PM 25 that, a provider needs to bring a claim under one of the other

1 subsections of 502, particularly 502(a)(3), for violations of  
2 the claims regulations that happened when they were trying to  
3 exhaust administrative remedies and actually get the benefits  
4 paid. And I -- there's a ton of authority for this, and I  
08:11PM 5 would start with *Spinedex* itself, the Ninth Circuit case.

6 If you look at Pages 1298 to 1300 of the *Spinedex* opinion,  
7 and I know the opinion is long and has many sections, but this  
8 is Section H, what Judge Fletcher did in that opinion is he  
9 reversed the district court's holding regarding the provider  
08:11PM 10 plaintiff's failure to exhaust so that the district court on  
11 remand could evaluate the deemed denial exhaustion argument.

12 Now I want to be clear, that is an argument that relies on  
13 a violation of the claims regulations. And so to essentially  
14 put our position in one sentence, because I want to drive this  
08:12PM 15 point home, our provision is not that somehow providers are  
16 independently beneficiaries under the statute, our position is  
17 that just as a provider becomes a derivative beneficiary for  
18 purposes of 502(a)(1)(B), and that's what *Misic* held and that's  
19 what all of the defendants acknowledge is the law, a provider  
08:12PM 20 also becomes a derivative claimant under the claims  
21 regulations.

22 If you look at Paragraph 55 of our First Amended  
23 Complaint, Pages 67 to 70, we allege this theory so that we put  
24 defendants clearly on notice, of what rights we thought we had  
08:12PM 25 under the Form A assignment. So our position essentially is

1 that you can't bring untethered 502(a)(2) and 502(a)(3) claims.  
2 That's not our position. You can't find some other breach of  
3 duty, for example, the plan defendants are illegally  
4 surcharging participants in the plan.

08:12PM 5 But if you have a claim that sounds under certainly  
6 (a)(3), and I would submit although it's a more aggressive  
7 position, I admit, under (a)(2), that is tethered to the  
8 benefits claim that you've asserted and that was assigned, that  
9 is an operation of law falls within the scope of the  
08:13PM 10 assignment.

11 And I thought it was interesting that in refuting this  
12 point, the lead case or one of the two lead cases that the  
13 defendants chose was the *Grasso* case from the Eighth Circuit.  
14 Because not only does it not help them, it expressly rejects  
08:13PM 15 their argument.

16 If you look at the *Grasso* case, the provider in that case  
17 sought an injunction ordering defendants to pay all assigned  
18 claims until they came into compliance with the claim's  
19 regulations. And if you look at what the Eighth Circuit said,  
08:13PM 20 the Eighth Circuit said providers did have standing not only to  
21 bring 502(a)(1)(B) claims, but also to bring 502(a)(3) claims  
22 asserting violations of the claims regulations.

23 The Eighth Circuit went on to reject the claims on the  
24 merits because it was a terrible claim, but the Eighth Circuit  
08:14PM 25 made clear that our position is the law in the Eighth Circuit.

1 Later in the opinion when the Eighth Circuit at the end  
2 was addressing the alternative argument of the providers, that  
3 they had standing as a plan-designated beneficiary. That's  
4 when the Eighth Circuit said, no, ERISA doesn't work that way.  
08:14PM 5 But in the context of an assignment, precisely our position  
6 with regard to Form A was adopted by the very circuit that is  
7 one of their lead cases as to why we're wrong.

8 Okay. So that essentially sets forth our view on Form A,  
9 which is my client's old form. It's not used anymore. It was  
08:14PM 10 applied to, I think, well less than half of the patients at  
11 issue in this case. And now I would like to turn to the third  
12 major issue, which brings me to Form B and the third issue, is  
13 Form B unconscionable? This is an interesting one to me  
14 because Form B, with all due respect, is a pitch-perfect ERISA  
08:15PM 15 assignment. Defendants admit as much when they effectively  
16 concede that it purports to assign not only ERISA benefits, but  
17 far more. And so they advance a position that I think is as  
18 radical as it is wrong, which is that somehow this contract is  
19 unconscionable.

08:15PM 20 Now as we explained in our opposition, there is no court  
21 anywhere in any jurisdiction that has ever found a medical  
22 provider's assignment to be unconscionable. I think it's very  
23 important to understand why, because it points up to a broader  
24 point that really undergirds the fight, the common-sense fight  
08:15PM 25 in this case.



1 To avoid paying cash up front, a patient gives up rights  
2 under her health insurance and gets covered medical services.  
3 There's nothing remotely shocking or unfair about that which is  
4 an extraordinarily common bargain. Now, what the defendants  
08:16PM 5 suggest, albeit artfully, and the main place where you see this  
6 is on Page 10 of their Reply, Form B is special, it's unique  
7 because it transfers to my clients all ERISA rights including  
8 those that the patients might need in the future to get from  
9 another provider. This is a very dangerous argument because it  
08:16PM 10 is totally false, and so I want to hit it head on.

11 If you take a look at Form B, and this is attached as  
12 Exhibit B to our Complaint, I want to quote the relevant  
13 language, because it collapses not only this argument, but also  
14 many others that are at the core of the Omnibus Motion.

08:16PM 15 Form B says, and I quote:

16 "I irrevocably assign, transfer, and convey  
17 to provider the exclusive right to benefits,  
18 insurance proceeds or other monies otherwise due to  
19 me for services rendered by provider."

08:17PM 20 And it creates a defined term called "Benefits" with a  
21 Capital "B." And then it goes on to say:

22 "And all judicial and other rights I may have  
23 related to the recovery of benefits from liable  
24 third parties."

08:17PM 25 And here's why this point is critical, Your Honor. Once a

1 patient assigns the right to be paid ERISA benefits, which  
2 everyone agrees since *Misic* can be done, that patient no longer  
3 needs any enforcement right under ERISA related to the recovery  
4 of those benefits. And that's why I'm -- surprisingly, we  
08:17PM 5 don't have any patients objecting or coming forward and  
6 claiming Form B is unconscionable because it essentially serves  
7 their interest.

8 And the parade of horrors that defendants put forth  
9 about why this type of assignment shouldn't be permitted is  
08:17PM 10 just based on a fundamental misreading of not only what the  
11 assignment purports to do, but what the various claims in our  
12 First Amended Complaint are all about.

13 Okay. So that brings me to the fourth major issue that  
14 Ms. Ridley discussed, and this is what I would label as what is  
08:18PM 15 the scope of Form B. Because I think it's pretty clear -- I  
16 think defendants can see that it assigns benefits and it  
17 assigns the right to bring a benefits claim under 502(a)(1)(B),  
18 they try to say it's unconscionable, but they can see that's  
19 within the scope.

08:18PM 20 Their argument is that it doesn't extend to our Count 2,  
21 which would allow the removal of fiduciaries of Section  
22 502(a)(2) of ERISA. And they say it doesn't extend to Count 3  
23 where we're seeking declaratory and injunctive relief only  
24 against the Blue Cross defendant under 502(a)(3). And here I'd  
08:18PM 25 like to take Count 3 first because I think this is a much

1 easier argument for me.

2 Count 2, as I said earlier, removal of the fiduciary is at  
3 the periphery. I appreciate that. But Count 3, this is  
4 actually an easy claim. If you look at Count 3, it's Pages 278  
08:19PM 5 to 279 of the First Amended Complaint, it maps perfectly onto  
6 Form B.

7 Paragraph 2 of Form B includes, and I quote:

8 "Claims brought under ERISA section  
9 502(a)(3), including claims predicated on a breach  
08:19PM 10 of fiduciary duty."

11 I don't see how the language could be any clearer that  
12 it's assigning an (a)(3) fiduciary claim.

13 Now let's look at Count 3. The plaintiffs have requested  
14 a Declaration that the Blue Cross defendants' handling of their  
08:19PM 15 benefits claim violates the claims regulations, which would be  
16 a breach of fiduciary duty, and we've requested an injunction  
17 requiring Blue Cross to comply with those regulations when they  
18 process the assigned benefit claims.

19 There can be no serious dispute that both of those  
08:20PM 20 remedies are available under 502(a)(3), and there's no serious  
21 dispute that those remedies squarely constitute what -- and I  
22 quote Form B, Form B describes as, quote, "judicial or other  
23 rights I may have relating to the recovery of benefits." So  
24 the notion that somehow Form B doesn't extend to an (a)(3)  
08:20PM 25 claim, I find that very hard to understand. What I don't find

1 hard to understand, and I appreciate this, is the defendants'  
2 argument about Count 2.

3 Now I believe our position is correct, but I understand  
4 how reasonable minds could disagree on this. And I'd like to  
08:20PM 5 state our position, which is as follows:

6 Count 2, which you can find on Pages 277 and 278 of the  
7 First Amended Complaint, seeks removal of fiduciaries under  
8 502(a)(2). Here's why this argument is more challenging for  
9 me. Paragraph 2 of Form B does not specifically mention  
08:20PM 10 502(a)(2). I readily concede that. But it does say, and I  
11 quote, "including claims predicated on a breach of fiduciary  
12 duty." Perhaps more importantly, the first paragraph after the  
13 nine numbered paragraphs in Form B says, quote:

14 "This agreement shall be construed in favor  
08:21PM 15 of assigning provider all rights that will assist  
16 it in recovering benefits from liable third  
17 parties."

18 Now I want to be clear. Obviously my clients will have a  
19 very high burden on the merits of this (a)(2) claim, because we  
08:21PM 20 will need to establish that each fiduciary defendant's  
21 misconduct in the processing of assigned benefits was so  
22 egregious as to warrant removal. I think we'll have an easier  
23 time with regard to the Blue Cross defendants frankly, but with  
24 regard to the welfare plan defendants, it's going to be fact  
08:21PM 25 based and it is challenging. You do not see a lot of cases

1 around the country where fiduciaries are removed under (a)(2).  
2 The ones where you see it involve the pattern and practice of  
3 misconduct, which is what we intend to litigate, but I will  
4 concede that on the merits this will be a challenging claim.

08:22PM

5 At this stage, however, we don't have the merits before  
6 us. The only question is whether my clients have standing via  
7 the Form B assignment to bring such a claim. And to the extent  
8 that my clients can show that fiduciary misconduct in  
9 processing the assigned benefit claims, making

08:22PM

10 misrepresentations on the phone about whether benefits are  
11 assignable, refusing to provide notice of anti-assignment  
12 provisions, a host of other things that we identify that I will  
13 talk about in a bit, if we can establish that those warrant  
14 removal because particular fiduciaries can't be trusted to  
08:22PM 15 process assigned claims, then that will state a claim under  
16 502(a)(2) that falls within the scope of the Form B assignment.  
17 So I would submit that we have a merits assignment masquerading  
18 as a standing --

19

THE COURT: Just a moment.

08:22PM

20 How you doing? Do you want to take a break?

21

THE REPORTER: Yes, Your Honor.

22

THE COURT: Yeah, I thought so.

23

Counsel, how long would you like for a break?

24

MR. STRIS: Oh, whatever the Court --

08:23PM

25

THE COURT: Oh, no. I'm fine.

1 MR. STRIS: I'm kind of, like, the Energizer bunny,  
2 so it's probably good for everyone that we're taking a break.  
3 So if you think ten minutes would be appropriate.

4 THE REPORTER: Yes, Your Honor.

08:23PM 5 THE COURT: Yeah.

6 MR. STRIS: Thank you, Your Honor.

7 **(Recess from 8:23 p.m. to 8:38 p.m.)**

8 THE COURT: Counsel, if you'd like to continue,  
9 please.

08:38PM 10 MR. STRIS: Thank you, Your Honor.

11 So before the break, I had addressed four of the eight  
12 major issues from the Omnibus Motion, and now I'll turn to the  
13 last four. So Issue 5 implicates at least two of the questions  
14 that Your Honor asked us to address at the beginning of this  
08:38PM 15 hearing. Issue 5, I would phrase as follows: Can any  
16 defendant here obtain pleading dismissal based on alleged  
17 anti-assignment provisions?

18 Now, as I explained earlier in my remarks, I believe that  
19 we have valid assignments which, as an initial matter, permit  
08:38PM 20 us to bring suit not only under 502(a)(1)(B), but also -- and  
21 this will become important in a moment in answering  
22 Your Honor's questions -- under other sections of  
23 Section 502(a), most importantly for violation of claims  
24 regulations to recover the assigned benefits.

08:39PM 25 Now as a starting point, I would submit that the

1 anti-assignment provisions that defendants ask you incorporate  
2 by reference are an affirmative defense to claims under  
3 502(a)(1)(B). And in some district court cases that I've seen  
4 over the years, there's some confusion on this point including  
08:39PM 5 the Southern District of New York case that was cited in the  
6 supplemental authority of defendants recently.

7 I would suggest that this is governed by the *Davidowitz*  
8 case from 1991. It's a Ninth Circuit case we cited on Page 6  
9 of our opposition. And it states basic standing principles.  
08:39PM 10 It uses the phrase, quote, "Healthcare provider with an  
11 allegedly valid assignment." And that makes sense. Because if  
12 you're a provider like my clients and you give notice of the  
13 assignment, which is another one of your questions I'll get to  
14 in a moment, if the plan refuses to deal with you and they  
08:40PM 15 don't give you copies of the plan, and they don't tell you  
16 there's an anti-assignment provision, and they don't tell you  
17 what the issue is, you certainly can't make out compliance with  
18 the plan. And especially, this case is a perfect example, if  
19 documents are given to you in a selective fashion, it becomes  
08:40PM 20 even that much harder.

21 So as we explained in our opposition, there are two  
22 roadblocks that I think are fundamentally fatal to having any  
23 defendant obtain pleading dismissal on an anti-assignment  
24 grounds. And here's how I would group them. The first set of  
08:40PM 25 questions involves does a given anti-assignment provision apply

1 here at all? Those are what I will call contract questions.

2 And then the second set of issues is if a given  
3 anti-assignment provision is applicable, is it enforceable?

4 And those are what we might call notice or fiduciary issues.

08:41PM 5 So with regard to the first subissue here, does a given  
6 anti-assignment provision apply, Your Honor asked, well, if you  
7 accept and decide, which is within your discretion, to  
8 incorporate the anti-assignment provision documents by

9 reference, need you assess every anti-assignment provision in  
08:41PM 10 determining whether it's applicable? My answer to that is  
11 simple, "yes."

12 Then you asked can they be grouped effectively, I  
13 understood your question to be in doing that contractual  
14 analysis, can they be grouped in some way? And, you know, with  
08:41PM 15 respect, that's what we attempted to do in putting our chart  
16 together and in reviewing all of them and making the best  
17 arguments we could based upon what I submit are incomplete  
18 documents. I don't know that I have any better suggestion for  
19 grouping with regard to what I'll call the contract analysis  
08:41PM 20 than what we did in our papers.

21 Now as far as authority you asked for, is there authority  
22 for what we call the four requirements. I'm going to take them  
23 in turn, and I think there are actually five requirements. I  
24 realize we call them four, but then we talk about an  
08:42PM 25 overarching one afterwards that is the most important.



1 Now as far as the four requirements we identify on Page 14  
2 of the opposition, the first two go to the issue of does a  
3 given anti-assignment provision apply here? And I think  
4 they're fairly uncontroversial with respect. The first  
08:42PM 5 requirement is the anti-assignment provision has to be in the  
6 written instrument, and we cite in our opposition the provision  
7 of ERISA that says there must be a written instrument.

8 And the second requirement is black letter contract law as  
9 it maps onto ERISA, which is when you assess the meaning of a  
08:42PM 10 contract, you need to see the full contract.

11 Now, if Your Honor wants additional authority, I suppose  
12 that this notion kind of undergirds a whole series of U.S.  
13 Supreme Court cases dating as far back as *Firestone vs. Bruch*.  
14 It's a 1983 case that talks about evaluating benefit claims.

08:43PM 15 And, in fact, it says that when you assess the meaning of a  
16 contract, a court does it de novo unless the plan says we get  
17 deference in interpreting our plan. And then there was one  
18 follow-up case that I litigated unsuccessfully before the U.S.  
19 Supreme Court called *Conkright v. Frommert* about the deference  
08:43PM 20 question, but the Court made clear that in these benefits  
21 cases, there's no doubt that you have to interpret the language  
22 of a plan.

23 I would also submit that *Kennedy vs. DuPont*, a U.S.  
24 Supreme Court case, *Heimeshoff vs. Hartford*, one of my -- one  
08:43PM 25 of opposing counsel mentioned another case I lost before the

1 U.S. Supreme Court in 2014, *McCutcheon vs. US Airways*, a 2013  
2 Supreme Court case where we lost half and partially prevailed  
3 before the Supreme Court. All these cases stand for the  
4 proposition that the plan language is paramount. And I don't  
08:44PM 5 think it's particularly controversial to suggest that you need  
6 to see the full plan.

7 If Your Honor would like cases that stand specifically for  
8 that proposition, I would have to submit supplemental  
9 authority. I suspect that they've been litigated, but did  
08:44PM 10 don't have them at my fingertips.

11 Now all of that goes to the question of does a given  
12 anti-assignment provision apply here? And I would submit that  
13 this is a prime reason why you should exercise your discretion  
14 not to incorporate these documents by reference. They are much  
08:44PM 15 more sensibly dealt with at the summary judgment stage when we  
16 can do discovery, we can send document requests, we can take  
17 depositions, we can obtain the full written instrument, and  
18 then we can make our contract position clear.

19 Defendants who have effectively previewed their summary  
08:44PM 20 judgment argument can make their arguments. And at that stage  
21 I would submit it's more appropriate to resolve that issue.  
22 And I think it definitely bears mention that that's what  
23 happened in the *Spinedex* case, the most recent Ninth Circuit  
24 case involving a provider assignment. The district court  
08:45PM 25 decided the question albeit unfavorably to the provider on

1 those facts on summary judgment. It's just a more sensible way  
2 to do that type of complex contractual analysis.

3 Okay. So now we get to where I think we're even on firmer  
4 footing, which is even if I assume that every one of the  
08:45PM 5 anti-assignment provisions here that's advanced apply to these  
6 facts, and I would note that Ms. Ridley was very candid, she  
7 admitted that there are plans that don't have anti-assignment  
8 provisions, which goes to the core of our misrepresentation  
9 pattern and practice theory that I'll talk about in a little  
08:45PM 10 bit.

11 But with regard to the plans that have submitted  
12 anti-assignment provisions, even if we assume that every single  
13 one of them applied on these facts, we still have very strong  
14 arguments that any given anti-assignment provision is  
08:45PM 15 unenforceable. And I'd like to start with the overarching one,  
16 because I think it's one that defendants have no response to,  
17 and then I'm going to circle back to what we call  
18 Requirements 3 and 4 on Page 14 of our opposition.

19 The overarching one is our claim for reformation. And I'm  
08:46PM 20 going to walk through this. If you look at our First Amended  
21 Complaint, we allege a pattern of misconduct in, I think,  
22 fairly staggering detail for our Complaint. We allege that the  
23 Blue Cross defendants regularly dealt with us -- you can find  
24 this, for example, on Pages 65 to 67 of the First Amended  
08:46PM 25 Complaint. We allege that they often told us, apparently

1 falsely, that claims were freely assignable.

2 The most relevant paragraphs are 45(c) of the First  
3 Amended Complaint on Page 67, and Paragraph 70, I think it's  
4 Page 73. We allege that they never pointed us in any one of  
08:46PM 5 these hundreds of claims to a specific anti-assignment  
6 provision. You'll find that on Pages 78 to 79. And maybe most  
7 importantly we allege that their motivation was to drive us in  
8 that work or just to not take Blue Cross PPO patients at all.  
9 And you can find those allegations on Pages 76 to 78 of the  
08:47PM 10 First Amended Complaint.

11 And I think the most damning is what we allege in  
12 Paragraph 75, this is on Page 65 of the First Amended  
13 Complaint, where we quote something that one of the defendants,  
14 Blue Cross of Oklahoma, said in their public materials. And I  
08:47PM 15 quote:

16 "Payments for services rendered by providers  
17 who do not contract with Blue Cross are sent  
18 directly to our customers. Thus out-of-network  
19 providers face the inconvenience of attempting to  
08:47PM 20 collect payment from the customer and the  
21 accompanying possibility of incurring bad debts."

22 That's remarkably candid in terms of what the Blue Cross  
23 defendants are doing here. And so the core spirit of our case  
24 here is that -- and this is why Count 3 in particular is levied  
08:48PM 25 only at the Blue Cross defendants -- is that Blue Cross engaged

1 in a pattern and practice of refusing to honor assignments  
2 without looking in many, if not most cases, as to what the  
3 underlying contract said. That can't be decided on the  
4 pleadings.

08:48PM 5 We bolster that with the specific allegation of  
6 affirmative misrepresentations. Why is that relevant? That's  
7 relevant because under 502(a)(3) of ERISA, we get to seek  
8 reformation. And reformation matters here in the context of  
9 this anti-assignment argument. Because what reformation  
08:48PM 10 results in is excision of any otherwise enforceable  
11 anti-assignment provision from the plans at issue. And  
12 Your Honor asked for authority for this proposition. Well, I'm  
13 happy to say that the Ninth Circuit in another case that we  
14 litigated called *Moyle vs. Liberty Mutual* just days ago  
08:49PM 15 endorsed this very theory.

16 And so you don't need, I would submit, to group anything.  
17 You don't need to do the contractual analysis of which  
18 anti-assignment provisions apply and which ones don't at this  
19 stage because that wouldn't end the case. We would still have  
08:49PM 20 the ability to argue that because of Blue Cross defendants'  
21 conduct, we can make out a 502(a)(3) claim which is part and  
22 parcel of Count 1 of the Complaint -- we explained that in our  
23 opposition -- the remedy for that would be reformation,  
24 excising these provisions from the plan as endorsed by the  
08:49PM 25 Ninth Circuit in *Moyle*. And in that point in time the

1 anti-assignment defense fails.

2 Now that obviously will turn on facts. We need discovery  
3 to determine whether or not there was an (a)(3) violation and  
4 whether or not reformation is warranted as a remedy. But these  
08:49PM 5 issues are litigated throughout the country. We prevailed  
6 before the second circuit on a similar theory not involving  
7 providers in *Conkright vs. Frommert* on remand.

8 THE COURT: Just a little slower.

9 MR. STRIS: Oh, I'm sorry. We prevailed in a case  
08:50PM 10 cited in the *Moyle* decision before the Eighth Circuit called  
11 *Silva*. And I would note in both of those cases the Department  
12 of Labor filed amicus briefs supporting our position for a  
13 broad view of equity remedies under 502(a)(3) in light of the  
14 Supreme Court seminal decision of *CIGNA vs. Amara*.

08:50PM 15 The final thing I'll say on this point is that the last  
16 two requirements, the anti-assignment provision needs to be in  
17 the SPD, and the SPD needs to be furnished. I don't think  
18 these are particularly controversial either in that what we  
19 cite in the Reply are the relevant provisions of ERISA that  
08:50PM 20 require a summary plan description, that require to have  
21 material --

22 THE COURT: Just a moment.

23 We're going to slow him down, aren't we?

24 THE REPORTER: Thank you, Your Honor.

08:50PM 25 THE COURT: Yeah.

1 I'm going to retrain you.

2 MR. STRIS: I appreciate it.

3 THE COURT: No, you don't.

4 MR. STRIS: No, I do. I've been told many times --

08:51PM 5 THE COURT: Watch me. Slow down or I'll cut you  
6 off. Understood?

7 MR. STRIS: Yes, Your Honor.

8 THE COURT: I won't tell you again.

9 MR. STRIS: Understood.

08:51PM 10 THE COURT: We're going to protect my court reporter  
11 now.

12 MR. STRIS: Understood. Yes, Your Honor.

13 THE COURT: First and last warning; otherwise, sit  
14 down.

08:51PM 15 MR. STRIS: So the SPD is a document that is  
16 required by the ERISA statute itself. And we cite the  
17 provision in our Reply that requires it. There is a series of  
18 regulations that we also cite where the DOL explains what needs  
19 to go into the SPD in a manner that a layperson could  
08:51PM 20 understand.

21 So the only question here is not, I think, whether this is  
22 a material provision that needs to be in the SPD, but rather  
23 whether, as I think it was counsel for Eaton mentioned, this is  
24 something that can be raised by an assignee. And what I would  
08:52PM 25 say on this point, Your Honor, is that we are not bringing a

1 claim for an SPD violation. If we were, then we arguably would  
2 not be a participant or beneficiary with standing to bring that  
3 claim. But I think it's black letter law dating back to a  
4 number of cases including *Amara* that you cannot enforce a  
08:52PM 5 provision in a plan unless it has been disclosed in a furnished  
6 summary plan description.

7 Now, the reason for that is that the SPD requirement  
8 protects participants. And I want to explain sort of as a  
9 common sense matter how that applies here because I think it  
08:52PM 10 gives force to our position. If you don't include in your  
11 summary plan description a conspicuous notice that you can't  
12 assign claims to a medical provider in a way that a layperson  
13 patient can understand, that most certainly injures patients,  
14 injures individuals, and here's how:

08:53PM 15 They get a big check like many of the patients in this  
16 case did from a healthcare payor, and they're confused because  
17 they signed an assignment. They're confused as to why they're  
18 getting a check and they don't turn it over to the provider.  
19 And what happens is State Court litigation on behalf of the  
08:53PM 20 provider against the patient where the patient is liable not  
21 only for the monies that he or she assigned, but attorney's  
22 fees, other damages, et cetera. And we see that type of  
23 confusion emanating from Blue Cross's practices.

24 There's other reasons why this SPD requirement protects  
08:53PM 25 patients. Patients or rather participants in ERISA plans who



1 may need medical treatment, they have the right to know that  
2 they've bought into an out-of-network PPO policy, but that they  
3 can't assign their claims, and so many providers, like my  
4 clients, may very well not take them or may require them to pay  
08:54PM 5 cash up front. That's why material terms about what benefits  
6 you get and what rights you have under the terms of a plan need  
7 to be in a summary plan description.

8 And so again, these cut to the heart of ERISA's critical  
9 protections dealing with clear plan language and clear notice  
08:54PM 10 and disclosure. And I think that there's ample authority both  
11 in the provider assignee setting and otherwise for what we list  
12 as the four requirements in our opposition.

13 So that brings me, Your Honor, to the sixth issue that I  
14 would like to discuss which is one that you asked us to discuss  
08:55PM 15 at the outset, namely were defendants given adequate notice of  
16 my client's assignments. And I think the answer to this is  
17 clearly "yes" for three reasons, that if they are not clear in  
18 the briefing, I would like to expand upon them now.

19 The first reason is that the UB-04 form, which is standard  
08:55PM 20 in the industry, has Box 53. And put simply, checking "Y" on  
21 Box 53 is known in the industry as the way you communicate that  
22 you are submitting a claim as an assignee. And I would advance  
23 two points in support of that position. The first is that's  
24 what payors have been arguing for years.

08:56PM 25 In our opposition on Pages 10 to 13, we cite a series of

1 cases. They're preemption cases where the shoe is on the other  
2 foot. Providers were attempting to argue, no, we should be  
3 able to stay in State Court. We checked "Y" in Box 53, but we  
4 were confused. We didn't have an assignment. It means  
08:56PM 5 something else. And in those cases, payors said "no."  
6 Checking "Y" means you have an assignment. And in each of  
7 those cases, the Court accepted that argument.

8 Now we have defendant payors who don't benefit from that  
9 industry reality, and they're trying to take the opposite  
08:56PM 10 position. If there's any doubt, I would say let's look at what  
11 the form says.

12 Now the defendants on Page 15 of their Omnibus Reply, I  
13 was surprised they say that the NUBC Manual on Box 53 is all  
14 about direct payments and does not constitute an assignment.  
08:57PM 15 And the reason that surprised me is because if you look at the  
16 very section of the manual that's quoted by defendants, it's  
17 entitled "Assignment of Benefits Certification Indicator." And  
18 if you look at the instructions for how you're supposed to fill  
19 out the code, you get three options: "N" for "no"; "Y" for  
08:57PM 20 "yes"; and "W" for "not applicable."

21 And here's what the instructions say with regard to "W."  
22 It says, "Use Code W when the patient refuses to assign  
23 benefits." So, I mean, even the authority the defendants are  
24 relying on as the industry manual supports what has always been  
08:57PM 25 my understanding and my client's understanding of how you

1 indicate you have an assignment. That's my first argument.

2 My second argument is that even if there were some dispute  
3 about industry practices, that's a fact issue. And frankly,  
4 Your Honor, I look forward to litigating that fact issue, and  
08:58PM 5 I'll tell you why. During the claims process, we sent dozens  
6 of letters to numerous defendants, and we pled this in the  
7 First Amended Complaint, I think Paragraph 93 or thereabouts.

8 What is not pled in the Complaint, but I can tell you as  
9 an officer of the Court is true, because I sent these letters,  
08:58PM 10 we attached the relevant executed assignments. So if they want  
11 to litigate discretion of notice on the facts, I look forward  
12 to it because they were aware and put clearly on notice, not  
13 just in many cases that there was an assignment by checking the  
14 "Y" box, but of the specific assignment themselves. And  
08:58PM 15 similarly as we pled in the First Amended Complaint, my  
16 clients' agents in each case called to verify benefits and  
17 asked about assignability, presumably the defendants record or  
18 keep records of those benefit calls. And so I think that those  
19 and other facts will come out that make clear that Blue Cross  
08:59PM 20 knew that these were assigned claims being submitted and they  
21 just have a policy that they don't honor assignments.

22 And that brings me to my third point on your notice  
23 question, Your Honor, which is pretty much one of common sense.  
24 If the defendants were confused, they could simply have asked  
08:59PM 25 for more information. And here, it's not a claim, two claims,

1 four claims, we're talking about hundreds of claims and never a  
2 single instance where the defendants asked, "Is this an  
3 assignment? Can you send me a copy of the assignment?" And I  
4 think the reason is simple, it's because they have a policy of  
08:59PM 5 not honoring assignments irrespective of what they say.

6 And on this point, I will close with the following: If  
7 you look at the Omnibus Motion and the individual motions,  
8 they're notable in one way for what they don't say. None of  
9 them say that these documents that are purportedly  
08:59PM 10 anti-assignment provisions were consulted at the time. After  
11 the fact they're trying to rely on these documents.

12 But the facts as we've alleged in the Complaint, most  
13 notably Ms. Ridley's admission that several of the plans here  
14 don't contain anti-assignments, I think supports the inference  
09:00PM 15 that in some, perhaps most if not many cases, whether or not  
16 the plan had an anti-assignment provision, Blue Cross was not  
17 intending to honor it and, therefore, this notice argument is  
18 really nothing more than a straw man.

19 Okay. That brings me to the last two issues from the  
09:00PM 20 Omnibus Motion, Your Honor, and they --

21 THE COURT: Just one moment. Let me make a note.  
22 Thank you.

23 MR. STRIS: So the last two points about the Omnibus  
24 Motion, Your Honor, pertain to Count 4 of our complaint, our  
09:01PM 25 alternative state law claim. And the first point I would like

1 to make is I'd like to explain why Count 4 is clearly not  
2 preempted by ERISA.

3 In our view, the law on this point has long been settled.  
4 If you lie or otherwise mislead someone who is not an ERISA  
09:01PM 5 beneficiary, then that's remediable under state law. And one  
6 of the cases that we cite, the *Meadows*, it's a Judge Pregerson  
7 Ninth Circuit opinion from 1995, frankly is on all fours. It's  
8 a case ironically that involves a substance abuse treatment  
9 facility as a plaintiff, and they were able to bring a state  
09:02PM 10 law misrepresentation claim against a health insurer defendant  
11 even though they had assignments.

12 And what happened in that case is the health plan argued  
13 that the patients who gave the assignments had no coverage, and  
14 therefore, even though the provider had an assignment, the  
09:02PM 15 provider had no viable claim because they were assigned  
16 something that effectively was worthless. That's akin to  
17 what's happening here. The defendants are arguing that the  
18 plan has an anti-assignment provision and, therefore, providers  
19 have no viable ERISA claim. Now certainly if they're right  
09:03PM 20 with regard to any of the individual plans, it becomes  
21 particularly important that we can bring our non-preempted  
22 state law claim.

23 But I think it's important to appreciate it doesn't even  
24 matter if they're right. And what I would do is I would quote  
09:03PM 25 a very articulate description of the law from the Eleventh

1 Circuit case that I mentioned earlier, *Connecticut State*  
2 *Dental*. And here's what that court said, quote:

3 "A provider that has received an assignment  
4 of benefits and has a state law claim independent  
09:03PM 5 of the claim arising under the assignment holds two  
6 separate claims. In such a case, the provider may  
7 assert a claim for benefits under ERISA, the state  
8 law claim or both."

9 And if you take a look at that Eleventh Circuit case, it  
09:03PM 10 goes on to cite and discuss a Ninth Circuit case from 1999,  
11 *Blue Cross of California vs. Anesthesia Care* cited by the  
12 defendants in their papers for effectively the same proposition  
13 in a preemption case. So I really don't think that the  
14 preemption position here holds water.

09:04PM 15 Our ERISA claims, the standing is based on principles of  
16 assignation of assignment. Our state law claim is a direct  
17 claim. It's predicated on the notion that the Blue Cross  
18 entities, the Blue Cross defendants, who are the only named  
19 defendants under Count 4 regularly dealt with us, they  
09:04PM 20 regularly told us claims were assignable, which it turns out  
21 apparently was false. They never pointed us to specific  
22 anti-assignment provisions, and they did so with the motivation  
23 to drive us in network or just to have us not take their PPO  
24 patients. That is a distinct state law claim that is not  
09:04PM 25 expressly preempted under ERISA, and it certainly is not

1 conflict preempted. It would not satisfy the second prong of  
2 *Davilla*. The state law claim has independent significance.  
3 There's an independent state law duty that's implicated.

4 So that brings me to the final major issue in the Omnibus  
09:05PM 5 Motion that Ms. Ridley discussed, which has to do with whether  
6 we state a claim under Count 4. And our position is simple, we  
7 believe that we state a claim under both the unlawful prong and  
8 the unfair prong of the UCL. We only need one; we believe we  
9 have both.

09:05PM 10 Now with regard to the unlawful prong, the defendants are  
11 correct, we have to plead facts that show that the alleged  
12 unlawful business practice violated some other law, and we  
13 have. Nothing requires us to identify specifically the law  
14 that's violated, although we do mention some in our briefing.

09:06PM 15 On Page 33 of the opposition, Footnote 28, we refer to  
16 California Insurance Code 10133. I submit that's directly on  
17 point. It prohibits insurers that have PPO plans like this one  
18 from interfering with the decision of a plaintiff as to which  
19 health facility to use. I think our theory is that's precisely  
09:06PM 20 what happened here. That's a borrowed law. That's a statutory  
21 borrowed law obviously. I submit that there's common law that  
22 could be borrowed. We can make out a violation of negligent  
23 misrepresentation at a minimum based upon a number of the facts  
24 we alleged. And as we mentioned in our opposition, probably  
09:06PM 25 the facts that we've alleged even rise to the level of

1 constructive or actual fraud.

2 Now I don't think that we need to do more than plead the  
3 underlying facts, but if Your Honor disagrees, you know, we  
4 would request leave to amend, and we will specifically identify  
09:07PM 5 an exhaustive list of borrowed law that we believe have been  
6 violated by the Blue Cross defendants in this case.

7 Now, with regard to the unfair prong, I think it's very  
8 clear that we have pled facts that state a claim under that  
9 prong. We've alleged in detail a business practice that I  
09:07PM 10 submit would meet both of the balancing tests that have been  
11 employed by California state courts to evaluate unfairness  
12 under the UCL, but the defendants in their Omnibus Motion make  
13 two arguments as to why we don't state a claim, and I'd like to  
14 address each of them.

09:07PM 15 First, they make a standing argument. They say that only  
16 consumers or competitors can rely on the unfair prong of the  
17 UCL. And I would suggest, Your Honor, that that's flatly  
18 wrong, and the starting point of any analysis has to be the  
19 statute itself. And if you look at Business and Professions  
09:08PM 20 Code Section 17204, which is the section that defines who can  
21 sue, it clearly refers in the final clause to any, quote,  
22 "person who has suffered injury in fact and has lost money or  
23 property as a result of the unfair competition," unquote. We  
24 suffered injury in fact as pled, we lost money as a result of  
09:08PM 25 unfair competition as pled.



1           Unsurprisingly, California State Courts regularly permit  
2 claims by medical providers who effectively are assignees of  
3 consumers to proceed under the unfair prong of the UCL. We  
4 cite one case squarely on point in our opposition, Page 34,  
09:08PM 5 this is the *Coast Plaza* case, and it couldn't be clearer. The  
6 Court -- the California State Court says:

7                   "Coast has also alleged that UHP's pattern of  
8 withholding payment constituted a violation of the  
9 UCL. This adequately alleged an unfair business  
09:09PM 10 practice within the meaning of the UCL."

11           And examples are legion. I have others, the *WellPoint*  
12 case cited by defendants in their papers, a case called  
13 *Rheumatology Diagnostics vs. Aetna*, that's a 2014 Northern  
14 District of California case. There are even nonconsumer  
09:09PM 15 noncompetitive cases outside the medical context such as  
16 *National Rural Telecommunications Co-Op vs. DirecTV*, 2003  
17 Central District case that allow these types of claims.

18           Defendants' contrary argument is predicated on the tender  
19 reed of the *Cel-Tech* case. But as we explain in our papers,  
09:09PM 20 that California Supreme Court case was a direct competitor  
21 case. It made very clear that what constitutes unfair  
22 competition, unfair business practices when you're dealing with  
23 direct competitors is a very high burden, and that makes sense,  
24 because direct competitors compete.

09:10PM 25           The footnote, that's dicta in that case, that is

1 attempting to make clear that the Court was saying nothing  
2 about the lion's share of cases involving consumers or indirect  
3 competitors is hardly a suggestion that you need to be a  
4 consumer or indirect competitor. It's hardly a suggestion that  
09:10PM 5 an assignee of a consumer, such as a medical provider, somehow  
6 lacks standing when the very statutory provision, 17204, has a  
7 contrary definition, and when California State Courts are  
8 regularly permitting claims like this.

9 Notably, there's no California State Court case cited by  
09:10PM 10 defendants. They cite two district court cases where they've  
11 been pushing this argument. And one of them, *Centre for Neuro*,  
12 albeit accepted their argument on the unfairness prong rejected  
13 the argument on the unlawful prong and actually let the UCL  
14 claim continue. So the notion that somehow we don't state a  
09:11PM 15 claim under the UCL, you know, really has no authority.

16 As to the second argument that we have to show, antitrust  
17 injury, I think I've already spoken to that, that requirement  
18 from *Cel-Tech* was expressly limited to direct competitor cases.

19 Okay. So those are the comments I wanted to give on, I  
09:11PM 20 think, the eight major points discussed by Ms. Ridley with  
21 regard to the Omnibus Motion. I would like to briefly address  
22 the two points involving the Anthem addendum and then turn it  
23 over to my colleague, Ms. Pathak, who, I think, will have some  
24 comments on some of the individual motions.

09:12PM 25 With regard to the Anthem addendum, Ms. Ridley makes two

1 points: First, she asserts that there are some individual  
2 plans that are not governed by ERISA. To the extent that  
3 that's true and that can be determined as a matter of law, then  
4 only our state law claims would continue, would be viable. But  
09:12PM 5 to the extent that turns on some sort of adjudication, it's  
6 certainly not an appropriate determination at the motion to  
7 dismiss stage for much the same reasons that the  
8 anti-assignment arguments I submit are not appropriately  
9 adjudicated at this early juncture.

09:12PM 10 The second point Ms. Ridley makes is that there are some  
11 claims that were submitted by an entity called MedLink, and  
12 this is true. But what we allege in the First Amended  
13 Complaint is that MedLink was an agent of my clients. MedLink  
14 had an assignment, and the defendants failed to pay MedLink  
09:13PM 15 directly just as they failed to pay the plaintiffs directly.  
16 And because MedLink was an agent of my client's, my clients  
17 have standing to bring that claim. And I don't quite  
18 understand the response to this in Anthem's addendum, because  
19 this relies on black letter notions of agencies.

09:13PM 20 The argument that MedLink is any different is perhaps a  
21 standing argument, but it's the same standing argument that I  
22 discussed earlier. In other words, if the assignments that my  
23 clients who are named plaintiffs are sufficient to bring the  
24 claims at issue, then the identical assignment from a business  
09:13PM 25 partner agent of my clients would be sufficient, and then the

1 only question is a fact one, which is was this an agent of  
2 ours? Did the money that they receive flow back to us? And we  
3 have said it does. And, in fact, in litigation we will prove  
4 that it does. And as a result, MedLink need not appear as a  
09:14PM 5 plaintiff in this case. We have the right to assert those  
6 claims. So if there are no specific questions, Your Honor, I  
7 would turn it over to my colleague.

8 THE COURT: Thank you very much, Counsel.

9 And I know who you are, but just reintroduce yourself for  
09:14PM 10 the record one more time, okay?

11 MS. PATHAK: Your Honor, Rachana Pathak for the  
12 plaintiffs.

13 Your Honor, I will confess that given the hour, the  
14 temptation is strong to speak quickly, but I will --

09:14PM 15 THE COURT: You don't have to. I just care that I  
16 get a record, so there are no time limitations on you or the  
17 defense.

18 MS. PATHAK: Thank you, Your Honor.

19 I'd like to address some of the procedural arguments that  
09:14PM 20 have been raised in a number of the individual motions, and I  
21 will address them in the order in which they were raised by  
22 defense counsel.

23 So first, I'd like to address the argument made by  
24 Mr. Beauchamp, counsel for BCBS, Arizona, and the two --

09:15PM 25 THE COURT: Just a minute. Just a minute. Okay.

1 MS. PATHAK: Mr. Beauchamp argues today that venue  
2 is improper, primarily on the basis of the form selection  
3 clause. First I just preliminarily want to make clear that  
4 there's no argument in either the BCBS Arizona motion or reply  
09:15PM 5 that 1132(e)(2) is not satisfied here. 1132(e)(2) is ERISA's  
6 venue statutory provision. So counsel is relying solely on the  
7 form selection clause to argue that venue is improper.

8 The Supreme Court, however, has made it clear in *Atlantic*  
9 *Marine* that a form selection clause does not render venue  
09:16PM 10 improper. And I don't think that counsel has a response to  
11 that argument.

12 Of course, under *Atlantic Marine*, a foreign selection  
13 clause may warrant transfer, but a foreign selection clause  
14 does not warrant dismissal. There may be one limited exception  
09:16PM 15 to that, that I don't think counsel is even relying on, but in  
16 an abundance of caution, I will address it.

17 If a mandatory forum selection clause specified a  
18 nonfederal forum only, then using the doctrine of forum  
19 nonconvenience, dismissal may be appropriate. That is not the  
09:17PM 20 case here. The mandatory forum selection clause that BCBS  
21 Arizona is relying on specifies Maricopa County as the sole  
22 appropriate forum. But it doesn't distinguish between state or  
23 federal court, so dismissal is under no circumstances  
24 warranted.

09:17PM 25 Now, as I said, under *Atlantic Marine* transfer may be

1 warranted. But we have two independent reasons why transfer is  
2 not appropriate in this case. The first reason is that  
3 mandatory forum selection clauses are illegal under ERISA, and  
4 so transfer pursuant to such a clause would be inappropriate.

09:17PM 5 Now I think counsel is correct in terms of number of  
6 cases, there are more reported decisions that uphold mandatory  
7 forum selection clauses in ERISA, that is true; however,  
8 Your Honor, we submit that the better position which has been  
9 adopted, and in particular has been adopted by the Department  
09:18PM 10 of Labor and the solicitor general, the better argument is that  
11 a mandatory forum selection clause, which limits participants  
12 and beneficiaries to only one forum is clearly contrary to  
13 ERISA's statutory purposes, which are to protect participants  
14 and beneficiaries. ERISA specifies a number of appropriate  
09:18PM 15 venues, and a forum selection clause that seeks to limit those  
16 appropriate venues is contrary to ERISA.

17 Now opposing counsel actually for Time Warner, but since  
18 both counsel made the forum selection clause argument, I'd like  
19 to mention here that it's not the case that the solicitor  
09:19PM 20 general disagrees with us. To the contrary, the solicitor  
21 general, Your Honor, urged that the *Smith vs. Aegon* case not be  
22 taken by the Supreme Court, but that's because there wasn't a  
23 deep enough circuit split, there was insufficient percolation.  
24 The solicitor general's brief explicitly said that this is an  
09:19PM 25 issue of critical importance and that a mandatory forum

1 selection clause is illegal under ERISA. And I would submit  
2 that that authority is highly persuasive and in the absence of  
3 controlling Ninth Circuit authority to the contrary, Your Honor  
4 should follow it.

09:19PM 5 Now, if Your Honor disagrees and decides to uphold the  
6 mandatory selection clause, there's a second reason why  
7 Your Honor should not transfer the case to Arizona. And the  
8 second reason is that the public interest factors don't weigh  
9 in favor of transfer. This is an unusual case. It's the type  
09:20PM 10 of exceptional case under *Atlantic Marine* where transfer simply  
11 is not warranted.

12 Now, the reason why transfer is not warranted, and this --  
13 I'll make this clear when I address Time Warner, but what I say  
14 will be true for both BCBS Arizona and Time Warner. The reason  
09:20PM 15 that the public interest factors weigh heavily in favor of  
16 keeping the case here rather than transferring is that the  
17 center of gravity of this case is clearly California. All the  
18 participants and -- all the patients who were treated were  
19 treated in California, the clear reasons why venue, for  
09:20PM 20 example, is satisfied. But it's a California-focused case, and  
21 judicial economy is highly favored by the Court keeping the  
22 entire litigation here in California.

23 We've alleged a pattern and practice of certain kinds of  
24 behavior which are best -- which are best litigated when all  
09:21PM 25 the defendants are treated together as a group. As a result,

1 we have an unusual case here where a mandatory forum selection  
2 clause, even if this Court believes it's valid, doesn't weigh  
3 in favor of transfer to another forum.

4 Now, those are my remarks about the BCBS Arizona  
09:21PM 5 procedural arguments. May I turn to the Time Warner arguments?

6 In their motion Time Warner argued -- spent time arguing  
7 that venue is improper under 1132(e)(2). Mr. Levin, counsel  
8 for Time Warner, is not making that argument today, but the  
9 argument is fleshed out in the Reply. May I address the  
09:22PM 10 arguments that were made in the Reply?

11 THE COURT: Certainly.

12 MS. PATHAK: Venue is proper here in California for  
13 two independent reasons: First, a breach has occurred in this  
14 district. Time Warner in its Reply continues to misunderstand  
09:22PM 15 the term "breach" to mean only fiduciary breach. It does not  
16 mean that. A breach can occur with respect to a benefits claim  
17 under (a)(1)(B) as well as a fiduciary breach claim under  
18 (a)(3) or (a)(2). When you have a benefits denial claim, the  
19 breach is where the benefit is supposed to be received.

09:22PM 20 Now, with respect to claims that have been assigned,  
21 courts are not in agreement about whether we should focus on a  
22 location of the assignee or the assignor. But that doesn't  
23 matter in this case because under either approach, the breach  
24 occurred in the Central District of California. The patient  
09:23PM 25 implicated -- the patient that is at issue for Time Warner



1 resides in California, and the treatment was received in  
2 California. Payment to our clients was to be made in  
3 California. The breach, in short, under any interpretation,  
4 occurred in California, so that's one provision of 1132(e)(2)  
09:23PM 5 that is satisfied.

6 A second provision that is satisfied is the resides or  
7 found provision of 1132. Time Warner both resides and is found  
8 in the Central District of California. There are a few  
9 different reasons why. They -- so they haven't argued that at  
09:23PM 10 any point that they don't have -- that they haven't purposely  
11 availed themselves of the privilege of conducting activity in  
12 California. They limited themselves in their motion that to --  
13 first of all, misstating the data disk test, and the second  
14 argument they made was that none of our claims arise out of  
09:24PM 15 their activity in the forum.

16 In response to their motion, we put forth specific  
17 arguments about how they purposely availed themselves of the  
18 privilege of conducting activity in California, and how our  
19 claims arose out of those activities, and why the exercise of  
09:24PM 20 jurisdiction, which is part of the data disk test, would be  
21 reasonable. Their Reply doesn't address the arguments that we  
22 presented in our opposition.

23 So I submit, Your Honor, that the data disk test is  
24 clearly satisfied. And as a result, they reside in the Central  
09:24PM 25 District of California, and your Court need not reach the issue

1 of whether nationwide service of process plays into whether  
2 venue is proper here.

3 At a minimum, Your Honor, in light of their failure to  
4 raise any factual arguments about how they didn't purposely  
09:25PM 5 avail themselves of the privilege conducting activity in  
6 California, the plaintiffs should be entitled to take limited  
7 jurisdictional discovery to establish that, in fact, the data  
8 disk test is satisfied.

9 Finally with respect to venue, we should be -- if all else  
09:25PM 10 fails, if Your Honor is not persuaded that the breach occurred  
11 here or that they reside here, we should be permitted to take  
12 discovery on the question of whether the plan is administered  
13 here.

14 In our opposition in Part 1(c) to their motion, we  
09:25PM 15 explained why we believe that it may well be the case that  
16 they -- that the plan is administered here. We didn't ask  
17 for -- we didn't attempt to engage in discovery at the time of  
18 briefing because we were confident of our arguments on the  
19 breach and resides pieces of the statute. But in light of  
09:26PM 20 what -- if Your Honor is not persuaded by those arguments, we  
21 believe that limited jurisdictional discovery will reveal that  
22 the plan is actually administered in California. So those are  
23 my reasons why venue with respect to Time Warner Cable is  
24 proper in the Central District.

09:26PM 25 I'm going to turn now to the next argument, the one that

1 counsel today spent more time on. Mr. Levin argued that their  
2 forum selection clause should be enforced. I have two  
3 responses to this point: First of all, they have waived this  
4 argument. They buried their forum selection clause in a  
09:26PM 5 footnote in their motion and then they expanded upon it -- and  
6 they did not argue that transfer was appropriate pursuant to  
7 that forum selection clause.

8 In fact, their forum selection clause, the role that it  
9 played in their motion was that they said we shouldn't expect  
09:27PM 10 to be sued here because of our forum selection clause. But  
11 that's not the role that a forum selection clause can play in a  
12 purposeful availment analysis. So they didn't in their motion  
13 make the argument that they make in their Reply and that they  
14 make today. And I urge the Court to disregard the argument as  
09:27PM 15 a result.

16 If this Court chooses to entertain the argument though,  
17 the arguments that I made earlier with respect to the forum  
18 selection clause that BCBS Arizona introduced, and did, in  
19 fact, fully brief in their motion, those same arguments apply:  
09:27PM 20 Namely, first a mandatory forum selection clause is illegal  
21 under ERISA; and second, the public -- if this Court disagrees  
22 and believes that a forum selection clause is legal and valid,  
23 transfer is nonetheless not warranted because the public  
24 interest factors weigh heavily against transfer.

09:28PM 25 The next argument that I'd like to turn to is the statute

1 of limitations argument advanced by Time Warner Cable. And  
2 here the key point, I think, is that Time Warner is both  
3 improperly introducing extrinsic documents into what should be  
4 a pleadings-based analysis, and second, is mischaracterizing  
09:29PM 5 the significance of those documents.

6 Counsel for Time Warner argues that we -- on the basis of  
7 two checks, that the statute of limitations must have expired.  
8 First of all, these checks are not appropriately considered by  
9 this Court. A statute of limitations defense should be granted  
09:29PM 10 only when it's clear from the face of the Complaint. And the  
11 Complaint does not refer to these two checks, nor are these two  
12 checks central to the plaintiff's claims. So as a result, they  
13 don't qualify for the incorporation by reference doctrine, and  
14 so the Court should not be looking at them. We ask the Court  
09:29PM 15 not to look at them.

16 But even if the Court does choose to look at them, as we  
17 state in our opposition, they are an incomplete set of  
18 documents. We allege in our Complaint the starting point for  
19 when services were rendered, but we don't allege the ending  
09:30PM 20 point. And there is no reason to believe that these two checks  
21 are the only two payments that were made to the patient.

22 So when you look at the face of the Complaint, we don't --  
23 in light of the fact that we don't allege any kind of ending  
24 point, you simply can't determine from the face of the  
09:30PM 25 Complaint. And even if you take the checks into account, you

1 cannot determine that the statute of limitations has expired.  
2 And, in fact, we believe that -- we're going to be able to  
3 prove that services continued for some time, and so the cause  
4 of action won't have accrued outside of the statute of  
09:30PM 5 limitations period.

6 The most relevant date for this court to look at will be  
7 the last date on which payment was not made to plaintiffs. And  
8 we may lose -- perhaps we'll lose on a motion for summary  
9 judgment, but as far as at the pleading stage, they simply  
09:31PM 10 haven't established that these -- this is the entirety -- this  
11 is the entire relevant universe of documents, and so a  
12 dismissal in the pleadings is inappropriate. Those are the  
13 arguments I have in response to what counsel for Time Warner  
14 Cable stated.

09:31PM 15 The last point I'd like to make grouped together arguments  
16 that counsel for Time Warner made as well as counsel for  
17 Bimbo -- the Bimbo plan, Geico, Mercy and Owens-Illinois.  
18 Those defendants have argued that our pleading is insufficient  
19 for Counts 1 through 3, that they are -- that our pleading is  
09:32PM 20 *Twombly* deficient. I believe a number of the arguments that my  
21 co-counsel, Mr. Stris made, already have addressed the  
22 sufficiency of our pleading. But to -- just to close the loop  
23 on this, let's talk about the two kinds of pleading arguments  
24 that they're making.

09:32PM 25 First of all, they're arguing with respect to our

1 (a) (1) (B) benefits claims. We have to allege for each patient  
2 a particular plan provision that shows that the patient is  
3 entitled to the medical services received or that we are  
4 somehow required to allege the existence of our right to  
09:32PM 5 payment. But that's wrong for two reasons -- or those two  
6 reasons are wrong, and here's why.

7 First of all, there's no dispute here that any of the  
8 patients were entitled to the medical coverage that they got.  
9 And we know this because the patients were paid for that  
09:33PM 10 medical coverage.

11 It doesn't make sense to translate pleading cases where  
12 there's a dispute about coverage to this setting where we have  
13 a different dispute. The second argument that we have to  
14 somehow plead the existence of our right to payment, that's  
09:33PM 15 just a recycled version of all the assignment clause arguments.

16 So as to the (a) (1) (B) claim, the First Amended Complaint  
17 clearly satisfies the requisite specificity demanded by *Twombly*  
18 and *Iqbal*.

19 As to the fiduciary breach claims, we're not required to  
09:33PM 20 allege the names of the fiduciaries, and we have, in fact,  
21 alleged the duties that have been breached by defendants. And  
22 this is where my co-counsel's arguments become important. I  
23 think that the pleading arguments misapprehend our core theory  
24 of breach. We have clearly alleged violations of the claims  
09:34PM 25 regulations, and those are obviously -- and there's a fiduciary

1 duty to follow those claims regulations. And so our pleading  
2 for the fiduciary breach claims satisfies *Twombly* and *Iqbal* as  
3 well. If Your Honor doesn't have any questions, I'll submit.  
4 Thank you.

09:34PM 5 THE COURT: All right. Now, rebuttal time.  
6 Ms. Ridley.

7 THE WITNESS: Thank you, Your Honor. If I may, I'm  
8 going to take the same order as the plaintiffs have presented  
9 their arguments just for organizational purposes.

09:34PM 10 Ultimately, though, you know, we have a theme of, I think,  
11 contentions by the plaintiffs that frankly are somewhat  
12 breathtaking in their overreach.

13 For example, the first argument that Form A is somehow  
14 construed to be an assignment because the execution block  
09:35PM 15 refers to the name of the document fails to recognize what the  
16 document actually says, or more importantly with regard to  
17 Form A, what it doesn't say. There is no assignment done in  
18 the actual wording of the form. And that is in stark contrast  
19 to Form B. It's actually rather indicative of the failure of  
09:35PM 20 Form A that plaintiff's opposition spent so much time on  
21 Form B. There's a reason why Form B became existent, because  
22 of the utter failure of Form A to be an assignment.

23 And the suggestion that somehow *Spinedex* supports the  
24 concept that Form A is an assignment or that *North Jersey Spine*  
09:36PM 25 does is quite contrary to what is actually the wording that

1 *Spinedex* or New Jersey actually dealt with.

2 In *Spinedex*, the language -- excuse me -- for example, the  
3 assignment in *North Jersey Brain* contained an expressed  
4 acknowledgment. It says, "The patient hereby assigns to the  
09:36PM 5 provider all payments for medical services." In *Spinedex* it  
6 says it was a, quote, "direct assignment of my rights and  
7 benefits under this policy." Nowhere is that wording present  
8 in Form A. Form A simply is not an assignment by its terms.

9 Then there was a discussion about the scope of the Form A.  
09:37PM 10 And throughout this discussion, it is a presumption that the  
11 provider is somehow a beneficiary, a participant or a claimant  
12 under the claims regulations. But the simple fact of the  
13 matter is they are not, both as a matter of law and certainly  
14 by the terms of Form A. There was no discussion of an  
09:37PM 15 assignment of any rights or any interest whatsoever.

16 Now, with regard to the whole argument related to the  
17 concerns of Counts 2 and 3, I think it's important to note the  
18 difference about what's being sought in Count 2 and Count 3.  
19 Even Form B is prefaced with the idea that what is being  
09:38PM 20 assigned is for the purpose of getting paid benefits.

21 Plaintiffs seeking reformation and the permanent removal  
22 of fiduciaries is not seeking benefits, it is seeking to  
23 radically alter the plan documents. That is vastly different  
24 and even the wording of Form B doesn't provide that kind of  
09:38PM 25 assignment.



1           And keeping in mind that plaintiffs admit they require  
2 these forms to be signed by every patient in order to get  
3 services, clearly an adhesion contract. I am sure it is  
4 absolutely not the case that the patients believe that by  
09:39PM 5 getting services, they are agreeing to let the provider make an  
6 argument to utterly change the plan documents to the provider's  
7 benefit.

8           And I want to be clear here, the provider wants to argue  
9 that it somehow was cloaked in the benefit of the patients.  
09:39PM 10 They're not interested in the benefit of the patients here.  
11 The benefits have actually been paid to the patients.  
12 Plaintiffs have admitted that. What the provider here is  
13 interested in is its own interest. And quite frankly, its own  
14 interest is quite in contravention to the rights and interest  
09:39PM 15 of the member.

16           And it's important to note even with the Form B and the  
17 argument that somehow they have been construed to be  
18 beneficiaries or claimants or participants. Again, contrary to  
19 law, they are seeking to change documents and plan documents  
09:40PM 20 that have effect as to others. For example, you have a plan,  
21 like the Home Depot, where there's one plan, and it covers all  
22 of the employees under the plan. The notion that a provider  
23 somehow has the right to reform that plan permanently and  
24 remove a fiduciary permanently because one member receives  
09:40PM 25 services based on an adhesion contract is quite contrary to the

1 interest of those other members and beyond the premise of  
2 ERISA.

3 Now, plaintiff's argument with regard to the meaning of  
4 the claim procedure regulation is quite notable, because it  
09:40PM 5 presumes that merely by having an assignment and putting aside  
6 the frailties of Form A and Form B, that merely having an  
7 assignment somehow gives them a derivative status as a  
8 claimant. There is no provision of law for that, and  
9 plaintiffs cite none. It is a novel position they've taken,  
09:41PM 10 and quite frankly, against both the law and the regulations  
11 themselves.

12 Particularly I would note both *Spinedex* and *Rojas* notes  
13 that you do not become a beneficiary entitled to bring claims  
14 merely because of an assignment. And contrary to the argument  
09:41PM 15 of plaintiff's counsel, *Grasso* specifically indicated that,  
16 quote:

17 "Plaintiffs are not beneficiaries as ERISA  
18 uses that term, so they are not entitled to the  
19 procedures established by Section 1133 and the  
09:42PM 20 claim procedure regulations."

21 It's remarkable, also, that plaintiff's counsel construes  
22 Form B as being pitch perfect and notes that it is so because  
23 no court has ever found an assignment unconscionable. Quite  
24 frankly, no court has ever countenanced such an assignment.

09:42PM 25 The question is before this Court, we have not found

1 decisions dealing with this question one way or the other, but  
2 the point of the fact is when you see such a broad attempt to  
3 assign rights where the patient is compelled to sign a document  
4 in order to get services, there are no negotiations. The  
09:43PM 5 analysis with regard to unconscionability has to be applied.  
6 And here the assignment is both procedurally and substantively  
7 unconscionable. It actually -- the position plaintiff takes is  
8 actually putting ERISA on its head, because they are construing  
9 the assignment to place the provider's interest before the  
09:43PM 10 members.

11 Now, it's interesting that plaintiff has acknowledged that  
12 their Count 2 is on the periphery, that it's a hard argument to  
13 make to remove fiduciaries. And the reason they say so is  
14 because there's no authority for the proposition and, in fact,  
09:43PM 15 it affects other members as I discussed.

16 Equally important is Form B even in the language that is  
17 presented never includes -- notwithstanding the litany of lists  
18 of supposed rights assigned never includes the right to remove  
19 a fiduciary or the equitable remedies that they seek. So by  
09:44PM 20 the language of the document itself, it also doesn't provide  
21 the relief. And by the way, this really isn't an issue for  
22 summary judgment, this is a threshold issue.

23 Notably nowhere in the Complaint -- I should say the First  
24 Amended Complaint -- does plaintiff ever cite what plan  
09:44PM 25 provision it's seeking to enforce. Remarkably what is

1 presented by the First Amended Complaint and actually the  
2 opposition and the argument tonight is an interest in excising  
3 actual terms from the plans.

4 In other words, they don't cite what they want to enforce,  
09:45PM 5 they certainly cite terms they want to get rid of. Notably  
6 plaintiff doesn't credibly dispute the genuineness of any of  
7 the documents that are provided or the terms regarding the  
8 anti-assignment provisions. At most there's the objection  
9 Declaration of Mr. O'Connell, which is really filled more with  
09:45PM 10 argument than any sort of factual presentation, and we raised  
11 objections to that which we ask the Court to consider. But the  
12 sheer reality is they make legal arguments, they do not make  
13 any argument regarding genuineness or authenticity.

14 On the fifth point with regard to the four factors, you  
09:45PM 15 heard a lot of discussion and interesting analysis as to why  
16 they presented the four factors. What you didn't hear is an  
17 actual answer to your question. And your question was, was  
18 there any case law that adopted these four factors. And the  
19 reason you didn't hear it, Your Honor, is because there is  
09:46PM 20 none.

21 There's also frequent reference by plaintiff's counsel  
22 about alleged misrepresentations and potential independent  
23 claims regarding misrepresentations. The point of fact is the  
24 First Amended Complaint contains no such cause of action.  
09:46PM 25 There is no claim for misrepresentation.

1           The discussion of plaintiff's counsel suggesting that  
2 there should be a question as to whether or not any  
3 anti-assignment provision is enforceable, in point of fact,  
4 courts have enforced anti-assignment provisions on a fairly  
09:47PM 5 regular basis. And, in fact, in the *Mbody* case that was  
6 presented decided this month, plan documents and SPDs were used  
7 on a motion to dismiss, and the Court found that, in fact, the  
8 anti-assignment provisions were not only enforceable but  
9 resulted in dismissal.

09:47PM 10           It is not a rare situation, it's appropriate to present it  
11 at this juncture. It's appropriate to ask for the  
12 incorporation because the First Amended Complaint is rife with  
13 references to the plan documents. It would be absurd to  
14 suggest that the Court cannot look at those documents in the  
09:47PM 15 guise of those allegations. And therefore, it is perfectly  
16 appropriate to present the application of those anti-assignment  
17 provisions.

18           Plaintiff's counsel argues there should be conspicuous  
19 notice of the anti-assignment, citing no authority for the  
09:48PM 20 provision, notwithstanding a number of cases including the  
21 latest *Mbody* applying those anti-assignment provisions as  
22 written in the plans.

23           With regard to the issue of adequate notice, plaintiff has  
24 much to say, but while saying much says nothing about their  
09:48PM 25 actual form. And what I mean by that is what we have is an

1 allegation that they checked a box, Box 53, saying that they  
2 had assignments.

3 Now, as we noted, the manual produced by the National  
4 Uniform Billing Committee indicates the provider has signed a  
09:49PM 5 form authorizing the third party payor to remit payment  
6 directly to the provider. That is not tantamount to an  
7 assignment. More the point here, it is alleged by the  
8 plaintiff that that box was checked on every single claim.  
9 It's also acknowledged by the plaintiff that there's either  
09:49PM 10 Form A or Form B with regard to all of the claims. So in other  
11 words, that box was checked regardless if they had a Form A or  
12 Form B.

13 As we discussed ad nauseam, Form A and Form B are vastly  
14 different. That check off the box provides no notice  
09:49PM 15 whatsoever as to the terms of those two documents, much less  
16 whether or not they were actually assignments as opposed to  
17 directions as to payment. That is not sufficient notice.

18 With regard to the arguments as to the 17200, the Count 4,  
19 not being preempted, again, the allegations of the Complaint  
09:50PM 20 indicate that they are seeking payment per the plans. There is  
21 no exempting or isolating the 17200 claim as alleged from that  
22 premise. So they are necessarily connected to the ERISA plans  
23 and, therefore, necessarily preempted.

24 Now they try to construe it as an independent claim based  
09:50PM 25 on misrepresentation or negligent misrepresentation or

1 constructive fraud or fraud. Notably not one of those causes  
2 of action have been asserted by the First Amended Complaint.  
3 More the point, if they're really trying to argue fraud, that  
4 has a heightened pleading standard that the First Amended  
09:51PM 5 Complaint comes nowhere near meeting.

6 How do we know this? Well, among other things,  
7 plaintiff's counsel has a remarkable position that they don't  
8 have to cite you what borrowed law they are using as a premise  
9 for 17200. It's somehow a secret. That is not appropriate in  
09:51PM 10 pleading. It doesn't pass *Iqbal*. And more to the point, it  
11 doesn't pass the basic standards for 17200.

12 Knowing that, plaintiff ultimately acknowledged he cited  
13 the Insurance Code. Here's the problem with that: We're  
14 talking about ERISA plans. These are not insurers, these are  
09:51PM 15 employers sponsored plans. That code section provides no  
16 premise upon which to bring a 17200 claim. As for the unfair  
17 claim, plaintiff relies on 17200. What he doesn't deal with is  
18 the cases that indicated that it's essentially an antitrust  
19 type of claim. And they have to assert antitrust-type  
09:52PM 20 allegations which they failed to do.

21 Citation to *Coast Plaza* also fails for them. In *Coast*  
22 *Plaza*, they actually cited the Knox-Keene Act as a basis for  
23 the claim for 17200. We don't have that here. So ultimately  
24 their 17200 claim must also fail.

09:52PM 25 I'll also note that their claim for a jury demand is

1 equally specious. There's no jury demand appropriate in ERISA  
2 cause of action, there's none in a 17200 cause of action. In  
3 response they have similar arguments. Well, we could possibly  
4 have a constructive fraud case. We might have a  
09:53PM 5 misrepresentation case. The problem is there is no such claim  
6 in the First Amended Complaint. So the jury demand must fail  
7 as well.

8 Finally, what we have with regard to ERISA is a case  
9 typically on the administrative record, not on discovery-like  
09:53PM 10 benefits cases. Again, plaintiff is trying to construe itself  
11 as a beneficiary or participant that's seeking benefits. That  
12 is just not the case here. At best, they have derivative right  
13 to seek benefits. But that derivative right does not create  
14 them as a beneficiary or participant under ERISA or claimant  
09:54PM 15 under the claim regs.

16 Finally, with regard to the Anthem addendum, essentially  
17 plaintiffs acknowledge that an individual plan doesn't come  
18 under ERISA. They would have to acknowledge it. That is the  
19 law. There is no dispute that, in fact, for the plaintiffs  
09:54PM 20 identified, they were individual plans. There can be no basis  
21 for claims under ERISA for those patients.

22 With regard to MedLink, it's remarkable that they can  
23 refer to MedLink but not have them as a party. MedLink had its  
24 own individual provider biller number independent. And for the  
09:54PM 25 first time tonight, I've heard plaintiff acknowledge that the



1 assignment in question didn't go to the plaintiffs, it went to  
2 MedLink. That's the first time I've heard that. And that  
3 supports the claim that those claims must be dismissed.  
4 Because if they went to MedLink, depending on what they say,  
09:55PM 5 it's only MedLink that has the rights, not the named plaintiffs  
6 here. And if it's Form A, there's no assignment whatsoever.  
7 And if it's Form B, it fails for the same reasons that we've  
8 argued that Form B fails for the plaintiff. Thank you,  
9 Your Honor.

09:55PM 10 THE COURT: I know each of you by sight, although I  
11 may not still be matching up names. So when you come forward  
12 again to argue, just reintroduce yourself. There's no  
13 particular order. If you want to change the order, that's  
14 fine.

10:06PM 15 MR. BEAUCHAMP: Keith Beauchamp. I represent Blue  
16 Cross/Blue Shield Arizona and the Tucson Electric plan. I'm  
17 going to address the venue issue. Whether you dismiss or  
18 transfer, with all due respect, I submit you have to do one or  
19 the other. I believe it's permissible for the Court to dismiss  
10:06PM 20 rather than transfer, because the forum selection clause is not  
21 specifically --

22 THE COURT: Well, it may be. Sometimes we're in the  
23 statute of limitations problem.

24 MR. BEAUCHAMP: In either event, they've come  
10:07PM 25 nowhere close to showing that this is an unusual case. They

1 articulated two issues that it's illegal under ERISA. They  
2 have a 2006 case from Texas, and that's what they got. There  
3 are more than a dozen cases since then cited in our brief  
4 including the majority opinion in the Sixth Circuit case that  
10:07PM 5 they cite that make clear that these provisions are  
6 enforceable.

7 And although the Court doesn't give deference to the  
8 purported views of the Department of Labor, the reality is what  
9 those courts are concerned about and what the -- I'm sorry --  
10:07PM 10 what those agencies are concerned about and what the Sixth  
11 Circuit dissent was concerned about are instances where there  
12 are forum clauses that disadvantage the participants.

13 And so in the Sixth Circuit you have an Iowa resident who  
14 works for a company who has to file suit several states away.  
10:07PM 15 Whether you want to tackle that in any case, you don't have to  
16 tackle it for my clients. My clients are only in Arizona. The  
17 four patients at issue here are all Arizona patients. And you  
18 don't have to take my word for it. It's in the Declaration  
19 submitted by the plaintiffs at Docket 835-11. It makes clear  
10:08PM 20 that these were Arizona residents who were in California for  
21 treatment, but they are, in fact, Arizona residents. So the  
22 concerns that you might have in some instances don't arise  
23 here, and the reality is the vast authority enforces these  
24 provisions.

10:08PM 25 The public interest is the second issue. And with all due

1 respect, it's not against the public interest to enforce a  
2 provision between an Arizona entity that I represent, the  
3 Arizona employers of these patients, and patients who are in  
4 Arizona. That does not violate the public interest.

10:08PM 5 The notion that the center of gravity is here because all  
6 the patients were treated here ignores the reality that all the  
7 patients are in Arizona.

8 THE COURT: Just a moment. I couldn't understand  
9 you.

10:09PM 10 MR. BEAUCHAMP: I apologize, Your Honor.

11 THE COURT: Let's be careful. Slow down. I've  
12 given you both unlimited time, but I'm not going to count  
13 slurring and speeding up. If I give you that courtesy, you  
14 give us that courtesy.

10:09PM 15 MR. BEAUCHAMP: Understood, Your Honor.

16 THE COURT: First and last warning; otherwise, sit  
17 down.

18 MR. BEAUCHAMP: So the center of gravity is not  
19 here, at least not with respect to the clients that I represent  
10:09PM 20 and the patients who are participants. All of the patients are  
21 from Arizona. Mr. Stris in his argument talked about -- in his  
22 first argument talked about wanting you to permit affidavits  
23 from the patients about their intent while all those folks are  
24 in Arizona.

10:09PM 25 With respect to his fifth argument on anti-assignability

1 enforceability, he said he wanted to take depositions to  
2 interpret the plans. Well, the plans for my clients are all  
3 administered from Arizona. That's where those depositions  
4 would be.

10:09PM 5           The final point I guess I would make is with respect to  
6 judicial economy. A mass action of this sort is not -- does  
7 not have advantages in terms of judicial economy to having the  
8 individuals whose assignments they seek to enforce all of whom  
9 live in Arizona bring their claims in Arizona. I have Arizona  
10:10PM 10 district courts that have interpreted the exact language and  
11 enforce the anti-assignment provisions that we seek to enforce  
12 here. And for those reasons, we respectfully submit the Court  
13 should enforce the venue provision with these Arizona parties  
14 with the exception of the plaintiffs who stand in the shoes of  
10:10PM 15 Arizona parties and either dismiss or transfer. Thank you.

16           THE COURT: Thank you.

17           All right, Counsel.

18           MR. LEVIN: Your Honor, first as to the --

19           THE COURT: I'm sorry.

10:10PM 20           MR. LEVIN: I'm sorry, I'm David Levin, and I  
21 represent Time Warner Cable Benefit Plan.

22           THE COURT: Thank you.

23           MR. LEVIN: Thank you. First as to the  
24 *Twombly/Iqbal* issue, there's a very long Complaint, and there's  
10:11PM 25 been a lot of briefing. But if the Court looks at 29 U.S.C.

1 1132(a)(1), the Court will see that that provision provides a  
2 cause of action to enforce the terms of the plan or determine  
3 the rights of participants and beneficiaries under the terms of  
4 the plan.

10:11PM 5 If the language itself left anything to imagination, the  
6 United States Supreme Court in *CIGNA vs. Amara* said you enforce  
7 the plan as it's written. *Iqbal* and *Twombly* say you have to  
8 provide the facts behind the support for the cause of action  
9 since the cause of action is to enforce the terms of the plan.

10:11PM 10 Somewhere in that First Amended Complaint there has to be  
11 some -- in words or substance some description of the plan  
12 provision that entitles these plaintiffs to the benefits that  
13 they seek, and it's not fair. And it wasn't there in their  
14 briefs, and it wasn't here in the argument. And that's not the

10:12PM 15 flip side of the anti-assignment or a back door to the  
16 anti-assignment provision, that's simply the notion that you  
17 have to seek to enforce that's affirmative on the part of the  
18 plaintiff to seek to enforce a term of the plan. There  
19 certainly isn't any mention of any plan term for us, and that's  
10:12PM 20 what they want. They want to be paid, according to them, under  
21 1132(a)(1), and it's not there.

22 And in addition, with respect to the anti-assignment  
23 provision, that actually involves a very different section of  
24 ERISA, 29 U.S.C. 1104(a)(1)(D), which requires the fiduciary to  
10:12PM 25 administer the plan in accordance with its terms. And here,

1 one of the terms of the plan, our plan anyway, is an  
2 anti-assignment provision. And that's the way the plan has to  
3 be enforced. And there is no action for breach of fiduciary  
4 duty for compliance with plan terms. It's just doesn't exist.  
10:13PM 5 And there isn't any case law that says to the contrary, not in  
6 this circuit or otherwise.

7 Then as was pointed out, there isn't any discovery taken  
8 in benefits cases except with respect to alleged conflict of  
9 interest. There isn't any conflict of interest alleged here.

10:13PM 10 The conflict of interest that the courts allow some discovery,  
11 some limited discovery on is with respect to a situation where  
12 the payor and the decision-maker is the same. We don't have  
13 that in this case, certainly not from my plan. We've all  
14 picked a third-party administrator to administer the plans  
10:13PM 15 rather than having the plan sponsor, the company itself make  
16 that decision. It's to eliminate any conflict of interest  
17 which, of course, makes all of these subject to rule -- Federal  
18 Rule 206(a)(1)(B). There's no -- you don't have discovery on a  
19 closed administrative record.

10:14PM 20 With respect to the issue about *Atlantic Marine, Atlantic*  
21 *Marine*, the Supreme Court determined that 12(b)(3) -- excuse  
22 me, the dismissal under Federal Rules of Civil Procedure  
23 12(b)(3) did not provide -- I'm sorry, the foundation of  
24 12(b)(3), dismissal, couldn't be associated with a forum  
10:14PM 25 selection clause. Forum selection clauses were to decide on a

1 forum, not on venue.

2 Having said that, the Supreme Court then said that forum  
3 selection clauses are generally enforced through the transfer.  
4 There was an issue presented to the Supreme Court by an amicus  
10:14PM 5 and the Supreme Court discusses it. It was a question of  
6 whether or not you get a dismissal under 12(b)(6) for a forum  
7 selection clause. The Supreme Court said it wasn't asked that  
8 question by the parties. The parties hadn't briefed it and,  
9 therefore, the Court wouldn't address it. That issue actually  
10:15PM 10 was raised in *Smith vs. Aegon* pension plan, because in that  
11 instance the Court dismissed -- it dismissed without prejudice,  
12 but it dismissed, nonetheless, based on the forum selection  
13 clause.

14 In addition, in that case, *Aegon -- Smith vs. Aegon*  
10:15PM 15 pension plan, with respect to the forum selection clause, the  
16 Court first looked to see whether or not it owed any deference  
17 to the position of the Department of Labor, because it's  
18 absolutely clear that in three different cases, the Department  
19 of Labor has filed amicus briefs saying that forum selection  
10:15PM 20 clauses are not enforceable. But as the Court pointed out, in  
21 the 42 years since ERISA was enacted, the Department of Labor  
22 has never adopted -- never adopted a regulation or rule that  
23 says that you could not have a forum selection clause.

24 The Department of Labor never issued an opinion letter or  
10:16PM 25 an advisory letter saying that you couldn't have them. The

1 Department of Labor has issued a regulation on claims and  
2 appeals. It's amended it, and it just recently issued a  
3 proposed amendment. Never in any of those, either the  
4 regulation or the proposed regulation, does the Department of  
10:16PM 5 Labor criticize or say you cannot have a forum selection  
6 clause. That's why the Sixth Circuit said though deference was  
7 owed to the position of the Department of Labor and as  
8 the words of the -- the Sixth Circuit used the word of the  
9 Supreme Court, that it was a whim because it's only in these  
10:16PM 10 three amicus briefs rather than a position actually recited in  
11 a regulation or rule.

12 Then plaintiff's counsel said that I -- we had waived our  
13 argument about forum selection clause. Well, if we waived it,  
14 I don't know how they knew to oppose it in their opposition  
10:17PM 15 brief. And clearly they opposed it in their opposition brief,  
16 and we responded in our Reply brief. I can't say that that's a  
17 waiver.

18 On the issue of venue, one place that you can have venue  
19 is where the breach occurred. If you look at ERISA from  
10:17PM 20 29 U.S.C. 1001, which is the statement of purpose, 29 U.S.C.  
21 1002, which are the definitions, through to 29 U.S.C. 1166, you  
22 will not find the mention of breach anywhere except with  
23 respect to fiduciary breach. It's 29 U.S.C. 1109, says that a  
24 fiduciary breach can be remedied.

10:18PM 25 To say that Congress decided that breach meant something



1 different is to invent something that's not in the statute. In  
2 addition, this issue was actually addressed by the Supreme  
3 Court in the case called *Varity, V-a-r-i-t-y, vs. Howe*. And in  
4 that case, the Supreme Court said that an individual  
10:18PM 5 participant could sue for breach of fiduciary duty for  
6 equitable remedies.

7       There were a number of amici that filed in that case, and  
8 the Supreme Court discusses the position of the amici, and the  
9 Supreme Court wrote and said that the amici were concerned that  
10:18PM 10 if an individual participant could sue for breach of fiduciary  
11 duty, anyone could sue and claim that a suit for benefits was a  
12 breach of fiduciary duty. Why? Because you have to pay  
13 benefits under the terms of the plan. And if you don't pay  
14 them under the terms of the plan, it's a breach.

10:18PM 15       The Supreme Court wrote and said the district courts would  
16 have enough sense not to open the floodgates to allow  
17 individual participants to create from benefit cases breaches  
18 of fiduciary duty. That's why we argued in our brief that the  
19 breach that's referred to in the venue section of ERISA in  
10:19PM 20 29 U.S.C. 1132(e)(2) is a breach of fiduciary duty. It's not  
21 where benefits are paid or -- not where benefits are paid, but  
22 all of those. And I go back on it just for a moment, if I may,  
23 the focus of the Complaint is the payment of benefits. It's  
24 the payment of benefits that were paid to participants and that  
10:19PM 25 weren't paid to the plaintiffs.

1           And that's why the Court can consider the terms of the  
2 plan, the summary plan description, and the claims and payment  
3 of the claims. How could -- how could you have a claim that  
4 you say payment wasn't made to me, it was made to someone else  
10:20PM 5 and avoid having the Court consider the payment? That's what  
6 the plaintiffs call excess -- beyond the four corners of the  
7 Complaint. And I submit to you that under the law, this  
8 jurisdiction and in the Ninth Circuit that the Court can  
9 actually consider what the basis is for the Complaint.

10:20PM 10           Now I'd like to close with one point and to reiterate it.  
11 As complicated as all this may seem, it all boils down to  
12 whether or not the plan terms allow the benefits that they  
13 want. And they're not in the Complaint. They're not in the  
14 First Amended Complaint. And without them, there simply isn't  
10:20PM 15 any viable cause of action. And to get to the point of talking  
16 about anti-assignment clause is to put the cart before the  
17 horse. They haven't put the horse in the Complaint because  
18 it's not there. Thank you.

19           MS. DILLER: Nicole Diller representing the  
10:21PM 20 healthcare plans of Bimbo Bakeries, Geico, Mercy Health  
21 Services and Owens-Illinois.

22           I wanted to join in Mr. Levin's comments on the  
23 *Twombly/Iqbal* issue and the responses that he made with respect  
24 to the (a) (1) (B) claim. I did want to also address the (a) (3)  
10:21PM 25 claim. Plaintiffs take the extraordinary position that they

1 don't need to name or identify in the Complaint who the  
2 fiduciary is that they allege breached its fiduciary  
3 responsibilities. They cite no authority for that proposition,  
4 and it's contrary to the authority we cited in our papers.

10:22PM 5 For instance, Owens-Illinois addendum, which is Docket 710  
6 on Page 9, *Pette vs. International Union of Operating Engineers*  
7 right here in the Central District of California, which  
8 dismissed a breach of fiduciary duty claim where the plaintiffs  
9 did not identify the specific fiduciary against whom the claim  
10 was brought.

11 Quite simply, *Iqbal* requires that to survive a motion to  
12 dismiss, the Complaint must state facts that are sufficient to  
13 state a plausible claim for relief. I don't see how you can  
14 get a claim for relief when you don't have the breach and  
10:22PM 15 fiduciary in a fiduciary breach of claim. That's all I wanted  
16 to add.

17 THE COURT: Thank you very much.

18 In the first round, Maynard Buck or William von Behren or  
19 Gary Pancer or Brian Boyle?

10:23PM 20 MR. BUCK: Maynard Buck for the Eaton Plan. No,  
21 Your Honor. Thank you.

22 THE COURT: Well, let me slowly go down the list and  
23 see if there's anybody else who wants to comment.

24 Hilary Erin Feybush, do you have any comments?

10:23PM 25 MS. FEYBUSH: No, Your Honor.

1 THE COURT: Robert Humphreys, do you, sir?  
2 MR. HUMPHREYS: No, Your Honor. Thank you.  
3 THE COURT: Carol Lewis?  
4 MS. LEWIS: Nothing further, Your Honor.  
10:23PM 5 THE COURT: Maynard Buck?  
6 MR. BUCK: No, Your Honor.  
7 THE COURT: Christopher Rillo?  
8 MR. RILLO: No, Your Honor.  
9 THE COURT: Alexandria Young?  
10:23PM 10 MS. YOUNG: No, Your Honor.  
11 THE COURT: William von Behren?  
12 MR. VON BEHREN: No, thank you, Your Honor.  
13 THE COURT: Keith Wesley?  
14 MR. WESLEY: No, Your Honor.  
10:23PM 15 THE COURT: Gary Pancer?  
16 MR. PANCER: No, Your Honor.  
17 THE COURT: Hong-An Vu?  
18 MS. VU: No, Your Honor.  
19 THE COURT: Nathan McClellan?  
10:24PM 20 MR. McCLELLAN: No, Your Honor.  
21 THE COURT: Dan Woods?  
22 MR. WOODS: No, Your Honor.  
23 THE COURT: Christopher Dueringer?  
24 MR. DUERINGER: No, Your Honor.  
10:24PM 25 THE COURT: Ronald Kravitz?

1 MR. KRAVITZ: No, Your Honor.

2 THE COURT: Melissa Cowan?

3 MS. COWAN: No, Your Honor.

4 THE COURT: Neil Barker?

10:24PM 5 MR. BARKER: Nothing further, Your Honor.

6 THE COURT: Patrick de Gravelles?

7 MR. DE GRAVELLES: "De Gravelles." No, Your Honor.

8 THE COURT: Thank you.

9 Raymond Collins Kilgore or Brian Boyle? Mr. Boyle, I'm  
10:24PM 10 sorry, I had you to begin with. I had you on the same line.

11 MR. BOYLE: No, Your Honor.

12 THE COURT: Thank you, gentlemen.

13 Thomas Gilbert?

14 MR. GILBERT: No, thank you.

10:24PM 15 THE COURT: Lauren Daming?

16 MS. DAMING: No, Your Honor.

17 THE COURT: Todd Wozniak?

18 MR. WOZNIAK: No, Your Honor.

19 THE COURT: Michael Sandner?

10:24PM 20 MR. SANDNER: No, Your Honor.

21 THE COURT: Susan Graham Lovelace?

22 MS. LOVELACE: Nothing further, Your Honor.

23 THE COURT: Elise Klein?

24 MS. KLEIN: Klein, K-l-e-i-n.

10:25PM 25 THE COURT: With BMW. I've got that portion. Local

1 556; right?

2 MS. KLEIN: 555.

3 THE COURT: And Jill Jaffe?

4 MS. JAFFE: No, Your Honor.

10:25PM 5 THE COURT: Monica Zi?

6 MS. ZI: Nothing further, Your Honor.

7 THE COURT: Let me turn back to the plaintiffs in  
8 this matter.

9 Counsel.

10:25PM 10 MR. STRIS: Thank you, Your Honor. A few brief  
11 comments on several of the eight primary issues that Ms. Ridley  
12 addressed in her rebuttal. First as to whether Form A is an  
13 assignment or not, I trust that the Court will look at the  
14 examples and put them next to one another. But I thought it  
10:25PM 15 was interesting that Ms. Ridley specifically referred to *North*  
16 *Jersey Brain*. Because if you look at that language and you  
17 specifically put it next to Form A, they're materially  
18 identical. *North Jersey's* language says, and I quote:

19 "I hereby assign to *North Jersey* all payments  
10:26PM 20 for medical services rendered to myself or my  
21 dependents." That's the language.

22 The Form A assignment says:

23 "I hereby request that payment of authorized  
24 insurance company benefits be made on my behalf  
10:26PM 25 directly to plaintiffs for the amount due to me for

1 any medical or psychological, psychiatric treatment  
2 or services that are rendered to me by plaintiffs.

3 I have executed this assignment of benefits."

4 So literally the only difference between the two is that  
10:26PM 5 the word "assign" is in a different sentence. And I think some  
6 of the other examples are even clearer, namely the Eleventh  
7 Circuit case that I mentioned that one of the defendants here  
8 today litigated unsuccessfully.

9 The final thing I'll add on this point is that we hear  
10:26PM 10 nothing from Ms. Ridley with regard to my point that insofar as  
11 there is any ambiguity, this is not something that can be  
12 decided on the pleadings. Because frankly, there is no  
13 response. Any ambiguity would require things such as  
14 affidavits from the patients.

10:27PM 15 The next issue goes to Form A's scope. And in her  
16 rebuttal what Ms. Ridley tells you is that our point that  
17 there's derivative standing as a claimant has no authority to  
18 support it. But as I explained before, that's precisely what  
19 happened in *Spinedex*, and I cited the relevant section of the  
10:27PM 20 opinion.

21 That's precisely what happened in the Eighth Circuit in  
22 *Grasso*, and we hear arguments that somehow the -- from not only  
23 Ms. Ridley, but other defense counsel that somehow the Second  
24 Circuit case of *Rojas* forecloses our core position. And  
10:27PM 25 frankly, that's even more difficult for me to understand

1 because Rojas was an ERISA retaliation claim where the provider  
2 wanted to be reinstated as an in-network provider.

3 Of course that claim couldn't be assigned because it's not  
4 a claim that was ever held by the patient in the first place.

10:28PM 5 And in any event, the Second Circuit in Footnote 8 found there  
6 was no evidence that any assignments had been signed. So  
7 frankly *Spinedex*, *Grasso* support our position; Rojas says  
8 nothing. And what Ms. Ridley tells you is that our theory  
9 can't be right. Either under Form A or frankly Form B, because  
10:28PM 10 in her words, things such as reformation or the removal of the  
11 fiduciary have nothing to do with seeking benefits. And this  
12 is a critical point, Your Honor.

13 With regard to reformation, that's flatly wrong. And the  
14 best authority for that is the recently decided Ninth Circuit  
10:29PM 15 *Moyle* case. If your benefit claim essentially fails because of  
16 a plan term that can't be enforced because of a breach of  
17 fiduciary duty, you get to excise that provision from the plan  
18 so that your benefits claim will succeed; otherwise,  
19 fiduciaries could effectively dupe assignees or patients or  
10:29PM 20 pension holders, et cetera, in the first instance by making  
21 misrepresentations about whether you need to pay life insurance  
22 premiums, what you need to do to be eligible for a benefit.  
23 Reformation is well settled that it is a precursor to obtaining  
24 benefits.

10:29PM 25 Now I understand Ms. Ridley's argument that there's an



1 attenuated connection between Count 2 and the removal of the  
2 fiduciary benefits, but I rest on what I said earlier, which is  
3 that's a merits argument. To the extent that the mishandling  
4 of our benefits claim warrants removal, because we can convince  
10:30PM 5 the Court that particular fiduciaries cannot be trusted to  
6 administer fairly our benefits, there is a sufficient nexus  
7 that both under Form A and Form B, we can state a claim under  
8 Count 2.

9 That brings us to Issue 3, the conscionability of Form 3.

10:30PM 10 I want to say a few words on this. Ms. Ridley says in her  
11 rebuttal that clearly this is an adhesion contract. And, you  
12 know, my response to that would be but that analysis would  
13 equally apply to every single insurance policy that's written  
14 by Blue Cross entities and to every single ERISA welfare plan  
10:31PM 15 at issue in this case. The fact that there is a standard  
16 contract that you must accept does not make the contract  
17 unconscionable.

18 The majority of our briefing and my remarks earlier  
19 explained why there's nothing even remotely troubling let alone  
10:31PM 20 shocking or disturbing about the bargain between patients and  
21 my clients in the Form B assignment, and we hear no response  
22 from Ms. Ridley as to why this is terrible let alone should  
23 rise to the level of unconscionability.

24 And I would note that in the briefing there are eight  
10:31PM 25 cases cited by defendants with regard to unconscionability.

1 One of them found no unconscionability, and the other seven,  
2 every single one of them involved an arbitration provision  
3 where the allegedly unconscionable term was either a class  
4 action waiver or a forum selection clause that required people  
10:32PM 5 to travel 2,000 or 3,000 miles from their home in order to  
6 litigate a case.

7 Unsurprisingly, there's never been a case that finds that  
8 a medical provider assignment is unconscionable because the  
9 bargain is very simple. The patient doesn't have to pay up  
10:32PM 10 front in cash or credit card, instead they assign their  
11 insurance or ERISA benefits and associated statutory rights in  
12 exchange for getting valuable medical services fronted to them.  
13 And we hear no response about why that's even troubling let  
14 alone troubling to the level of unconscionability.

10:32PM 15 With regard to the scope of Form B, the comments I made  
16 about the scope of Form A I believe apply similarly. So I'd  
17 like to turn to Issue 5, which is perhaps the most significant  
18 or contentious here today, which is what is the significance of  
19 these anti-assignment provisions?

10:33PM 20 Now Ms. Ridley gets up and says that you asked for us to  
21 cite authority as to the requirements that we allege about a  
22 written instrument, about having the totality of the written  
23 instrument, about SPD disclosure, about SPD furnishing. And  
24 Ms. Ridley says that I cite no authority because there is none.

10:33PM 25 But frankly that's not true.

1           In the general litigation context, the principles that we  
2 articulate on Page 14 of our opposition are black letter ERISA  
3 law. I point you to *Firestone*, that's the Supreme Court case  
4 from the '80s *Heimeshoff, McCutchen, Kennedy vs. Dupont, CIGNA,*  
10:34PM 5 *Moyle* from the Ninth Circuit, *Silva* from the Eighth Circuit,  
6 *Frommert* from the Second Circuit, a number of these cases where  
7 the position that we're taking was expressly adopted and  
8 supported by the Department of Labor. And in the Supreme Court  
9 cases, many of them the solicitor general.

10:34PM 10           In essence, what the defendants are arguing here is that  
11 somehow those general principles about the ERISA plan and SPDs  
12 don't apply to assigned claims. And it's -- for lack of a  
13 better analogy, it's similar to the kind of arguments people  
14 used to make about how if you were in a fight with your ERISA  
10:34PM 15 plan about whether you were eligible. So, for example, they  
16 say you weren't an employee long enough, so you never became a  
17 participant under the pension plan. Or they say you never paid  
18 your premiums, so you never became eligible for benefits under  
19 the life insurance part of the welfare plan. People used to  
10:35PM 20 argue that that meant you couldn't bring a claim and litigate  
21 these plan meaning and notice issues. But that argument was  
22 dispensed with in *Firestone*.

23           The U.S. Supreme Court in *Bruch* said what matters as a  
24 threshold question is whether you have a colorable claim to  
10:35PM 25 benefits. And defendants persist with this argument when we

1 litigated *LaRue vs. DeWolff, Boberg* before the Supreme Court, a  
2 motion to dismiss the petition was filed by the defendants  
3 precisely on this ground, which we successfully opposed,  
4 because the threshold question of eligibility is a standing  
10:35PM 5 question. And as long as you have a colorable claim to  
6 benefits, you can litigate these issues as a participant.

7 This is perfectly analogous to a medical provider. And I  
8 bring you back to where did started, Your Honor, when I  
9 mentioned *Davidowitz*, the Ninth Circuit case that referred to,  
10:36PM 10 quote, "an allegedly valid assignment."

11 The way this works is exactly the same in a threshold  
12 participation case. If we put forward an assignment, whether  
13 it's Form A or Form B, and we establish that it is a valid  
14 assignment -- obviously we have to win that issue -- then when  
10:36PM 15 we're talking about the merits of our benefits claim, we get to  
16 litigate what the plan means, and that requires looking at the  
17 entirety of the plan like in any pension case or any welfare  
18 plan case. We get to litigate whether there was proper notice  
19 in an SPD, whether it was furnished, whether there can be  
10:36PM 20 reformation.

21 What's happening here is a conflation of two points. And  
22 I think this is important because you have a number of district  
23 court cases, I will concede, where issues of anti-assignment  
24 provisions are decided at the motion to dismiss stage. But  
10:37PM 25 that's merely because, No. 1, these arguments are not being

1 advanced by the providers; and No. 2, a lot of the facts that  
2 we pled in this case don't exist.

3 If you have a benefits case with one claim, and the  
4 relevant documents have essentially been put before the Court,  
10:37PM 5 then none of the issues that I've been urging today apply. The  
6 bottom line of what I'm saying is that this is a pleading  
7 challenge, and in order for the anti-assignment arguments to  
8 have any purchase, you have to exercise your discretion to  
9 incorporate them by reference. You certainly have the  
10:37PM 10 authority to do that, but I would submit that you ought not,  
11 because these very issues which are complex, which are fact  
12 specific, will need to be litigated.

13 And when Ms. Ridley says, "All we have is the O'Connell  
14 Declaration," which is improper legal argument, that, in  
10:38PM 15 essence, proves up my point, which is the various things that  
16 they are claiming are improper argument is the dispute about  
17 the various questions that must be decided before we can  
18 determine whether the anti-assignment provisions bar some or  
19 several of our claims.

10:38PM 20 Briefly in conclusion, I have nothing further to add on  
21 the notice question, No. 6. And with regard to Issues 7 and 8  
22 involving our state law claim, what Ms. Ridley said in rebuttal  
23 essentially just misstates our theory under state law. And so  
24 the record will reflect my description earlier. The First  
10:38PM 25 Amended Complaint and our briefing reflects our theory.

1           The only thing I would add is on both the preempts and  
2 failure to state a claim basis, Ms. Ridley makes much of the  
3 fact that we didn't cite borrowed law. And I would just  
4 reiterate as we pointed out in Footnote 1 of our opposition, in  
10:39PM 5 a recently cited Supreme Court case, *Johnson vs. City of*  
6 *Shelby*, the Supreme Court made clear that you don't have to  
7 cite legal provisions, you just have to give notice and make  
8 clear what it is you're arguing.

9           But if Your Honor is troubled by that and feels like our  
10:39PM 10 Complaint is not clear enough, we would request leave to amend.  
11 We can make our state law claim very clear. We can make the  
12 borrowed law very clear. And if there's any doubt, we can make  
13 it clear that it is a distinct claim from our ERISA rights as  
14 an assignee. And the various preemption cases in our brief  
10:39PM 15 make clear that you have the right as a provider to bring one  
16 or both of those claims. They are different claims targeting  
17 different things.

18           And then I guess finally with regard to the addenda  
19 involving MedLink, I don't know why Ms. Ridley was surprised at  
10:40PM 20 our position on this. If you look at Paragraph 51 to 53 of the  
21 First Amended Complaint on Page 69, we make clear that the  
22 plaintiffs or their agents obtained assignments and submitted  
23 claims.

24           And our position is very simple here, we had a  
10:40PM 25 relationship with MedLink. MedLink had an assignment. MedLink

1 submitted claims. The defendants had an obligation to pay  
2 MedLink. MedLink had an obligation to remit much of that money  
3 to us; therefore, MedLink need not be a plaintiff. We can  
4 bring this claim on behalf of the injury that was done to our  
10:40PM 5 agent. We set forth this argument in more detail in our  
6 opposition to the Anthem addenda, and I don't think either in  
7 the Reply or an argument today the essence of what we've said  
8 has been responded to. So with that, if my colleague has any  
9 comments on the individual motion --

10:41PM 10 MS. PATHAK: Your Honor, I think --

11 THE COURT: Just one more time. Just your name for  
12 the record?

13 MS. PATHAK: Of course. Rachana Pathak for  
14 plaintiffs.

10:41PM 15 THE COURT: Thank you.

16 MS. PATHAK: So, Your Honor, I think that opposing  
17 counsel and I have joined issue on most of the points, but I  
18 would like to address a few where -- that I think would be of  
19 some value to the Court.

10:41PM 20 So first of all, I think it's important to remember that  
21 while *Twombly* and *Iqbal* made pleading more rigorous, they  
22 continued the system of notice pleading. Pleading is not --  
23 pleading requirements are not supposed to be technical tricks  
24 to keep potentially meritorious claims out of court. The key  
10:42PM 25 inquiry is whether our claims are plausible -- and I apologize

1 if I'm being too basic. I'm a sole procedure professor in my  
2 other life -- and plausibility is clearly established here with  
3 respect to both (a) (1) (B) claims and also our several fiduciary  
4 breach claims.

10:42PM 5 So with respect to the benefits claims, first is it  
6 plausible that the patients here were entitled to the medical  
7 services that our clients provided? Of course it is. Need we  
8 allege the existence of plan terms to make that medical  
9 coverage plausible? No. And that's because we've alleged that  
10:43PM 10 the medical services were covered. And we've also alleged that  
11 the patients were paid for the medical services. That  
12 establishes that it is more than plausible that the medical  
13 services were covered by all the plans. To require us to  
14 allege additionally the specific plan terms that prompted the  
10:43PM 15 defendants to pay the patients would be unnecessary.

16 So what is the issue with plausibility, then? The issue  
17 with plausibility is whether we have the requisite standing.  
18 This is why I'm saying that their (a) (1) (B) pleading arguments  
19 really collapse into their assignment arguments. And my  
10:43PM 20 co-counsel, I think, has sufficiently addressed those. We  
21 allege obviously the existence of assignments. We allege that  
22 the patients executed the assignments. And obviously there's  
23 disagreements about the significance of all that.

24 So the fiduciary breach claims are also sufficiently  
10:44PM 25 alleged as required by *Twombly* and *Iqbal*. We've explained in



1 the opposition to Omnibus, but also the individual motions why  
2 we believe that we have included the requisite specificity.  
3 But to the extent that you think specificity is lacking, it's  
4 important to note that the reason why there's not an  
10:44PM 5 administrative record is because the defendants refused to  
6 engage with our clients.

7       Instead of responding to our presented claims, they  
8 entirely ignored us and paid the patients. That's why there's  
9 no administrative record. That's why to the extent that  
10:44PM 10 there's some specificity lacking, that's why it's lacking. So  
11 *Twombly* and *Iqbal* certainly don't compel dismissal because of  
12 insufficient pleading here.

13       The next point -- and the points that I just made are  
14 responsive to the arguments advanced by both Mr. Levin as well  
10:45PM 15 as Ms. Diller. So I apologize, I went out of order without  
16 alerting you to that fact.

17       The last point I'd like to make was advanced by Mr. Levin,  
18 counsel for Time Warner Cable, that somehow we are not entitled  
19 to discovery. I don't believe there's support for the  
10:45PM 20 proposition that we're not entitled to discovery on any of the  
21 substance here. We certainly would be. But there is certainly  
22 no authority for the proposition that limited procedural  
23 discovery on pre-answer motion would not be something that we  
24 would be entitled to have. The claims regulations don't say  
10:46PM 25 that, nor does any statutory provision in ERISA. So the Court

1 certainly has the ability to give us limited discovery on  
2 issues like jurisdictional issues or other procedural issues.  
3 With that, I'll submit on the briefing, Your Honor.

4 THE COURT: Ms. Ridley, what is the  
10:46PM 5 one-and-half-minute thought that you have as you walk towards  
6 the elevators and say, "If I just would have told the judge the  
7 following, he would have changed his position"? And you  
8 literally have one and a half minutes. Because when I was  
9 litigating, I always knew when I left the door, I left that one  
10:47PM 10 golden thought on the floor. You have literally one minute and  
11 that's it.

12 MS. RIDLEY: I actually think I hit all the  
13 substantive thoughts. The only golden thought is  
14 Mr. von Behren mentioned he appeared after the briefing was  
10:47PM 15 done for some parties, my firm did as well, so we didn't have  
16 all of their plan documents. So those later-appearing parties  
17 don't have the plan documents before the Court.

18 THE COURT: Okay. Let me speak to Mr. von Behren  
19 for a moment. You talked about grouping, and you went very  
10:47PM 20 quickly, and you said you represented "600 billion" people, and  
21 seemed to wrap up in eight categories with a few outliers or  
22 whatever the word was, but I didn't hear that those eight  
23 groupings, in a sense, from your perspective represented the  
24 140-some or whatever, you know, plans here. I got confused. I  
10:47PM 25 thought you were speaking on one hand about the entire assembly

1 here, but then I realize you may have just been speaking about  
2 your representation of your own clients.

3 MR. VON BEHREN: Yes, Your Honor, I have not  
4 reviewed the 174 plans implicated; however, I do know from my  
10:48PM 5 group of clients alone, it involves about 90.

6 THE COURT: Thank you for that minute. I appreciate  
7 it. In other words, you just represent the 60-some. You think  
8 you can group it into eight or so. Ms. Ridley is not going to  
9 help you, okay?

10:48PM 10 MR. VON BEHREN: Yes, but the addendum that we filed  
11 was the information we obtained from all defendants concerning  
12 their anti-assignment provisions and the plans at issue and,  
13 therefore, that is instructive on that. And I believe the  
14 point is that --

10:48PM 15 THE COURT: Mismanagement.

16 MR. VON BEHREN: Absolutely.

17 THE COURT: Counsel, what's the one thought when you  
18 walk out the door, "I wish I would have told that judge one  
19 more thing" in about one minute? That's all you've got.

10:49PM 20 MR. STRIS: In a rare moment, Your Honor, I have to  
21 tell you I have nothing else.

22 THE COURT: Oh, no. That's not possible. You stay  
23 right there now. Talk to co-counsel. Do you have anything  
24 further?

10:49PM 25 **(Counsel conferred off the record.)**

1 THE COURT: See, I knew that wisdom would flow.  
2 Thank you, Counsel.

3 MR. STRIS: I stand by my statement, but my  
4 colleague tells me that it's worth emphasizing that not only  
10:49PM 5 have the number of the plans not submitted anti-assignment  
6 provisions, but there's a concession here that a number of them  
7 don't have them at all, which speaks up at the broader theory  
8 of our case, which is that there's a pattern and practice of  
9 conduct here that at minimum states a claim across various  
10:49PM 10 statutory provisions. And she says that we should not lose  
11 sight of that broad point.

12 THE COURT: Okay. Well, I want to thank all of you.  
13 I know these are not normal hours. Go spread the word that,  
14 you know, we never eat or sleep, which is a bunch of nonsense,  
10:50PM 15 but it was really extended as a courtesy to you, because I  
16 wanted your appearances initially. I didn't know who really  
17 wanted to speak, and so the odd hours are really a benefit to  
18 you. I'm certainly not getting paid any more for this, trust  
19 me. So good night.

10:50PM 20 MR. DE GRAVELLES: Your Honor, sorry, can I have two  
21 minutes of your time?

22 THE COURT: Oh, absolutely. Do other counsel need  
23 to remain? We can resolve this. Okay. Good night.

24 Do you want this on the record, Counsel?

10:51PM 25 MR. DE GRAVELLES: Yes, Your Honor. Patrick de

1 Gravelles on behalf of CareFirst Maryland, Group  
2 Hospitalization. Your Honor, I represent two defendants --

3 THE COURT: No, let's start again.

4 MR. DE GRAVELLES: Oh, Patrick de Gravelles on  
10:51PM 5 behalf of the CareFirst defendants, that's CareFirst Maryland,  
6 Inc., and Group Hospitalization Medical Services, Inc.

7 Your Honor, I apologize because I made two errors. One  
8 just -- one was a simple oversight. I'm so used to e-filing, I  
9 forgot that I signed the pro hac application as well as the  
10:52PM 10 applicant. The second is not correctible. I do not have an  
11 office here in this district. I have been a California  
12 attorney for going on 21 years now, but I do -- I am in-house  
13 counsel, and I practice here on behalf of my client.

14 THE COURT: Okay.

10:52PM 15 MR. DE Gravelles: So what I'd like to do is simply  
16 withdraw the motion. And if the issue comes up -- my concern  
17 was if I had a trial in front of another fellow judge  
18 somewhere, and you had a hearing, but I think that I can deal  
19 with that on an individualized basis. And if need be, we could  
10:52PM 20 even appoint one of the counsel here to represent us. They  
21 could enter appearance for us just --

22 THE COURT: That would resolve the issue for you?

23 MR. DE GRAVELLES: I think it would. And I  
24 apologize, it was my mistake.

10:52PM 25 THE COURT: No, please don't. Glad to rectify it

1 now. Simply you're withdrawing the motion at this time?

2 MR. DE GRAVELLES: Yes, Your Honor.

3 THE COURT: With that record, I think that's  
4 sufficient. I want to thank you for your courtesy.

10:53PM 5 MR. DE GRAVELLES: Thank you, Your Honor. Have a  
6 good evening.

7 **(Proceedings concluded at 10:53 p.m.)**

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*Date: June 28, 2016*

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