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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
HONORABLE DAVID O. CARTER, JUDGE PRESIDING

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DUAL DIAGNOSIS TREATMENT CENTER,)
INC., et al.,)
Plaintiffs,)
vs.)
BLUE CROSS OF CALIFORNIA, et)
al.,)
Defendants.)

CERTIFIED

No. 8:15-CV-0736-DOC
Item No. 7

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Hearing on Motion to Dismiss Case
Santa Ana, California
Monday, June 12, 2017

Debbie Gale, CSR 9472, RPR, CCRR
Federal Official Court Reporter
United States District Court
411 West 4th Street, Room 1-053
Santa Ana, California 92701
(714) 558-8141

Certified for Stris & Maher LLP
Debbie Gale, CSR 9472, RPR, CCRR
Federal Official Court Reporter

1 **APPEARANCES OF COUNSEL:**

2 FOR PLAINTIFF DUAL DIAGNOSIS TREATMENT CENTER, INC., ET AL.:

3 Brendan Stephen Maher
4 STRIS & MAHER LLP
5 725 South Figueroa Street
6 Suite 1830
7 Los Angeles, California 90017
8 213-995-6805
9 brendan.maher@strismaher.com

7 Hanna Chandoo
8 STRIS & MAHER LLP
9 725 South Figueroa Street
10 Suite 1830
11 Los Angeles, California 90017
12 213-995-6814
13 hanna.chandoo@strismaher.com

11 FOR DEFENDANT BLUE CROSS OF CALIFORNIA, ET AL.:

12 Eileen R. Ridley
13 FOLEY & LARDNER LLP
14 555 California Street
15 17th Floor
16 San Francisco, California 94104
17 415-434-4484
18 eridley@foley.com

17 William E. von Behren
18 VON BEHREN & HUNTER LLP
19 2041 Rosecrans Avenue
20 Suite 367
21 El Segundo, California 90245
22 310-607-9111
23 Bvonbehren@vbhlaw.com

21 FOR DEFENDANT HEALTH CARE SERVICE CORPORATION, *a Mutual*
22 *Legal Reserve Company, dba BlueCross BlueShield of Illinois;*
23 *BlueCross BlueShield of Montana; and/or BlueCross BlueShield*
24 *of Texas*

23 Kenneth R. O'Rourke
24 O'MELVENY & MYERS LLP
25 400 South Hope Street
Los Angeles, California 90071
213-430-6000
korourke@omm.com

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15
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25

FOR DEFENDANT GEICO CORPORATION CONSOLIDATED WELFARE
BENEFITS PROGRAM:

Anna Kim
Morgan, Lewis & Bockius LLP
300 South Grand Avenue
22nd Floor
Los Angeles, California 90071
213-612-2500
anna.kim@morganlewis.com

FOR DEFENDANT WEBMD HEALTH & WELFARE PLAN:

Corbin Knight Barthold
BROWNE GEORGE ROSS LLP
2121 Avenue of the Stars
Suite 2800
Los Angeles, California 90067
310-274-7100
cbarthold@bgrfirm.com

FOR DEFENDANT HL FINANCIAL SERVICES, LLC, EMPLOYEE BENEFITS
PLAN:

Jill Nicole Jaffe
NOSSAMAN LLP
50 California Street
Suite 3400
San Francisco, California 94111
415-438-7275
jjaffe@nossaman.com

FOR DEFENDANT ROCKET SOFTWARE GROUP INSURANCE BENEFITS PLAN:

Nathan M. McClellan
DECHERT LLP
633 West Fifth Street
37th Floor
Los Angeles, California 90071
213-808-5700
nathan.mcclellan@dechert.com

1 FOR DEFENDANT WELLS FARGO & CO. HEALTH PLAN:

2 Ronald S. Kravitz
3 SHEPHERD FINKELMAN MILLER & SHAH LLP
4 44 Montgomery Street
5 Suite 650
6 San Francisco, California 94104
7 415-429-5272
8 rkravitz@kravitzesq.com

9 FOR DEFENDANT MUELLER WATER PRODUCTS, INC. FLEXIBLE BENEFITS
10 PLAN:

11 Neil J. Barker
12 NEIL J. BARKER APC
13 225 South Lake Avenue
14 Suite 300
15 Pasadena, California 91101
16 626-440-5980
17 neiljbarker@sbcglobal.net
18
19
20
21
22
23
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1 **SANTA ANA, CALIFORNIA, MONDAY, JUNE 12, 2017**

2 **Item No. 7**

3 (10:48 a.m.)

10:48 4 THE COURT: On the never-ending Blue Cross of
5 California, et al, and the parties, it'll probably take you
6 longer to make your appearances, so let's slow down here.

10:49 7 **APPEARANCES**

10:49 8 THE COURT: Let's begin with the Dual Diagnosis
9 Treatment Center, plaintiffs, for a moment. Very slowly --
10 and that's called a microphone. I want you to step over to
11 it so I can hear you. And very slowly state your name so I
12 know who's here.

10:49 13 Are you Mr. Mather -- or Maher?

10:49 14 MR. MAHER: Yes, Your Honor.

10:49 15 THE COURT: Okay. So you're Brendan -- is that
16 correct?

10:49 17 MR. MAHER: Yes, Your Honor.

10:49 18 THE COURT: Brendan Stephen Maher?

10:49 19 MR. MAHER: Yes, Your Honor.

10:49 20 THE COURT: Where are you from? Where are your
21 offices?

10:49 22 MR. MAHER: We have several offices. I actually
23 split time between Texas and the East Coast.

10:49 24 THE COURT: Texas and the East Coast. But where
25 are you personally currently located?

10:49 1 MR. MAHER: I have homes in Texas and Connecticut.

10:50 2 THE COURT: Okay. Because I can always set this
3 in the afternoon. In other words, the reason I'm asking you
4 isn't because I have a prurient interest in where you live;
5 it's because I've got some folks coming out from Texas,
6 Wednesday, on a hearing, and I scheduled it at 2:00 o'clock
7 because of the time difference. They didn't need to take
8 time from their family. Okay?

10:50 9 Counsel, are you Peter Stris?

10:50 10 MS. CHANDOO: I am not. I am Hanna.

10:50 11 THE COURT: And would you spell your first name
12 for me, please.

10:50 13 MS. CHANDOO: Sure. It's H-A-N-N-A.

10:50 14 THE COURT: Hanna. Okay.

10:50 15 MS. CHANDOO: Last name Chandoo, C-H-A-N-D-O-O.

10:50 16 THE COURT: Thank you very much.
17 Where are your offices located?

10:50 18 MS. CHANDOO: Downtown Los Angeles.

10:50 19 THE COURT: Okay. So Los Angeles and Texas.
20 Who's Peter Stris? We just get these attorneys'
21 names, and we don't know who they are.

10:50 22 MR. MAHER: Peter is the cofounder of the firm
23 with me. He won't be appearing today.

10:50 24 THE COURT: Well, you're lead counsel, then.

10:50 25 MR. MAHER: Yes, sir.

10:50 1 THE COURT: Okay. 'cause I only allow lead
2 counsel to appear. And sometimes associates have become
3 lead counsel. But you're lead counsel.

10:51 4 And you're lead counsel?

10:51 5 MR. MAHER: I'm sorry. Yes. I am lead counsel.

10:51 6 THE COURT: And you're lead counsel?

10:51 7 MS. CHANDOO: I am not lead counsel.

10:51 8 THE COURT: Congratulations. You are lead
9 counsel.

10:51 10 Okay. Let's see who our defendants are very
11 slowly. And so I'll start with -- is it Dr. -- I'm sorry --
12 Eileen Ridley here?

10:51 13 MS. RIDLEY: That would be me, Your Honor.

10:51 14 THE COURT: Thank you very much. It's a pleasure.
15 And could I ask where you're from?

10:51 16 MS. RIDLEY: I'm from the firm of Foley & Lardner.
17 My office is in San Francisco.

10:51 18 THE COURT: In San Francisco. Okay. So you're
19 only an hour away, then.

10:51 20 MS. RIDLEY: I am, Your Honor.

10:51 21 THE COURT: Okay. Thank you very much for your
22 appearance.

10:51 23 And William von Behren.

10:51 24 MR. VON BEHREN: Good morning, Your Honor.
25 William von Behren.

10:51 1 THE COURT: And, Mr. von Behren, where are your
2 offices located?

10:51 3 MR. VON BEHREN: El Segundo, Your Honor.

10:52 4 THE COURT: So you're in the same place. You can
5 get a ride down, then with -- I'm kidding you.

10:52 6 MR. VON BEHREN: No. That -- that's in Southern
7 California. It's here.

10:52 8 THE COURT: In Southern California. Near the
9 airport, huh?

10:52 10 MR. VON BEHREN: Yeah.

10:52 11 THE COURT: You ever gonna connect that railway
12 system, the Metro, up to the airport or keep the taxi
13 drivers in --

10:52 14 MR. VON BEHREN: As a matter of fact, they are.
15 They're in process of doing so right now.

10:52 16 THE COURT: Okay. Thanks. It's nice meeting you.

10:52 17 MR. VON BEHREN: Thank you, Your Honor.

10:52 18 THE COURT: Patrick De Gravelles?

10:52 19 *(No response.)*

10:52 20 THE COURT: Must be deceased.

10:52 21 Kenneth O'Rourke?

10:52 22 MR. O'ROURKE: Good morning, Your Honor. I'm
23 Kenneth O'Rourke. I'm with O'Melveny & Myers. And my
24 office is in Downtown Los Angeles.

10:52 25 THE COURT: In Downtown Los Angeles. Pleasure to

1 meet you, sir.

10:52 2 And Ronald Alberts?

10:52 3 *(No response.)*

10:52 4 THE COURT: Nicole Diller?

10:52 5 *(No response.)*

10:52 6 THE COURT: Hong-An Vu?

10:52 7 MS. KIM: Sorry, Your Honor. Nicole Diller is not
8 here today. I'm Anna Kim appearing on behalf of Nicole
9 Diller.

10:53 10 THE COURT: And you are senior counsel? You're
11 lead counsel. Congratulations. Because only lead counsel
12 appears here, and I know that you read my order. So she'll
13 be carrying your bags as second counsel, if we go to trial.
14 Understood?

10:53 15 MS. KIM: Um, we --

10:53 16 THE COURT: Thank you very much. You're lead
17 counsel. So you're Anna?

10:53 18 MS. KIM: I'm Anna Kim.

10:53 19 THE COURT: You're Anna. Could you help me with
20 your first name.

10:53 21 MS. KIM: A-N-N-A.

10:53 22 THE COURT: Thank you. And?

10:53 23 MS. KIM: Kim, K-I-M.

10:53 24 THE COURT: K-I-M. Thank you very much.

10:53 25 And what firm are you with again, Anna?

10:53 1 MS. KIM: I'm with Morgan, Lewis & Bockius. I'm
2 in the Downtown Los Angeles office.

10:53 3 THE COURT: In Los Angeles. Thank you. It's a
4 pleasure meeting you.

10:53 5 Eric George?

10:53 6 *(No response.)*

10:53 7 MR. BARTHOLD: Your Honor, good morning. I'm
8 Corbin Barthold at Brown George Ross. Mr. George is not
9 here this morning.

10:53 10 THE COURT: Also lead counsel, then; is that
11 correct?

10:54 12 MR. BARTHOLD: Counsel, Your Honor.

10:54 13 THE COURT: Excellent. Congratulations.
14 James Harold Vorhis.

10:54 15 MS. JAFFE: Good morning, Your Honor. My name is
16 Jill Jaffe. I'm lead counsel for Nossaman. I'm up in
17 San Francisco.

10:54 18 THE COURT: Is it J-O? You say Jo?

10:54 19 MS. JAFFE: Jill, J-I-L-L.

10:54 20 THE COURT: Oh, I'm sorry. I apologize. I've got
21 a granddaughter name Jolene. We call her Jojo. It's Jill.
22 And what's your last name?

10:54 23 MS. JAFFE: Jaffe.

10:54 24 THE COURT: J-A-F-F-E?

10:54 25 MS. JAFFE: Correct, Your Honor.

10:54 1 THE COURT: Thank you. And you're in
2 San Francisco.

10:54 3 MS. JAFFE: Yes, Your Honor.

10:54 4 THE COURT: What firm are you with?

10:54 5 MS. JAFFE: Nossaman.

10:54 6 THE COURT: Thank you very much. It's a pleasure
7 meeting you. You're lead counsel.
8 Nathan McClellan?

10:54 9 MR. McCLELLAN: Good morning, Your Honor. Nathan
10 McClellan.

10:54 11 THE COURT: Where are you from?

10:54 12 MR. McCLELLAN: I am in Downtown Los Angeles.

10:54 13 THE COURT: The firm.

10:54 14 MR. McCLELLAN: Dechert LLP.

10:55 15 THE COURT: Pleasure, sir.

10:55 16 MR. McCLELLAN: Thank you, sir.

10:55 17 THE COURT: Charles Birenbaum.
18 *(No response.)*

10:55 19 THE COURT: John Provost?
20 *(No response.)*

10:55 21 THE COURT: Then, counsel, some of you I may
22 not've called your name. Are there any counsel present who
23 I did not call? And, if you'd be so kind, I'd like to meet
24 you.

10:55 25 MR. KRAVITZ: Ronald *(inaudible)* --

10:55 1 THE COURT: I'm sorry? First name.

10:55 2 MR. KRAVITZ: Ronald.

10:55 3 THE COURT: Ronald.

10:55 4 MR. KRAVITZ: Kravitz.

10:55 5 THE COURT: And is it K-R-A-V-I-T-Z?

10:55 6 MR. KRAVITZ: Correct, Your Honor.

10:55 7 THE COURT: Where are you from?

10:55 8 MR. KRAVITZ: Law Office of Ronald Kravitz in
9 San Francisco.

10:55 10 THE COURT: It's nice meeting you.

10:55 11 MR. KRAVITZ: Nice meeting you.

10:55 12 THE COURT: Thank you for coming down.

10:55 13 MR. BARKER: Good morning, Your Honor. My name is
14 Neil, N-E-I-L, Barker, B-A-R-K-E-R.

10:55 15 THE COURT: Thank you, sir.

10:55 16 MR. BARKER: I'm from Pasadena. And I'm a sole
17 practitioner.

10:55 18 THE COURT: Okay.

10:55 19 MR. BARKER: Thank you.

10:55 20 THE COURT: Let me do this: I want to work
21 through lunch with you -- I don't need a lunch break -- if
22 you work with me. That way, if we can resolve the
23 arguments, you're not coming back at 1:30 'cause I've got a
24 calendar call then. So, as a courtesy, I can go without
25 lunch, if you can. And if we can get your arguments in a

1 thoughtful manner before then, then I have no desire to hold
2 you over to 3:00 o'clock call. Fair enough? So let's see
3 if we can work together so there's no discourtesy to all of
4 you. And I apologize. We started at 7:00 this morning with
5 criminal matters, and it took longer than expected.

10:56 6 Now, how would you like to present your arguments?
7 In other words, there's no time limits here. And I don't
8 wish to exclude any of you.

10:56 9 MS. RIDLEY: If I may, Your Honor. This is Eileen
10 Ridley.

10:56 11 The defendant group, all together, have agreed
12 that I would present the argument "in the main."

10:56 13 THE COURT: Okay.

10:56 14 MS. RIDLEY: There may be some idiosyncratic
15 issues or questions the Court may have that I may not have
16 the best answers --

10:56 17 THE COURT: Did you say "idiot questions that the
18 Court may have"?

10:56 19 *(Laughter in the courtroom.)*

10:56 20 MS. RIDLEY: I'm sticking with "idiosyncratic."

10:56 21 THE COURT: If I do, though, anybody's welcome to
22 jump in and answer those. Fair enough?

10:56 23 And also, when you're done with your argument,
24 I'll give you time to check with all the respective counsel.
25 So, if you have other input or you just think that there's a

1 point that wasn't emphasized enough -- it's completely
2 courteous here as far as your appearance -- you can jump in.
3 Okay?

10:57 4 Okay. Then after that, what are we going to do?
5 Turn to them?

10:57 6 MS. RIDLEY: Yes, Your Honor.

10:57 7 THE COURT: Then we'll hear from the plaintiffs;
8 right? And then we're going to have two rounds, though. In
9 other words, just because you've spoken once -- there's
10 another round to respond (*indicating*) and another round to
11 respond (*indicating*). So there's the opening, if you will,
12 and then rebuttal; and then if we have questions, we'll ask
13 questions.

10:57 14 So, Counsel -- and you represent different
15 entities, by the way. I've asked you who you were, but I
16 haven't matched you up with your entity.

10:57 17 So, Ms. Ridley, who do you represent?

10:57 18 MS. RIDLEY: Your Honor, I represent Anthem and
19 what we've referred to as the Anthem-related entities.
20 There's a couple of exhibits that go through the list.

10:57 21 THE COURT: Please. Lectern's yours.

10:57 22 And, Counsel, be comfortable, wherever you'd like
23 to sit.

10:57 24 MR. MAHER: Your Honor, if I may ask a question?

10:57 25 My understanding was that Ms. Ridley was going to

1 present argument in the main on the omnibus motion to
2 dismiss. I didn't understand (*inaudible*) --

10:58 3 (*Court reporter requests clarification for the*
4 *record.*)

10:58 5 MR. MAHER: I did not understand whether or not
6 she was going to then address the individual motions.

10:58 7 THE COURT: I don't know. We're gonna find out,
8 aren't we?

10:58 9 MR. MAHER: Okay.

10:58 10 THE COURT: Good.

10:58 11 Ms. Ridley, the lectern's yours. You organize it
12 the way you feel most comfortable.

10:58 13 MS. RIDLEY: Thank you, Your Honor.

10:58 14 **ARGUMENT BY MS. RIDLEY**

10:58 15 MS. RIDLEY: And my thought process, quite
16 frankly, Your Honor, was to organize it first with the
17 question the Court put to us --

10:58 18 THE COURT: Two questions.

10:58 19 MS. RIDLEY: Yes. I apologize. I was speaking a
20 little globally there.

10:58 21 -- and then deal with the motion. And then with
22 regard to the individual motions, that would be encapsulated
23 a bit on what we were talking about, unless the Court has a
24 specific question that is better addressed by somebody who's
25 directly representing the party.

10:58 1 THE COURT: Okay. Please.

10:58 2 MS. RIDLEY: So if I may, Your Honor -- excuse me.
3 I see better farther, and glasses nearer, so I'll be taking
4 'em on and off depending upon my direction.

10:58 5 But, with regard to the questions that Your Honor
6 asked about the applicability of essentially two
7 decisions -- one is the *Simon* decision, one is the *Advance*
8 decision -- or, excuse me -- the *Advocate Healthcare Network*
9 decision -- I would like to first address the *Simon*
10 decision. And the question the Court put was whether
11 plaintiffs can have derivative standing under *Simon*.

10:59 12 And it would be our position -- in this case --
13 "our" is the "Royal defendant group," so to speak -- larger
14 group -- that they cannot have, uh, derivative standing.
15 Under *Simon* what the Ninth Circuit was, uh, noting was that
16 there's no direct standing, but a provider has essentially
17 an exception for derivative standing if they can show that
18 they have assignments.

10:59 19 But in those circumstances -- and that exception
20 was really created in the Court's mind, as it describes in
21 the case, in order to essentially facilitate the provision
22 of benefits and the general ERISA construct, uh, simplified
23 billing and the such.

11:00 24 It specifically also noted that, um, sort of
25 having a "derivative" derivative assignment -- in other

1 words, having a provider assigned to another provider --
2 would not be countenanced and, really, for a couple of
3 reasons: One, because, at least in the case before the
4 court at the time -- *Simon* --

11:00 5 (Court reporter requests clarification for the
6 record.)

11:00 7 MS. RIDLEY: At least in the case before the court
8 at the time -- *Simon* had not provided any services to the
9 members. And, uh -- and the Court found that it was
10 important to note that fact because, again, the reason for
11 the exception was to facilitate the processing of services,
12 payment for services, and billing and the like.

11:00 13 It also noted that providing that sort of
14 derivative -- secondary derivative status -- you know, an
15 assignment upon an assignment -- essentially was a concern
16 to the court because it made those assignments essentially a
17 commodity, an asset, that could be sold *ad infinitum*. And
18 the court reasoned that in that instance it actually caused
19 harm to the general ERISA network, uh, in the process of
20 billing, and so was disinclined to essentially take the
21 exception and make it broader.

11:01 22 And we would argue, Your Honor, both those issues
23 really are *at the fore* in this case. For example, when you
24 have an entity like Medlink -- there's no allegation it
25 provided services, and, more to the point, there's no

1 allegation that there was an assignment, uh, from one
2 provider to another.

11:01 3 And then, thirdly, as the court in *Simon* noted,
4 essentially the sort of suggestion that there could be a --
5 an "assignment of assignment" really creates a situation
6 where the assignment becomes a commodity. And it really
7 goes beyond the structure of ERISA. And, therefore, we
8 would say that, no, there was no standing, uh, based on the
9 holding with regard to *Simon*.

11:02 10 With regard to the second case, the *Advocate*
11 *Health*, this really deals with the issue with regard to
12 church-related plans and when they come under --

11:02 13 *(Court reporter requests clarification for the*
14 *record.)*

11:02 15 MS. RIDLEY: "Church-related."

11:02 16 -- under ERISA. We actually don't think it's
17 applicable in this matter. And, in particular, I do note
18 that there was one, um, uh, claim where we originally
19 thought it was a church-related plan -- at least on the
20 Anthem defendants and -- turned out not to be.

11:02 21 Uh, I believe HCSC has one plan that is arguably
22 church --

11:02 23 *(Court reporter requests clarification for the*
24 *record.)*

11:02 25 MS. RIDLEY: -- HCSC -- that is church-related,

1 but believes that the case, um, is not applicable'a this
2 case.

11:03 3 Having said the above with regard to the two
4 questions, I'd like to now turn briefly to the motion as a
5 whole. And I am quite aware that the Court does a, uh,
6 extraordinary amount of work, and I will not be revisiting
7 arguments that've been presented, uh, in the whole on our
8 briefing. We've done quite a bit'a briefing.

11:03 9 What we would note in particular is, as we set
10 out, we don't believe that the Second Amended Complaint
11 presents claims that survive the motion. And we
12 particularly wanna note that the attempt in the opposition
13 to either recharacterize causes of action or add allegations
14 that aren't in the Complaint is inappropriate use of the
15 opposition and, in fact, doesn't rectify the problems.

11:03 16 We have 26 welfare plans that there -- there is
17 uh, no allegations with regard to. We have the general
18 lumping together of defendants notwithstanding allegations
19 of fraud and misrepresentations. The allegations
20 themselves, therefore, don't meet either the Rule 8 or Rule
21 "9-V" requirements -- of course, Rule 9(b) --

11:04 22 *(Court reporter requests clarification for the*
23 *record.)*

11:04 24 MS. RIDLEY: "B" as in boy.

11:04 25 -- being the heightened requirements with regard

1 to fraud and misrepresentation.

11:04 2 Then you have claims for equitable remedies under
3 Section 502(a)(1)(B), when, in fact, that section is only
4 related to enforcement and really doesn't provide the
5 methodology to have any sort of claim for equitable relief.
6 That really comes under 5 -- or, uh, (a)(3), which they
7 haven't alleged in their Second Amended Complaint. And even
8 if you were looking at those, you would still need to have
9 allegations related to mistake in the inducement of the
10 plan.

11:05 11 And it's important that, when you look at the
12 cases that are being referenced by, uh, the plaintiff,
13 they -- those cases really deal with issues where the
14 parties to the contract are having the dispute; and they're
15 talking about, really, what was communicated between them in
16 the inducement of the contract. We don't have that here.
17 It's not as if we have the members suggesting that somehow
18 these plans were induced in a way that, uh, was either a
19 mistake or fraudulent.

11:05 20 Point of the fact is, that is not the case, uh,
21 that the agreements themselves, the plans, are unambiguous,
22 they have these anti-assignment provisions, and there's no
23 evidence nor real -- real knowledge of any sort of assertion
24 of either a mistake or fraud in the inducement with regard
25 to those plans. And, therefore, those remedies just are not

1 available.

11:05 2 And the allegation by plaintiffs that allege post,
3 um, claim submission, uh, alleged representations somehow
4 give the -- the stage to them to ask for reformation is, in
5 fact, against authority, including *Gabriel* and *Skinner*.

11:06 6 Finally, Your Honor, as we've argued, the
7 allegations with regard to 17200 equally do not meet the
8 measure. They -- they are -- fail to meet any of the
9 prongs, and there's a real issue with regard to preemption
10 with regard to that cause of action.

11:06 11 I'm happy to address any questions the Court has.

11:06 12 THE COURT: Not -- not yet.

11:06 13 MS. RIDLEY: Okay.

11:06 14 THE COURT: Not yet. I want to let you argue
15 unimpeded by any questions I have.

11:06 16 MS. RIDLEY: Understood. And I don't wanna
17 retread ground that I know Court has seen.

11:06 18 THE COURT: Why don't you check with your
19 colleagues, then, for just a moment, on the opening round.
20 Take a few moments.

11:07 21 And while you're doing that --

11:07 22 Counsel, let me see you on our "alleged"
23 Preliminary Approval of the Class Action Settlement and get
24 your thoughts.

11:08 25 *(Interruption in the proceedings at 11:08 a.m. for*

1 *another matter.)*

11:10 2 *(Proceedings resumed at 11:10 a.m.)*

11:10 3 MS. RIDLEY: Your Honor, just to make the record
4 clear, I've talked to my colleagues. They're all fine, with
5 one comment that --

11:10 6 THE COURT: Please. And, sir, I think you're
7 Mr. Burns?

11:10 8 MR. O'ROURKE: Kenneth O'Rourke for --

11:10 9 THE COURT: Oh, Mr. O'Rourke.

11:10 10 MR. O'ROURKE: -- Health Care Service Corporation
11 doing business as BlueCross/BlueShield of Texas, Oklahoma,
12 Montana, New Mexico, and Illinois.

11:10 13 **ARGUMENT BY MR. O'ROURKE**

11:10 14 MR. O'ROURKE: Your Honor, very briefly.

11:11 15 I've spoken to counsel for --

11:11 16 *(Court reporter requests clarification for the*
17 *record.)*

11:11 18 MR. O'ROURKE: I've spoken to the plaintiff's
19 counsel in advance of the hearing this morning to clarify
20 the issue that we had raised in our individual Motion "for"
21 Dismiss. We joined in the broader motion. We brought a
22 separate issue as to two specific patients. And we've
23 agreed that the Claims 1 and 2 are not being -- are not
24 being asserted against Patients 6, uh -- 77 and 267.

11:11 25 THE COURT: Okay. 77 and 267?

11:11 1 MR. O'ROURKE: Correct.

11:11 2 THE COURT: Not being asserted against your
3 client?

11:11 4 MR. O'ROURKE: Correct.

11:11 5 THE COURT: Who is, again?

11:11 6 MR. O'ROURKE: Health Care Service Corporation.

11:11 7 THE COURT: Okay.

11:11 8 MR. O'ROURKE: And those two patients are part of
9 plans that the plaintiffs allege are non-ERISA plans.

11:11 10 THE COURT: Okay.

11:11 11 MR. O'ROURKE: Therefore, there should be no Claim
12 1 or 2 from those.

11:11 13 THE COURT: Okay. Thank you. Pleasure.

11:11 14 Counsel -- now, you've brought me quite an
15 interesting, entangled lawsuit. That does not work to your
16 benefit. Lack of clarity is not a wonderful place to be
17 with the Court.

11:12 18 So now we're going to have clarity.

11:12 19 MR. MAHER: Yes. Thank you, Your Honor.

11:12 20 **ARGUMENT BY MR. MAHER**

11:12 21 MR. MAHER: I'd like to begin by referencing the
22 church-plan question that you asked. And I'm largely in
23 agreement with, uh, opposing counsel. There were -- there
24 were effectively three patients, uh, for which there was a
25 church-plan issue. Patient 74.

11:12 1 THE COURT: Just a moment. Let me write that
2 down.

11:12 3 Patient 74.

11:12 4 MR. MAHER: Patient 267.

11:12 5 THE COURT: 267.

11:12 6 MR. MAHER: And Patient 272.

11:12 7 THE COURT: 272.

11:12 8 And these were our "church plan."

11:12 9 MR. MAHER: With respect to Patient 272, that
10 claim has been dismissed.

11:12 11 THE COURT: Okay.

11:13 12 MR. MAHER: With respect to Patient 74, there was,
13 uh, conflicting factual evidence about whether or not the
14 plan was a Catholic diocese plan or whether it was a plan of
15 a company -- company. And we reached out to the defendants
16 and we stipulated that Patient 74 is a member of the Alltech
17 plan, which is governed by ERISA.

11:13 18 THE COURT: Just a moment.

11:13 19 MR. MAHER: I don't know if that counsel's here,
20 but I believe we stipulated in writing to that.

11:13 21 THE COURT: Under the Alltech plan?

11:13 22 MR. MAHER: Yes.

11:13 23 THE COURT: Okay. Just a minute.

11:13 24 MS. RIDLEY: And, Your Honor, I believe the
25 stipulation is correct: It was counsel for Alltech, and

1 then it's also an Anthem-related plan. And we were helping
2 to resolve the factual issue.

11:13 3 THE COURT: Okay. Thank you.

11:13 4 And 267.

11:13 5 MR. MAHER: 267 was a patient that was enrolled in
6 a plan with the Health Care Service Corporation. There was
7 some question as to whether or not it was a church plan
8 because of the complexities of the plan's formation, whether
9 it was maintained or established by a religious group.

11:14 10 But, in the aftermath of Supreme Court's
11 holding --

11:14 12 *(Court reporter requests clarification for the*
13 *record.)*

11:14 14 MR. MAHER: -- the Supreme Court's holding in
15 *Advocate Health*, which is the question Your Honor had asked
16 us to discuss, uh, in our remarks today, we agree that this
17 is a church plan and therefore not subject to ERISA.

11:14 18 THE COURT: Okay. So "church plan "-- just a
19 moment.

11:14 20 So let me summarize: 272 is no longer before the
21 Court.

11:14 22 MR. MAHER: Correct.

11:14 23 THE COURT: 267 is no longer before the Court.

11:14 24 MR. MAHER: That's not so.

11:14 25 There, uh, individual -- they're a plan that's

1 governed by state law and therefore we'd have a claim for --
2 against them.

11:14 3 THE COURT: Okay.

11:14 4 74 is covered -- not a church plan, but covered by
5 the Alltech?

11:14 6 MR. MAHER: Yes, sir.

11:14 7 THE COURT: Got it. Thank you.

11:14 8 MR. MAHER: Sure.

11:14 9 Okay. The other question Your Honor asked us was
10 with regard to the effect of the *Simon* decision in the Ninth
11 Circuit. And if I have Your Honor's indulgence, I'm going
12 to address that in the course of, uh, my overall remarks.

11:15 13 Your Honor, may it please the Court, uh, before I
14 respond to my friend Eileen's arguments, I want to offer an
15 overview, uh, so that we are all starting in the same place.
16 After Your Honor's November 22nd order last year, there are
17 four live counts in this case:

11:15 18 Count One is an ERISA claim that is based on the
19 terms of the governing plan.

11:15 20 Count Two is an ERISA misrepresentation claim
21 that's based on the notion that the defendants
22 misrepresented to plaintiffs whether the underlying claims
23 were assignable.

11:15 24 Count Three is an unfair competition claim under
25 California law that the Blue Cross defendants offered

1 provider hotlines that routinely and recklessly provided
2 inaccurate information.

11:16 3 And Count Four is a state law claim that seeks
4 relief under both contract and misrepresentation theories.

11:16 5 I'm now going to consider each count and the
6 defendants' objections.

11:16 7 Count One is a contract claim against ERISA
8 defendants. And by that I mean those welfare defendants and
9 those Blue Cross defendants who are associated with a
10 patient governed by an ERISA plan. Count One is a contract
11 claim against those ERISA defendants who did not have in
12 their plans an anti-assignment provision.

11:16 13 Put differently: These are defendants who did not
14 honor plaintiff's assignments even though such assignments
15 were permitted by ERISA and under their plans.

11:17 16 Now defendants've only offered one potential
17 ground by -- these claims should be dismissed. (*Verbatim.*)

11:17 18 THE COURT: Why don't you state which claims those
19 are very slowly for me.

11:17 20 MR. MAHER: Um, you mean the -- for which patients
21 they're associated with?

11:17 22 THE COURT: Yeah.

11:17 23 MR. MAHER: Well, I can't say that --

11:17 24 THE COURT: Sure you can. Because that's what I
25 have to do.

11:17 1 MR. MAHER: Sorry?

11:17 2 THE COURT: That's what I have to do, so why don't
3 you --

11:17 4 MR. MAHER: Well, by looking at a chart --

11:17 5 THE COURT: Sure.

11:17 6 MR. MAHER: -- but not from memory --

11:17 7 THE COURT: Sure.

11:17 8 MR. MAHER: -- my chart?

11:17 9 THE COURT: Absolutely. Very slowly. That way we
10 have an absolutely accurate record. We don't miss anything
11 that way going through the volume of materials you supplied
12 us. And I have a record of which claims fit Count -- or,
13 Claim 1.

11:18 14 MR. MAHER: Okay. With respect to Claim 1, we
15 are -- well, Your Honor, I -- I think I -- I need to make
16 the following --

11:18 17 THE COURT: I've got all day.

11:18 18 MR. MAHER: -- point.

11:18 19 THE COURT: Which patients?

11:18 20 MR. MAHER: Well, I'm gonna make the point before
21 I give you the patients 'cause I think it's important to
22 state this clearly: We brought a Count One claim based on
23 the idea that there are plans out there that don't have
24 anti-assignment provisions. And based on what we've been
25 presented now, these are the patients for whom we think

1 there is no anti-assignment provision.

11:19 2 THE COURT: What?

11:19 3 MR. MAHER: No anti-assignment provisions.

11:19 4 If the proof later shows *(unreportable)* --

11:19 5 *(Court reporter requests clarification for the*
6 *record.)*

11:19 7 MR. MAHER: If the proof later shows there're some
8 additional plans that lack anti-assignment provisions, for
9 whatever reason, then on the proofs, we would still maintain
10 Count One against them.

11:19 11 THE COURT: I understand.

11:19 12 MR. MAHER: So Patient 4, 5, 9, 10, 14, 17, 20,
13 21, 24, 25, 30, 32, 33, 35, 36, 38, 40, 42, 43, 44, 45, 48,
14 49, 50, 51, 52, 53, 54, 56, 57, 60, 70, 73, 76, 78, 81, 84,
15 90, 91, 92, 97, 100, 103, 107, 108, 110, 114, 134, 133,
16 129 --

11:21 17 THE COURT: 133? 129?

11:21 18 MR. MAHER: I'm sorry, Your Honor. I was reading
19 from the bottom of the page instead of the top.

11:21 20 THE COURT: Let's go back over:

11:21 21 108, 110.

11:21 22 MR. MAHER: I have 110, 114. My apologies,
23 Your Honor.

11:21 24 Right after 114: 115, 117, 118, 121, 122, 124,
25 128, 129, 133, 134, 136, 141, 142, 143, 145, 146, 147, 148,

1 151, 152, 155, 156, 158, 159, 162, 164, 165, 166, 167, 168,
2 169, 170, 172, 175, 176, 177, 179, 183, 184, 185, 187, 188,
3 189, 190, 193, 194, 195, 199, 201, 202, 206, 208, 212, 214,
4 217, 218, 220, 221, 223, 225, 226, 227, 228, 229, 230, 231,
5 232, 233, 234, 235, 236, 237, 239, 241, 242, 244, 245 -- the
6 last number I said was 244 and 245; is that right?

11:25 7 THE COURT: Yes.

11:25 8 MR. MAHER: Okay.

11:25 9 248, 249, 251, 252, 253, 255, 256, 257, 259, 260,
10 266, 269, 270.

11:25 11 THE COURT: Thank you.

11:26 12 MR. MAHER: I hope that wasn't the most persuasive
13 I'munna be all day. Let's see.

11:26 14 So back to the Count One claim. Count One is a
15 contract claim against ERISA defendants associated with a
16 patient governed by a plan that lacks --

11:26 17 *(Court reporter requests clarification for the*
18 *record.)*

11:26 19 MR. MAHER: -- that lacks an anti-assignment
20 provision in the plan -- or lacks an anti-assignment
21 provision that reaches provider assignments.

11:26 22 So, put differently, these are defendants who
23 didn't honor plaintiff's assignments even though those
24 assignments were permitted by their plans. The defendants
25 offer one primary ground why Count One should be

1 dismissed --

11:26 2 (Court reporter requests clarification for the
3 record.)

11:26 4 MR. MAHER: Some people tell me, usually, I speak
5 too loudly so I'm delighted to hear that in fact they've
6 been wrong.

11:26 7 Um, the defendants have claimed that plaintiffs
8 have not alleged that they are actually owed any money but
9 money for benefits; that is, defendants' say, *Well, there*
10 *are claims out there for which plaintiffs have fully*
11 *collected for the services provided.*

11:27 12 But that's not true. The Second Amended Complaint
13 alleges that plaintiffs have not been fully paid for the
14 services they rendered, and the plaintiffs' supplemental
15 filing that Your Honor ordered makes clear that for all live
16 patients in this case, plaintiffs are owed some money for
17 benefits totaling around \$16 million in total.

11:27 18 Now, that's their primary objection. And it's not
19 so. But I'd like to pause here to discuss the subject that
20 Your Honor wanted us to address because it affects Count
21 One, namely the consequence of the fact that some of the
22 assignments in question facially identify Medlink, rather
23 than a Sovereign entity as the assignee. You've asked us
24 *What does that mean given the assignment opinion?*

11:28 25 Plaintiff's view that *Simon* is no barrier to the

1 claims that we bring here, including Count One. Sovereign
2 and Medlink are both providers and they are business
3 partners in treating patients.

11:28 4 Now, Your Honor, a defendant who's since been
5 dismissed from the case filed an opposition in which it
6 attached an assignment that was a Medlink assignment rather
7 than a Sovereign assignment. Now, this filing is still on
8 the court document. We responded but responded after we
9 realized the case had been dismissed. So we withdrew our
10 opposition. I asked that the Court take judicial notice of
11 the arguments in that opposition that we withdrew after that
12 case was dismissed.

11:29 13 But, in the defendants' motion which is still on
14 the docket, they attached a copy of the assignment. And at
15 the -- if you look at the assignment, you see that Sovereign
16 Health is at the top and Medlink is named on the document as
17 well. So from the beginning the idea is that Sovereign and
18 Medlink are gonna work together to manage, care for, and
19 seek -- right? -- insurance reimbursement for patients.
20 They are business partners. And the fact that Sovereign's
21 at the top -- its letterhead is the top of the assignment --
22 indicates that the assignment was created so that Sovereign
23 could act as an assignee of the patients.

11:30 24 Medlink has always knowingly acted as Sovereign's
25 agent in procuring these assignments, and has also, in an

1 abundance of caution, long-assigned to Sovereign any
2 assignment that for whatever reason did not identify with
3 sufficient clarity Sovereign as assignee.

11:30 4 *Simon* does not bar this type of arrangement. And
5 if you look at Paragraph 17 of our Complaint, Your Honor, it
6 describes Medlink and Sovereign's relationship.

11:30 7 *Simon* does not bear -- bar this type of
8 arrangement. *Simon* involved a sub-assignee who had no
9 pre-existing relationship with a provider, was not a
10 provider himself. It's settled law that ERISA permits
11 assignments, and the reason that it permits assignments in
12 the welfare setting is so that patients can be more likely
13 to receive care in the first instance from providers.

11:31 14 That rationale holds where, as here, providers are
15 working together from the start to offer, manage, and
16 coordinate care. The reason it makes sense to --

11:31 17 *(Court reporter requests clarification for the*
18 *record.)*

11:31 19 MR. MAHER: I spoke too quickly.

11:31 20 The reason it makes sense to 'mit (*sic*)
21 assignments to doctors and providers is not just because of
22 their medical therapeutic expertise because they also have
23 the wherewithal to interact with an insurance company in an
24 efficient way and save a suffering patient from that
25 headache as well.

11:31 1 So none of the negatives in *Simon* are present
2 here. And to illustrate that, I'd like to read a quote from
3 *Simon*. This is what the Ninth Circuit said, quote:

11:31 4 "In the instant case, for us to grant
5 *Simon* standing would be tantamount to
6 transforming health benefit claims into
7 a freely tradeable commodity. It could
8 lead to endless reassignment of claims
9 and would allow third-parties with no
10 relationship to the beneficiary to
11 acquire claims solely for the purpose of
12 litigating them. We do not see how such
13 a result would further ERISA's purpose."

11:32 14 *Simon* is not this case.

11:32 15 Now, final thing on *Simon*, Your Honor. If you
16 believe that *Simon* poses a problem, then, plaintiffs, as we
17 did in our original motion -- opposition that we withdrew
18 (*sic*) because the case was dismissed -- request leave to add
19 Medlink as a plaintiff.

11:32 20 Plaintiffs don't believe that's necessary, but we
21 have a good relationship with Medlink, and we have good
22 reason to believe if the vindication of these claims
23 required Medlink as a plaintiff, they could be promptly
24 joined and make no new substantive allegations other than
25 those that've already been made. It's simply adding a party

1 to qualify with -- uh, to the extent there's some
2 requirement that the assignment facially identify
3 *(unintelligible)*.

11:33 4 *(Court reporter requests clarification for the*
5 *record.)*

11:33 6 THE COURT: We couldn't understand you.

11:33 7 MR. MAHER: Okay.

11:33 8 We could add Medlink as a party if it's necessary
9 for the vindication of the rights asserted here to have
10 the -- the party that is facially named on the assignment.

11:33 11 Um, we're confident that we can do that. Medlink
12 and Sovereign have a good business *(inaudible)*.

11:33 13 THE COURT: Have a what?

11:33 14 MR. MAHER: "Good business relationship."

11:33 15 THE COURT: Thank you.

11:33 16 MR. MAHER: I'd like to move on to Count Two.

11:33 17 THE COURT: Well, just a moment.

11:33 18 *(Interruption in the proceedings at 11:33 a.m.)*

11:38 19 *(Proceedings resumed at 11:38 a.m.)*

11:38 20 THE COURT: All right.

11:38 21 Counsel, we're on Claim 2.

11:38 22 MR. MAHER: So, Your Honor, that's the -- that's
23 the contract part of the case. The -- I'm already speaking
24 too fast.

11:38 25 That's the contract part of the case. The rest of

1 the case is the misrepresentation part of the case. And
2 this is the place that defendants truly train their fire.
3 This is the -- these are the claims that they object to with
4 great vigor and at great length. And so let me set the
5 stage. Let me talk about the first misrepresentation claim,
6 Count Two.

11:38 7 Count Two is a misrepresentation claim against
8 ERISA defendants who told plaintiffs that the claims against
9 the relevant plan were assignable. Put differently, these
10 are defendants who said *Assignments are okay* and then didn't
11 honor them, leaving plaintiffs holding the bag.

11:39 12 ERISA prohibits such treatment under both theories
13 of reformation and *estoppel*.

11:39 14 Let's begin with reformation. Reformation can
15 arise from mutual mistake and from fraud. We are not
16 arguing mutual mistake. We are not arguing mistake.

11:39 17 Importantly, in the reformation context, the
18 Supreme Court itself, as well as the treatises in the
19 Department of Labor, as we cite in our brief, make clear
20 that fraud includes inequitable conduct, not just classic
21 fraud.

11:39 22 Here, plaintiffs did not have the plan. They
23 asked defendants, who did have the plan, *Are assignments*
24 *allowed?* Defendants said Yes. Plaintiffs believed them.

11:40 25 Defendants' behavior was inequitable and

1 misleading and the plan should be reformed accordingly to
2 permit assignment.

11:40 3 Defendants say that reformation cannot lie for
4 misrepresentations that occur after the plan is written.

11:40 5 Let's be clear about what that means. According
6 to defendants, if there is a plan enacted in January, and in
7 July a fiduciary writes a sworn letter to a beneficiary
8 unquestionably and egregiously misleading him about the
9 terms of the plan, reformation is not available. That's
10 defendants' view of the law.

11:41 11 That's not correct. It's obviously not just. But
12 it's also not correct as a matter of law. And here's why:

11:41 13 A plan is not a contract that was agreed to on a
14 certain date and never again. Every day a beneficiary goes
15 to work, he was agreeing to trade labor for wages and
16 benefits. That means he is induced to continue working and
17 agree to the plan each day based in part about (*sic*) what he
18 has been told about his benefits.

11:41 19 When he is misled but continues working,
20 reformation protects his expectations and labor. No case
21 says otherwise. No case says that post-plan
22 misrepresentations cannot form a basis for reformation.

11:41 23 First, the United States Supreme Court, in *CIGNA*
24 *v. Amara (verbatim)*, specifically dealt with a case that
25 involved conduct, misrepresentations that had occurred after

1 the new plan was enacted. It deals with misrepresentations
2 that went from 1997 through 1999. And the plan was enacted
3 in 1998. As a result *Amara* is clearly okay with post-plan
4 misrepresentations being a basis for reformation. In any
5 event, there's no language in *Amara* that suggests post-plan
6 misrepresentations would somehow not be a permissible ground
7 for reformation.

11:42 8 Where do defendants stand? Given what reformation
9 seems to mean, given what *Amara* says, where do defendants
10 stand? They rely on two cases -- Ninth Circuit cases:
11 *Gabriel* and *Skinner*.

11:42 12 Now, obviously neither *Gabriel* nor *Skinner* can
13 overrule *Amara* to the extent *Amara* considers post-plan
14 misrepresentations to be grounds for reformation. But
15 here's the thing: Neither of those cases actually do what
16 defendants say they do. Not at all.

11:43 17 Let's take *Skinner* first. *Skinner* was decided
18 first. *Skinner* involved two plaintiffs. At issue was an
19 offset to how -- excuse me -- at issue was how an offset to
20 their pensions would be calculated. The case was litigated
21 in the early --

11:43 22 (Court reporter requests clarification for the
23 record.)

11:43 24 -- litigated in the early aughts, A-U-G-H-T-S.

11:43 25 The case was litigated in the early aughts. It

1 was started in the early -- in the case, the defendant had
2 promulgated a summary plan description whose terms were
3 allegedly more favorable to beneficiaries than the terms of
4 the defendants' plan. At the time, the law of the Ninth
5 Circuit was that SPD's should be treated as plan language.
6 That was directly enforceable under an (a)(1)(B) claim.

11:44 7 Plaintiffs sued to enforce the SPD on its
8 language. But during the lawsuit the Supreme Court decided
9 *Amara*. And in *Amara* it made clear that an SPD is not plan
10 language. SPD's were representations about the plan. They
11 were not plan language. And thus, misrepresentations in an
12 SPD needed to be remediated through (a)(3), an equitable
13 relief.

11:44 14 So the *Skinner* plaintiffs, given *Amara*, could not
15 simply argue that the SPD language was better and therefore
16 it was part of the plan. They had to come up with an
17 equitable theory that would permit them to recover.

11:45 18 To give the *Skinner* plaintiff's credit: They did
19 not lie. They explicitly admitted that they understood the
20 terms of the offset in question and they were not misled.
21 Because that's not a necessary condition to win a claim when
22 you think an SPD language is part of the plan. So they
23 admitted that. Indeed, the defendant in that case had sent
24 them a packet explaining how the offset worked. And they
25 testified they understood everything.

11:45 1 Obviously, that case found there was no
2 reformation because the plaintiffs did not misunderstand
3 anything and therefore they were not induced to do anything
4 pursuant to some agreement that didn't exist.

11:45 5 Now let's move to *Gabriel*. *Gabriel* follows
6 *Skinner* but the law it offers is no different. *Gabriel*
7 specifically reiterates that a plaintiff may obtain
8 reformation when a party's assent to a contract was induced
9 by the other party's misrepresentations as to the terms or
10 effect of the contract, and he was justified in relying on
11 the other party's misrepresentations. That's what *Gabriel*
12 says about reformation.

11:46 13 But the facts of *Gabriel* did not support
14 reformation as a remedy. *Gabriel* involved a plaintiff --
15 *Gabriel* -- regarding benefits that he was not entitled to.
16 He'd been overpaid benefits he was not entitled to. The
17 plan sent him a letter on this point and he executed a
18 release indicating that he understood.

11:46 19 His subsequent interactions with the plan,
20 however, led him to argue that he had later -- later, in
21 fact, been misled about his benefits. Defendant sought
22 dismissal not under 12(b)(6), they sought dismissal under
23 Rule 56, "motion summary judgment" (*verbatim*).

11:47 24 And the Ninth Circuit ultimately held as a matter
25 of fact that *Gabriel* was not misled by the defendant into

1 misunderstanding the terms of the plan, thus no reformation
2 could lie on the actual and litigated facts of that case
3 which are, of course, different than the pled facts here.

11:47 4 Two other things about *Gabriel* are noteworthy.
5 First, the misrepresentations that *Gabriel* relied on
6 occurred well after the plan in question was enacted. At no
7 point did the Ninth Circuit suggest that *Gabriel's*
8 reformation claim failed as a matter of law because he was
9 claiming later misrepresentations, um, caused his
10 misunderstanding.

11:48 11 Second, *Gabriel* sought more money than he was
12 entitled to under the terms of the plan. So if his claim is
13 successful, he can deplete plan assets. Plaintiff's here do
14 not do that. They seek only the money that the assigning
15 beneficiaries would've been entitled to and thus plaintiff's
16 claims cannot deplete the plan. Plaintiffs' asked only that
17 the proper amount of moneys be sent to the right address.

11:48 18 That's gonna matter and I'm gonna explain why when
19 I discuss *estoppel*. Plaintiffs have sought relief under
20 reformation, which I just discussed, and under *estoppel*.

11:48 21 *Estoppel* is a remedy designed to hold the
22 defendant to its words. *Skinner* isn't relevant because the
23 plaintiffs did not seek relief under an *estoppel* theory
24 there. *Gabriel*. *Gabriel* is the case the defendants depend
25 on.

11:49 1 Before we discuss *Gabriel*, vis-a-vis *estoppel*,
2 let's speak plainly. *Estoppel*'s elements have been the same
3 for hundreds of years: Misrepresentation, reasonable
4 reliance, resulting injury. So suits involving and
5 interpreting *estoppel* are going to turn on whether the
6 victim was reasonable in relying on the defendants'
7 misrepresentation.

11:49 8 Here, the facts: Sovereign did not have the plan.
9 Sovereign called the provider hotlines; that is, the
10 hotlines made available to ask questions about policy terms,
11 to ask about assignments. Sovereign was told assignments
12 were permitted. And it relied, as everyone in the industry
13 does, on what it was told in those calls. And, lastly,
14 Sovereign wasn't able to ascertain the truth of what the
15 plans said until Your Honor literally orders the defendants
16 to produce the plans in question.

11:50 17 So, in these circumstances, was it reasonable for
18 Sovereign to rely on the defendants' misrepresentations? Of
19 course it was. Sovereign had no other realistic
20 alternative.

11:50 21 Defendants' response to that -- I think it's
22 indisputable as a matter of common sense. Defendants'
23 response is: *No, no. Gabriel. Gabriel says differently.*

11:50 24 *Gabriel* says, according to defendants, that
25 *estoppel* requires that the plan terms be ambiguous. But

1 *Gabriel* is squarely distinguishable. *Gabriel* involved
2 beneficiaries who had access to the plan and who were not,
3 in fact, misled, which means reasonable reliance was not
4 present.

11:50 5 Defendant wants this Court to hold that *estoppel*
6 is not available even where it was entirely reasonable to
7 rely on the misrepresentations at issue -- calling a
8 provider hotline -- and where no plan was available to clear
9 up the confusion. Defendants' request runs up against
10 common sense and precedent. Because, if we look carefully
11 at *Gabriel*, we see that the Ninth Circuit was careful to
12 ensure that its holding would not be overly broadly applied.

11:51 13 First, in *Gabriel* the Ninth (*verbatim*) explained
14 that its plan must be "ambiguous condition"; it explained
15 that condition as follows: They said they were referring --
16 the Ninth said it was referring to circumstances where,
17 quote:

11:51 18 "The provisions of the plan at issue
19 were ambiguous such that reasonable
20 persons could disagree as to their
21 meaning or effect," end quote.

11:51 22 Of course, people who don't have access to the
23 plan can't reasonably disagree about anything and therefore
24 cannot be expected to disbelieve a misrepresentation that
25 conflicts with a document they don't have.

11:52 1 Now, as for the question of why in *Gabriel* the
2 Ninth Circuit listed plan ambiguity and ignorance of the
3 true facts as two separate conditions -- well, there's an
4 obvious explanation for that in the beneficiary setting. If
5 you're a beneficiary and you wanna make an *estoppel* claim,
6 the fact that the plan is ambiguous is not enough. You
7 still have to be reasonably misled. So that's why ambiguity
8 in the plan and ignorance of true facts are mentioned as two
9 factors in *Gabriel*. Because, when you have the plan, a
10 memorandum condition for reasonable reliance is that there's
11 some ambiguity in it. But it's not enough. You also have
12 to "be ignorance" (*sic*) of the true facts because that's
13 what *estoppel* depends on.

11:53 14 So like in *Gabriel*, if you get a letter explaining
15 the truth to you, the fact that the plan is ambiguous isn't
16 gonna save your *estoppel* claim. But if somebody misled you
17 on a provider hotline and there's no plan to check, that's
18 not the same situation at all.

11:53 19 And Your Honor actually -- in your November 2nd
20 order, on page 18, you acknowledge this, uh, when you wrote
21 the following -- I'm not suggesting Your Honor has already
22 ruled anything. I'm just, uh, using language that I think,
23 uh, illustrates the point. You said, quote:

11:53 24 "Plaintiffs have also not met the Ninth
25 Circuit's additional pleading

1 requirements because they have not
2 alleged the plan terms were ambiguous or
3 that the plaintiffs were unable to
4 obtain plan documents."

11:53 5 This time around we did. Because that's the
6 truth. In this is -- this matters because the key question
7 with respect to *estoppel* is whether or not you had access to
8 something that would undermine a claim of reasonable
9 reliance. That's not the case for plaintiffs.

11:54 10 There's a second thing about *Gabriel* that
11 undermines its applicability to this case. In *Gabriel* the
12 Ninth Circuit explicitly said that the purpose of its plan
13 ambiguity condition -- first stop -- explicitly said the
14 purpose of its "plan ambiguity condition" was to protect the
15 plan's actuarial of soundness from preventing --

11:54 16 (Court reporter requests clarification for the
17 record.)

11:54 18 MR. MAHER: -- the Ninth Circuit explicitly said
19 that the purpose of the plan ambiguity condition in *estoppel*
20 was to protect the plan's actuarial soundness by preventing
21 plan administrators from contracting to pay benefits to
22 persons not entitled to them under the express terms of the
23 plan. That's *Gabriel* at 956.

11:55 24 But that concern that plan assets will go to
25 people who aren't entitled to them isn't a risk here.

1 Plaintiffs are seeking to get a check sent to the right
2 address, not a larger check or a check that would wrongfully
3 deplete plan funds. No plan assets are going to end up in
4 the hands of people who don't have a valid claim for
5 benefits.

11:55 6 Defendants argued in their reply that plaintiff's
7 inability to get -- to get at the plan is irrelevant because
8 it means that somehow plaintiffs have a better remedy than
9 beneficiaries who gave them the assignment. But that's not
10 true. The remedy's exactly the same. The elements are
11 exactly the same for assignee and assignor. In both cases,
12 reasonable reliance is required. But the way in which
13 reasonable reliance is shown in one case is different than
14 it's shown in another. And of course that's true because
15 equity is always sensitive to circumstance.

11:56 16 Now, let me discuss two general arguments they
17 make about reformation or *estoppel*. They're not specific to
18 reformation and *estoppel*. They're more general.

11:56 19 First, the defendants have argued that the Form A
20 assignments do not reach claims that sound in (a)(3). They
21 say the Form A assignments only permit (a)(1)(B) claims.
22 That is not so. The scope of any assignment depends on the
23 intent of the parties. And Form A, that assignment
24 undisputedly conveys the right, as Your Honor has already
25 held, to seek payment for benefits. And both (a)(1)(B)

1 claims and the particular (a) (3) claims plaintiffs are
2 making here -- reformation and *estoppel* -- seek the same
3 thing, namely, the monetary value of the benefits that the
4 patients were due. They are therefore both covered by the
5 Form A assignment because what the Form A assignment conveys
6 is the right to use the law to get the monetary value of
7 benefits.

11:57 8 Defendants have also suggested that the
9 reformation and *estoppel* claims fail because they're
10 insufficiently specific about what the misleading conduct
11 was. To that, I say the Complaint speaks for itself.

11:57 12 For every patient, we provided an independent --
13 we divided -- we -- excuse me -- we provided a patient
14 "tile" that's set forth when the contact occurred, what was
15 said on the phone in response to a specific question about
16 assignments, when the treatment began, who we believe the
17 plan was, who the Blue Cross defendants were. That was in
18 conjunction with the pages of factual detail we provided to
19 discuss our processes in general for interacting with
20 provider -- interacting with insurers, and getting
21 information.

11:58 22 THE COURT: Now, just a moment.

11:58 23 Counsel, I'm going to give you all the time you
24 need for both sides.

11:58 25 MR. MAHER: Of course.

11:58 1 THE COURT: But we've been at it since 7:00. I
2 can certainly work through lunch, but I don't want Debbie
3 to.

11:58 4 MR. MAHER: Okay.

11:58 5 THE COURT: I can't lose her. Okay?

11:58 6 MR. MAHER: Sure.

11:58 7 THE COURT: So let me apologize to you 'cause I'm
8 not intending to hold you.

11:58 9 MR. MAHER: Sure.

11:58 10 THE COURT: I think -- I've got a 1:30 call. But
11 let me just try to reason out with you how long that's gonna
12 take.

11:58 13 Hold on for just a second.

11:58 14 *(To Court Reporter:)* Deb, quit typing for a
15 moment. Rest your hands.

11:58 16 *(Informal discussion held, not reported.)*

12:01 17 *(Matter concluded at 12:02 p.m.)*

12:02 18 *(Proceedings scheduled to resume Tuesday,*
12:02 19 *June 13, 2017 at 1:00 p.m.)*

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CERTIFICATE

I hereby certify that pursuant to Section 753,
Title 28, United States Code, the foregoing is a true and
correct transcript of the stenographically reported
proceedings held in the above-entitled matter and that the
transcript page format is in conformance with the
regulations of the Judicial Conference of the United States.

Date: October 4, 2017

/s/ Debbie Gale

DEBBIE GALE, U.S. COURT REPORTER
CSR NO. 9472, RPR, CCRR

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
HONORABLE DAVID O. CARTER, JUDGE PRESIDING

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DUAL DIAGNOSIS TREATMENT CENTER,)
INC., et al.,)
Plaintiffs,)
vs.)
BLUE CROSS OF CALIFORNIA, et)
al.,)
Defendants.)

CERTIFIED

No. 8:15-CV-0736-DOC
Item No. 2

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Hearing on Motion to Dismiss
Santa Ana, California
Tuesday, June 13, 2017

Debbie Gale, CSR 9472, RPR, CCRR
Federal Official Court Reporter
United States District Court
411 West 4th Street, Room 1-053
Santa Ana, California 92701
(714) 558-8141

1 **APPEARANCES OF COUNSEL:**

2 FOR PLAINTIFF DUAL DIAGNOSIS TREATMENT CENTER, INC., ET AL.:

3 Brendan Stephen Maher
4 STRIS & MAHER LLP
5 725 South Figueroa Street
6 Suite 1830
7 Los Angeles, California 90017
8 213-995-6805
9 brendan.maher@strismaher.com

10 FOR DEFENDANT BLUE CROSS OF CALIFORNIA, ET AL.:

11 Eileen R. Ridley
12 FOLEY & LARDNER LLP
13 555 California Street
14 17th Floor
15 San Francisco, California 94104
16 415-434-4484
17 eridley@foley.com

18 FOR DEFENDANT HL FINANCIAL SERVICES, LLC, EMPLOYEE BENEFITS
19 PLAN:

20 Jill Nicole Jaffe
21 NOSSAMAN LLP
22 50 California Street
23 Suite 3400
24 San Francisco, California 94111
25 415-438-7275
jjaffe@nossaman.com

FOR DEFENDANT ROCKET SOFTWARE GROUP INSURANCE BENEFITS PLAN:

Nathan M. McClellan
DECHERT LLP
633 West Fifth Street
37th Floor
Los Angeles, California 90071
213-808-5700
nathan.mcclellan@dechert.com

1 TELEPHONIC AUDIENCE:

2 Elise Klein, Lewis Brisbois Bisgaard and Smith LLP

3 Nicole Diller, Morgan Lewis Bockius LLP

4 Molly Madden, Godwin Proctor LLP

5 Ron Kravitz, Shepherd Finkelman Miller and Shah LLP

6
7 ADDITIONAL TELEPHONIC AUDIENCE *(not listed on court docket)*:

8 Neil Barker

9 John Gershon

10 Alexandra Markel

11 Lindsay Adelman

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1 **SANTA ANA, CALIFORNIA, TUESDAY, JUNE 13, 2017**

2 **Item No. 2**

3 (1:04 p.m.)

01:04 4 THE COURT: All right. Then we're on the record.
5 And all counsel are present.

01:04 6 Counsel, if you would have a seat. Thank you for
7 your courtesy once again.

01:05 8 First of all, are you okay?

01:05 9 MS. RIDLEY: I am okay. And I want to express my
10 thanks to the Court and my colleagues, both the defense and
11 the plaintiffs, for understanding.

01:05 12 THE COURT: Not a concern. It's just an absolute
13 pleasure.

01:05 14 Once again, there's no time constraints on you.
15 Whatever your argument entails, you've got a Court willing
16 to listen.

01:05 17 So, also, Debbie just informed me that there are a
18 number of parties who may be joining us by phone and that,
19 Counsel, you'll indicate on the record who they are, with
20 the following caveat: I don't hear a click on or a click
21 off.

01:05 22 But, for all of you folks listening -- or involved
23 in the conversation but listening, you're more than welcome.
24 Hopefully that saves you the appearance, flying all the way
25 out here. But I expect it's organized. When I received the

1 request at the last moment, there was no time to put that
2 together for the first hearing.

01:05 3 Who's joining us by phone?

01:05 4 **TELEPHONIC AUDIENCE LISTED**

01:06 5 MS. RIDLEY: Your Honor, we have -- excuse me for
6 reading off my email. My assistant was sending me them.

01:06 7 Neil Barker.

01:06 8 THE COURT: From where?

01:06 9 MS. RIDLEY: I'm sorry?

01:06 10 THE COURT: Well, if they're from Los Angeles,
11 there's no reason that they're here. If they're from
12 San Diego, there's no reason they're here -- they're not
13 here, or Orange County. *(Verbatim.)*

01:06 14 Now, this is for Chicago, New York. You know,
15 these are for out-of-town counsel.

01:06 16 MS. RIDLEY: Okay. I understand.

01:06 17 I believe he was here yesterday. He was from
18 Pasadena. He had a conflict.

01:06 19 THE COURT: That's a foreign country. That's
20 fine, Counsel.

01:06 21 *(Laughter in the courtroom.)*

01:06 22 MS. RIDLEY: We have John Gershon, G-E-R-S-H-O-N,
23 from Reed Smith.

01:06 24 THE COURT: Okay.

01:06 25 MS. RIDLEY: There's Alexandra Markel,

1 M-A-R-K-E-L, from Blue Cross of Michigan, and I think she is
2 in Michigan.

01:06 3 THE COURT: Okay. Thank you.

01:06 4 MS. RIDLEY: Lindsay, L-I-N-D-S-A-Y, Adelman,
5 A-D-E-L-M-A-N from Greenberg Traurig. I also believe she's
6 out of state.

01:07 7 THE COURT: Okay. Fine. Thank you.

01:07 8 MS. RIDLEY: Elise Klein, K-L-E-I-N, from
9 Lewis Brisbois. I believe she's in L.A.

01:07 10 THE COURT: All right. Thank you.

01:07 11 MS. RIDLEY: Nicole Diller, D-I-L-L-E-R, from
12 Morgan Lewis -- I believe is in L.A. -- San Francisco? I
13 lied. Sorry. Excuse me, Your Honor. San Francisco.

01:07 14 Molly Madden, M-A-D-D-E-N, from Godwin Proctor.

01:07 15 THE COURT: All right. Thank you.

01:07 16 MS. RIDLEY: And we have one other. Ron Kravitz,
17 K-R-A-V-I-T-Z, from San Francisco.

01:07 18 THE COURT: All right. Thank you very much.

01:07 19 Counsel, if you would like to continue with your
20 argument, please.

01:07 21 And, Counsel, you can retrace your argument from
22 yesterday so that you have continuity, if would like to.
23 I'm not requiring you to pick up at an exact spot. So, as a
24 courtesy, if you'd like to retrace those portions, you're
25 more than welcome to.

01:08 1 **ARGUMENT BY MR. MAHER**

01:08 2 MR. MAHER: Your Honor, may it please the Court,
3 this is Brendon Maher for the plaintiffs.

01:08 4 The argument I made yesterday, I'm not going to
5 reiterate. I'm going to pick up where I left off, uh, and I
6 had left off discussing Count Two. I had discussed
7 reformation and *estoppel* and why I thought defendant's
8 arguments against them, uh, failed specifically. And then I
9 had addressed the general argument that they'd made about
10 both the reformation and *estoppel*, um, that Form A did not
11 cover, uh, those claims and I'd rebutted that.

01:08 12 And I was just gonna move on to make one final
13 small point with respect to a general objection they had to
14 Count Two; namely, that --

01:08 15 Madam Court Reporter, am I speaking too fast?

01:08 16 THE COURT: Yes.

01:08 17 MR. MAHER: That's what I thought. I apologize.

01:08 18 THE COURT: Debbie just nodded.

01:08 19 Okay.

01:08 20 MR. MAHER: I'm gonna make a closing point about
21 Count Two with respect to defendant's general argument that
22 we did not plead sufficient facts regarding those
23 misrepresentations.

01:09 24 THE COURT: That's Claim Two, Three and Four?

01:09 25 MR. MAHER: Uh, yes, yes. I'm discussing it in

1 the context of Two.

01:09 2 THE COURT: Okay.

01:09 3 MR. MAHER: The facts that we've alleged in this
4 Complaint, in my view, are extremely detailed, giving times,
5 dates, treatments, who we called -- namely, the provider
6 hotline. I would characterize the detail in the Complaint
7 not just as sufficient, but as excruciating in its detail.
8 And so I don't think there's additional information that we
9 can be expected to supply at the pleading stage, given the
10 400-and-some-page -- uh, pages of detail that we've
11 currently supplied.

01:09 12 Now I'd like to move on to Count Three. Count
13 Three is an unfair competition claim under California law
14 against the Blue Cross defendants for routinely and
15 recklessly misleading plaintiffs over the provider hotlines
16 as to the assignability of their claims.

01:10 17 Defendants have two primary objections to
18 plaintiff's UCL claims. One is what I'll call substance and
19 one is preemption. Let me address the substance objection
20 first.

01:10 21 In the substance objection they have two
22 subpoints. The first is that no UCLA -- UCL claim lies
23 because plaintiffs, according to defendants, cannot satisfy
24 either the unlawful or the unfair prong of the UCL. So the
25 sub-arguments are we failure (*verbatim*) -- we fail on the

1 unlawful prong, and that we fail on the unfair prong.

01:11 2 With respect to the unlawful prong, the defendants
3 insist that plaintiff's fail because we have not identified
4 a specific statute that was violated that constitutes the
5 predicate unlawful act for UCLA -- UCLA -- excuse me -- UCL
6 relief. But the unlawful requirement does not demand a
7 statutory violation. A common law violation will do. And
8 we cited cases in our brief to that effect. And the
9 Complaint clearly pleads conduct that is unlawful under the
10 California common law; namely, and at a minimum, negligent
11 misrepresentation.

01:11 12 And I would like to direct Your Honor's attention
13 to Paragraph 290 of the Second Amended Complaint, which
14 re-alleges by reference every paragraph in the Complaint,
15 most pertinent -- most pertinently all the specific
16 allegations about Sovereign "using and relying, the provider
17 hotline" (*verbatim*) and "Blue Cross routinely providing
18 false information."

01:12 19 Paragraph 292 incorporates all the allegations in
20 the patient appendix, which details how Blue Cross routinely
21 misled Sovereign about the assignability of claims when
22 asked.

01:12 23 Paragraph 304 characterizes Blue Cross's conduct
24 as unlawful.

01:12 25 And Paragraph 305 alleges specifically and

1 summarizes Blue Cross's misconduct as unlawful, clearly
2 satisfying negligent misrepresentation at the very least.

01:12 3 The other objection that defendants offer with
4 respect to the UCL claim, the second sub-objection on
5 substance is that we cannot plead unfair conduct.
6 Plaintiffs cannot plead unfair conduct because plaintiffs
7 are neither a competitor or a consumer.

01:13 8 That is not the law in California. Health care
9 providers can sue payor's for unfair conduct. That's the
10 holding of the *Bell* case, cited on page 18 of our brief.
11 And that case makes clear that the UCLA -- the UCL unfair
12 prong is available to anyone against whom the unfair
13 practice is directed, not just consumers or competitors.

01:13 14 Now, *Celtic* (phonetic) case merely says that
15 competitors who bring unfair UCLA claim -- UCL claims have
16 to show anticompetitive conduct. It does not say that all
17 unfair claims must be brought by competitors.

01:14 18 The *Caskey* (phonetic) case merely observed in
19 passing that the UCL protects consumers or competitors, but
20 it does not say that the UCL only protects consumers or
21 competitors. And that's not the implication of the
22 decision. If I note in passing that a stable protects
23 horses, that does not mean that it does not protect
24 "oner" (sic) -- other animals who seek shelter under it.

01:14 25 *Bell*, the leading California appellate case on

1 this issue, considered and rejected the very arguments that
2 defendants make here about the unavailability of an unfair
3 UCL claim for providers and again rejected those arguments.

01:15 4 Second, the defendants make a preemption argument
5 against plaintiff's UCL claims. Now, ERISA preemption is
6 extremely and unpleasantly complicated. And I know that
7 from experience. So let's talk about this practically.

01:15 8 California providers can choose to treat some
9 people and not others. And if the decision to treat depends
10 on whether or not there is insurance, then they are going to
11 ask insurers about coverage. And when insurers unfairly
12 mislead them, that has nothing to do with the underlying
13 policy being an ERISA plan. It has to do with the
14 relationship between a provider trying to understand how to
15 allocate its resources and an insurer making an inaccurate
16 statement.

01:16 17 So when Blue Cross sets up a provider hotline that
18 routinely misleads Sovereign about, well -- whether it would
19 be paid directly, that has nothing to do with employee
20 benefit plans, and squarely falls within the unfair sort of
21 conduct that the statute is intending to prohibit.

01:16 22 THE COURT: Now, you claim that this is an
23 affirmative misrepresentation pursuant to the hotline; is
24 that correct?

01:16 25 MR. MAHER: Yes, sir.

01:16 1 THE COURT: Your client is a relatively
2 sophisticated entity.

01:16 3 MR. MAHER: Fair enough.

01:16 4 THE COURT: They can read the policy?

01:16 5 MR. MAHER: They don't have the policy.

01:16 6 THE COURT: So, therefore, they're dependent upon
7 the information being given to them?

01:16 8 MR. MAHER: Yes, sir.

01:16 9 THE COURT: Thank you.

01:16 10 MR. MAHER: Now I'm gonna move on to Count Four.
01:17 11 Count Four seeks relief under state law. But
12 Count Four, read in conjunction with the rest of the
13 Complaint, actually reaches on its face to different sets of
14 defendants.

01:17 15 First, it sounds, in contract, against non-ERISA
16 defendants that are associated with plans that lack
17 applicable anti-assignment provisions. In other words, some
18 of the policies in this case aren't ERISA policies. And if
19 they lack anti-assignment provisions and the assignments
20 weren't honored, that's a breach of contract under state
21 law.

01:17 22 Now, to the extent a non-ERISA plan has an
23 anti-assignment provision, but representatives for the plan
24 misled Sovereign over the provider hotline, then under state
25 law, Sovereign is asserting claims for negligent

1 misrepresentation, reformation, and *estoppel*. That's the
2 first set of defendants that Count Four reaches.

01:18 3 Now, second, however, the facts -- given the facts
4 that are alleged in Count Four and the facts that are
5 alleged by Count Four's explicit incorporation of Count
6 Two -- given those facts in the conjunct, the Complaint as
7 written, read fairly under the Rules of Federal Civil
8 Procedure, also states a cognizable claim for negligent
9 misrepresentation under state law against all defendants who
10 misled them on assignability, even defendants associated
11 with ERISA plans.

01:18 12 As I will explain, even for ERISA defendants,
13 negligent misrepresentation claims in this fact setting, to
14 a provider, are not preempted. We specifically make this
15 argument on pages 23 and 24 of our brief, if Your Honor is
16 looking -- if Your Honor wants to know what underlying cases
17 we relied on for the non-preemption argument.

01:19 18 Now, the defendants have objections on multiple
19 grounds to the state law claim for negligent
20 misrepresentation. First, as they do with the claims made
21 under an ERISA *estoppel* and ERISA reformation theory, they
22 claim that the facts are insufficient to put them on notice
23 of the claims made against them, in that -- in short, we
24 don't have enough facts for them to know which way is up.

01:19 25 With all due respect, that's just not so. The law

1 of pleading requires pleading sufficient facts to state a
2 plausible claim for relief. Count Four incorporates by
3 reference the exhaustive factual allegations in the case,
4 including, as I mentioned just a moment ago, details of how
5 and when and the process by which Sovereign verified
6 benefits, how/when in the process by which it contacted
7 plans and talked to their agents and recorded information,
8 and how -- which -- and how in the process by which
9 Sovereign treated patients and sought payment. (*Verbatim.*)
10 It's not clear what else plaintiffs should be obligated to
11 plead.

01:20 12 Defendants make a second argument about the
13 sufficiency of plaintiff's pleadings. They say the state
14 law claim pleadings are insufficient because according to
15 defendants, plaintiffs do not clearly set forth their legal
16 theories of relief in the Complaint in that count.

01:21 17 Now, to begin, the federal re -- the federal
18 pleading rules require the pleading of facts sufficient to
19 obtain relief. One does not need to articulate by name a
20 particular theory. The law allows relief on the pled facts.
21 The claim survives. But that's really an academic
22 observation here because we do specifically mention the
23 legal theories upon which we are seeking relief.

01:21 24 I realize I spoke too fast. We do specifically
25 allege the legal theories upon which we are seeking relief.

01:21 1 We mention negligent misrepresentation,
2 intentional misrepresentation, reformation and *estoppel*, all
3 explicitly named in Count Four. So we've pled sufficient
4 facts. And even if we -- even though we did not need to, we
5 pled the legal theories we were availing ourselves "to."
6 (*Verbatim.*)

01:22 7 Now, the defendants also believe that, like our
8 UCL claims, any state law negligent misrepresentation claim
9 we would make against an ERISA plan and the associated Blue
10 Cross defendants is preempted. And their theory is --
11 apparently, the same sort of theory. It's something that
12 relates to ERISA benefit plans: Preempted.

01:22 13 But that's not the law in the Ninth Circuit, and
14 it's not the law across the country. When a -- remember,
15 Sovereign is a provider in it's own right. Okay? When a
16 provider -- "Qua-" (*sic*) provider is misled about coverage,
17 that's independent of the ERISA nature of the policy. It's
18 actionable because it leads the provider to misallocated
19 scarce resources, not because any right of the patient
20 that's regulated under ERISA is being violated.

01:23 21 Remember that Sovereign has essentially two
22 statuses: Assignee and provider. And it's been settled law
23 in the Ninth Circuit for two decades that negligent
24 misrepresentation claims brought by a provider who was
25 misled about the policy are not preempted by ERISA. That's

1 the *Meadows (phonetic)* case, 1995, written by
2 Judge Pregerson. And that makes sense because, think about
3 it: If defendants are right that state law
4 misrepresentation claims are preempted when an insurer
5 misleads a provider in connection with a patient, subject to
6 an ERISA plan, the following could occur -- and I'm not
7 suggesting the defendants did this, to be clear -- but the
8 following could occur under their theory:

01:24 9 An unscrupulous insurer could print out a fake
10 copy of a policy to tell doctors everywhere *This is our Form*
11 *X policy. And if you see Paragraph 19 says we honor*
12 *assignments. So it'd be in your interest to take patients*
13 *covered by our insurance.* Or they can insert a provision
14 promising to cover expensive surgery, send it to the
15 doctors, get them to render care.

01:24 16 And a provider in that setting, after the fact,
17 who sought to be paid, must have a claim under state law to
18 punish the insurer for misleading them in that fashion.

01:24 19 Now, here, the same rationale applies, except that
20 the insurers were acting under negligent misrepresentation,
21 rather than -- at least on the facts we know now -- classic
22 fraud.

01:25 23 So after plaintiffs filed their papers, an
24 interesting opinion came down from the Second Circuit on the
25 preemption issue. It's not controlling, of course; but I

1 commend it to Your Honor's attention. The case is
2 McCulloch -- *McCulloch Orthopaedic Surgical v. Aetna*. And
3 the citation is 857 F.3d 141, Second Circuit, 2017. That
4 case speaks to the wisdom of concluding there is no
5 preemption when a payor misrepresents to the provider the
6 status of the assignability of a claim when the underlying
7 policy in fact has an anti-assignment provision.

01:26 8 And so, my take away is, a negligent
9 misrepresentation claim -- and, of course, a fraud claim to
10 the extent that the facts ever showed that -- are not claims
11 that in this circumstance are preempted by ERISA.

01:26 12 Now, one final thing before I yield the microphone
13 to my friend. The Complaint alleges in Count Two and Count
14 Four facts, read together, that would permit obtaining
15 relief on negligent misrepresentation claims that we believe
16 are not preempted, even against the ERISA defendants and the
17 associated "Blues." However, to the extent that Your Honor
18 believes that the Second Amended Complaint "give" (*verbatim*)
19 the defendants insufficient notice on this point, plaintiffs
20 seek, as we did in our brief in an abundance of caution, on
21 pages 23 and 24 -- we seek leave to amend. It would not be
22 futile because the Complaint, as written, already pleads
23 sufficient facts to constitute a statement of a negligent
24 misrepresentation claim against all defendants who misled
25 Sovereign on assignability.

01:27 1 We would simply amend to make crystal clear that
2 we are seeking non-preemptive state law negligent
3 misrepresentation claims against all defendants that misled
4 plaintiffs as to assignability.

01:27 5 And with that, unless Your Honor has questions,
6 I'm ready to sit down.

01:27 7 THE COURT: Okay. Counsel, thank you for your
8 argument. My suggestion is this: I'm going to take a brief
9 recess for about 10 minutes. I want you to absorb the
10 argument by your opposition, have that discussion privately
11 so that when you speak, you're a cohesive body.

01:28 12 And also, if you'd like to, I think that
13 plaintiff's counsel would give you the courtesy of excusing
14 themselves for a moment, into the hallway, so that you could
15 have a conversation with any of the parties on the phone
16 outside my presence.

01:28 17 So, Counsel, would you mind paying the opposition
18 that courtesy?

01:28 19 MR. MAHER: Absolutely.

01:28 20 THE COURT: That way, they have a number of folks
21 across the country that they've tried in good faith now to
22 get together.

01:28 23 MR. MAHER: Of course.

01:28 24 THE COURT: And in hearing part of that argument,
25 if they have comments, it allows them to participate, but

1 not through, you know, a direct colloquy with the Court.

01:28 2 MR. MAHER: Your Honor, what time should we
3 return?

01:28 4 THE COURT: Counsel, trust me. They'll know where
5 you are. They'll find you. I promise you. Okay. So let
6 me take about a 15-minute recess.

01:28 7 You're welcome to the microphone. I promise you
8 that I will know nothing about your conversation. And
9 Debbie won't convey anything to me. So if you want to speak
10 to your colleagues by the phone, I'll come back in about 15
11 to 20 minutes.

01:29 12 MS. RIDLEY: Thank you, Your Honor.

01:29 13 MS. JAFFE: Thank you.

01:29 14 *(Recess held at 1:29 p.m.)*

01:43 15 *(Proceedings resumed at 1:43 p.m.)*

01:43 16 THE COURT: Okay. Then we're back in session.
17 All the parties are present.

01:43 18 And, Counsel, on behalf of the defense.

01:44 19 **ARGUMENT BY MS. RIDLEY**

01:44 20 MS. RIDLEY: Thank you, Your Honor. And I will do
21 my best to speak slowly.

01:44 22 Again, I'm Eileen Ridley on behalf of the Anthem
23 defendants, but on behalf of the defendant group.

01:44 24 In response to plaintiff's arguments -- and I'm
25 going to go back to some of what was presented yesterday, as

1 well -- one of the things that I will note is this is an
2 entangled Complaint. It has a number of different theories
3 and allegations. But they all don't quite jibe together.
4 And some of the presentation that the plaintiffs have
5 presented to the Court today don't seem to address some of
6 these issues.

01:45 7 So, for example, Counsel noted that in Count One
8 the, I guess, "intent" was to make allegations with regard
9 to plans that did not have anti-assignment provisions in
10 them. That is not what is specifically alleged with regard
11 to Count One. It is not so limited. It's rather broad.

01:45 12 And, in fact, what is in fact the case is it's
13 somewhat all-encompassing and makes its allegations, as does
14 the entire Complaint, in what I would call "Group Form."

01:45 15 We frequently have allegations of "the
16 plaintiffs," even though we have a number of plaintiff
17 entities identified. And then we have the allegations
18 "plaintiffs are informed and believe" something about
19 defendants and the defendants being a group not specified.
20 And what that does is not provide the notice that is
21 required to the defendants.

01:46 22 We also have 26 plans, which is in Exhibit C in
23 our motion, where no allegations have been asserted
24 whatsoever. So subsequently what you have is something of a
25 hodgepodge of trying to piece together what exact

1 allegations are trying to be asserted by a group of
2 plaintiffs unspecified against a group of defendants.

01:46 3 With regard to the issue of reformation and
4 equitable *estoppel*, what wasn't addressed and what is
5 important is that the Complaint seeks recovery for
6 reformation and *estoppel* under 502(a)(1)(B). By the
7 statute, that kind of relief -- "equitable relief" -- is not
8 available. At best, it would be available under (a)(3), but
9 (a)(3) is not asserted in the Complaint.

01:47 10 Now, with regard to reformation itself, we
11 appreciate Counsel acknowledging that they are not asserting
12 reformation based upon mistake. But the problem is the
13 allegations, with regard to basing it on fraud, do not meet
14 the specificity required for such an allegation --
15 certainly, not under Rule 9(b).

01:47 16 And we do rely on *Gabriel* and *Skinner* (*phonetic*),
17 which also relate to the fact that -- at least, for example,
18 for reformation -- the issues regarding reformation go to
19 the events regarding the procurement of the plan, the
20 creation of the plan. It is not post-statements as
21 plaintiffs are attempting to allege in this case.

01:48 22 There's no allegation whatsoever with regard to
23 fraud or misrepresentation in the por- -- procurement of
24 these plans. And *Gabriel* specifically notes that under its
25 analysis you cannot have reformation in those circumstances.

1 It also notes in *estoppel* that you are not -- *estoppel* does
2 not permit a party to get more rights than are what's in the
3 plan itself. And, essentially what we have here, is
4 plaintiffs essentially seeking *estoppel* in an effort to
5 excise certain clear terms in the plans; namely the
6 anti-assignment provisions.

01:48 7 By making that argument, they are seeking greater
8 rights than the plan provides, and certainly more rights
9 than their assignors had, which is counter to authority.

01:49 10 And *Amara* (*phonetic*) doesn't differ on that.
11 *Amara* agrees. In fact, *Gabriel* and *Skinner* follow the first
12 *Amara* case and agree with that analysis.

01:49 13 As to Form A, we do make the allegation that
14 Form A doesn't provide any basis to seek equitable claims.
15 There's no reference to equitable claims.

01:49 16 Now it's interesting: Counsel argued that the
17 assignments are supposed'a be determined based on the intent
18 of the parties. It's actually supposed to be determined
19 based on what the terms of the assignment are. And
20 D.B. Health and Sanctuary Surgical specifically limit
21 assignments to their terms. That assignment does not
22 provide the ability to have equitable claims assigned.

01:49 23 Counsel next talked about the *Simon* case -- which
24 was one of the two cases the Court asked to be addressed --
25 and in that, attempted to argue that *Simon* didn't apply

1 because essentially MedLink was a business partner of
2 plaintiffs, and that there was, uh, some names on one
3 particular assignment, although no reference that the
4 assignment was actually to any specific plaintiff; and that
5 those business partners actually worked together.

01:50 6 And we would contend, Your Honor, that's -- that's
7 even less than what *Simon* had. *Simon* actually had "a"
8 assignment of an assignment.

01:50 9 Here, there's just an allegation that they are
10 business partners. There's no al- -- even allegation that
11 they had any rights or assignments. And even if they did,
12 *Simon* holds that you cannot have these rights basically
13 fashioned into some sort of commodity. They're not to be
14 traded back and forth, uh, between providers because that
15 could be antithetical to the nature of ERISA and the goal to
16 make the provision of benefits and the administration of
17 ERISA plans more clear.

01:51 18 I'll also note that there was some discussion
19 about there being no windfall. Now, the reason why I raise
20 that is I think it's important to note what is exactly being
21 alleged in this Complaint. What's alleged in the Complaint
22 is that each of the defendants paid for the claims, for the
23 services provided. The issue in the Complaint, according to
24 the plaintiffs, is they don't like the fact that that
25 payment was directed to entities or people other than

1 themselves. So what they're talking about is for each of
2 those plans to double pay because of their reading or their
3 subjective belief with regard to their own assignments.

01:52 4 They've also made arguments with regard to the
5 sufficiency of the representations -- which I'll get to in a
6 moment -- but they've made arguments that they should be
7 able to make their allegations based on the fact that they
8 didn't have the plans.

01:52 9 That argument should fail for a number of reasons.
10 One is, if they are truly supposed to be assignees, they
11 have to be in the shoes of the assignors. The assignors had
12 the plan -- excuse me -- the plans available to them.
13 Notably there's no allegations with regard to plaintiffs
14 seeking the plans, somehow being deprived of the plans -- no
15 such allegations whatsoever. So again, quite a bit of
16 supposition based on their position.

01:52 17 Now, with regard to the sufficiency of the claims
18 for, uh, fraud, misrepresentation: Plaintiffs claim that
19 they have been presenting this excruciating --

01:53 20 THE COURT: That's Claim No. Three.

01:53 21 MS. RIDLEY: Three, yes.

01:53 22 -- says that they presented these in excruciating
23 detail. And we would contend that that is not the case.

01:53 24 What we have are, in general, again, what I would
25 call, uh, clumps of plaintiffs -- never specified which

1 plaintiff -- alleging "a" alleged misrepresentation by
2 defendants, again frequently clumped, and the subjective
3 understanding of the plaintiffs, for the purposes of the
4 Complaint, as to what that misrepresentation was.

01:53 5 That doesn't meet the standards. The standards
6 are who, what, where, when, how. Who wrote to whom. When.
7 How they -- how they communicated -- may not've --

01:54 8 *(Court reporter requests clarification for the*
9 *record.)*

01:54 10 MS. RIDLEY: -- may have been oral, and what was
11 said.

01:54 12 That is not provided in the Second Amended
13 Complaint, in the appendix; or, for that matter, in the most
14 recent tables that were provided through the Court's, uh,
15 order. And those tables frequently don't reflect, uh,
16 similar information that were in the appendix.

01:54 17 So, for example, when you take a look at the
18 Complaint, and you take a look -- for example, for Patient
19 5 -- I'm just using this as a zample (*sic*). You see, at
20 Paragraph 319, allegations such as:

01:54 21 "With regard to the relevant welfare
22 benefits implicated by this lawsuit, the
23 unknown plan either" -- lower case (i)
24 -- "is insured by North Carolina Blue
25 and/or North Carolina" -- or, 'scuse

1 (sic) me -- "and/or California Blue
2 Cross, or is self-insured."

01:55 3 So, in other words, the -- it's either North
4 Carolina Blue or California Blue Cross, or is self-insured.
5 And then,

01:55 6 "Has entered into an agreement with
7 North Carolina Blue or California Blue
8 Cross, which the unknown plan receives
9 third-party administrative services."

01:55 10 Then, in Paragraph 319(d), it says,

01:55 11 "On or about July 2, 2014, Sovereign,
12 or its agents, contacted the provider
13 hotline of North Carolina Blue and/or
14 California Blue Cross and requested
15 details about Patient 5's coverage.
16 Sovereign or its agents recorded the
17 information learned from North Carolina
18 Blue and/or Blue Cross on the bottom of
19 Patient 5's insurance verification
20 form."

01:56 21 Here again, we don't know if it's Sovereign or its
22 agent. We don't know if it's North Carolina Blue or
23 Califor- -- California Blue Cross. And they "learned" the
24 in- -- "from recorded information, learned from North
25 Carolina Blue or California Blue Cross" -- we don't know

1 what that information is. And this is a pattern of
2 allegation that's repeated. You can see it in Patient 8,
3 Patient 9, Patient 10.

01:56 4 So my -- my point, Your Honor, is that it's hardly
5 excruciating detail. It doesn't provide the proper notice.
6 It doesn't provide the basic facts you would require with
7 regard to misrepresentation claims. And yet, plaintiffs
8 contend this is excruciating detail and they have no more
9 facts to -- to present. That would suggest to us they do
10 not have the facts to support such claims.

01:57 11 With regard to Count Three and the unfair
12 competition. With regard to the unlawful prong, in point of
13 fact, you must allege a statute and the elements of the
14 statute. And this Court noted that in the last motion to
15 dismiss. It's still the same today.

01:57 16 In the -- with regard to the unfair conduct, there
17 is a requirement -- even in the healthcare context, under
18 authority -- that you have to allege anticompetitive
19 activity. You have to be a consumer or competitor.

01:58 20 Now, plaintiff's counsel cites to *bell* for the
21 contention that *bell* believed -- or *bell* holds that they can
22 bring an unfair claim under 17200. But that's not the case.
23 If you look at *Bell*, it did speak to 17200; but, it spoke to
24 17200 under the unlawful prong, not the unfair prong.

01:58 25 And the unlawful prong was based upon contentions

1 that portions of the Knox-Keene Act were in fact violated.

2 In other words --

01:58 3 THE COURT: Under the -- just a moment.

01:58 4 Debbie's got realtime. Under the?

01:58 5 MS. RIDLEY: Knox-Keene.

01:58 6 THE COURT: Spell that.

01:58 7 MS. RIDLEY: Again, not my strong suit. But
8 K-N-O-X, and then Keene is K-E-E-N-E -- no, K-A-N-E (*sic*).

01:59 9 THE COURT: Debbie.

01:59 10 (*Court and court reporter confer.*)

01:59 11 MS. RIDLEY: So in *Bell*, *Bell* actually, at least
12 in the context of a claim for unlawful -- uh, under the
13 unlawful prong of the 17200 claim, cited an actual statute
14 and its elements, and was permitted to do so. It did not
15 make a claim under the unfair prong.

01:59 16 With regard to the issue of preemption for 17200,
17 it is clear here that what is being sought are the benefits
18 within the plans themselves, and also addressing
19 administrative issues; for example, where the benefits are
20 going to be paid. That goes to the heart of ERISA.
21 Therefore, there is preemption.

02:00 22 And this argument that there are separate state
23 law claims actually alleges too much. And, in fact, seems
24 to envelop some of the arguments with regard to the fourth
25 cause of action, which seems to be something of a kitchen

1 sink of allegations.

02:00 2 The problem with the "kitchen sink" aspect is it
3 doesn't provide sufficient notice. It doesn't say which
4 plaintiff believes it has supposedly a breach of contract
5 claim -- for example, against which defendant -- or what
6 that contract said. It doesn't say which plaintiff believes
7 they received misrepresentations from which defendant, when
8 that happened, who said it, and what was said.

02:00 9 And by alleging or asserting in the opposition,
10 and today in oral argument, that there are several different
11 claims -- reformation, *estoppel*, uh, misrepresentation -- is
12 an attempt to amend the Complaint as presently written, but
13 also basically relies upon all of the frailties of those
14 claims that we've already been discussing today and in our
15 papers. Because each one of those claims fails for all the
16 reasons that we've previously briefed and have been
17 discussing.

02:01 18 So ultimately what we have is an entangled claim,
19 but it's entangled in a way specifically that doesn't
20 provide the prop -- proper notice and, in fact, doesn't lend
21 support for any of the claims.

02:01 22 Now, to the extent that plaintiffs are seeking to
23 further amend the Complaint, we would contend that this is
24 the Second Amended Complaint this Court's been dealing with.
25 And we do not believe there's appropriate reason to have a

1 further amendment. We think the plaintiffs've had
2 sufficient attempts to do so. We think they can't do so,
3 for the reasons we've discussed.

02:02 4 THE COURT: Why? In other words, you're in the
5 Ninth Circuit. Welcome. And where's the prejudice?

02:02 6 Second, why can't they -- for instance, if they
7 fail in this motion, include MedLink?

02:02 8 MS. RIDLEY: Well, for example, with regard to
9 MedLink, MedLink -- for two reasons: MedLink, they knew
10 about from the very beginning. They've been talking about
11 MedLink in the body of the Complaint.

02:02 12 THE COURT: I know that they have, and they're at
13 fault, and they're waiting to see what the Court does in
14 this motion. Okay? Who's kidding who? But I've also put
15 the plaintiff on notice: Confusing complaints do not strike
16 to the plaintiff's benefit.

02:02 17 MS. RIDLEY: Understood, Your Honor.

02:02 18 And then the other --

02:02 19 THE COURT: And I know he hasn't heard me, but he
20 has now.

02:02 21 So having heard that, this "mush," if you will,
22 may meet with the Court's disapproval. But that doesn't
23 mean it doesn't meet with the opportunity to amend.

02:02 24 So now my question's back to you: So what about
25 MedLink?

02:02 1 MS. RIDLEY: So back to MedLink --

02:03 2 THE COURT: The prejudice?

02:03 3 MS. RIDLEY: The prejudice is MedLink's not a
4 provider.

02:03 5 THE COURT: Okay.

02:03 6 MS. RIDLEY: Did not provide service.

02:03 7 THE COURT: Why don't we get to that if his motion
8 fails -- or if your motion's successful -- I'm sorry -- and
9 why don't we get to that in terms of also not alleging "by
10 information and belief."

02:03 11 Repeat back to me. What did I just say?

02:03 12 MR. MAHER: You said you would prefer to see a
13 complaint --

02:03 14 THE COURT: No, I didn't say "prefer."
02:03 15 What did I say?

02:03 16 MR. MAHER: Uh, you said, "not alleging by
17 information and belief."

02:03 18 THE COURT: Excellent. Excellent. Good.
02:03 19 Counsel?

02:03 20 MS. RIDLEY: Yes, Your Honor, I would also
21 contend --

02:03 22 THE COURT: We're all done with the gamesmanship
23 now; understood?

02:03 24 I get clear Complaints; understood?

02:03 25 MR. MAHER: Yes, sir.

02:03 1 THE COURT: Otherwise, you meet with failure;
2 understood?

02:03 3 MR. MAHER: Yes, sir.

02:03 4 THE COURT: We've had that communication now
5 between us. Excellent.
6 Counsel?

02:03 7 MS. RIDLEY: Understood, Your Honor.
8 We would still contend, Your Honor, that in -- in
9 the detail that we've described, even the allegations that
10 they have or even said that they might present, still
11 wouldn't present claims for -- that they're asserting.

02:04 12 THE COURT: We'll get to that. Let's see how we
13 come out. It's an unfair question on my part concerning
14 MedLink. It causes premature argument. But I'm not too
15 certain I wouldn't allow an amendment if the motion is
16 successful. Okay?

02:04 17 MS. RIDLEY: Understood, Your Honor.

02:04 18 THE COURT: I don't like that coming back
19 piecemeal. And I don't see the prejudice or harm with the
20 issue. But that's to put you on fair notice.
21 Also plaintiff's heard, very quickly, we're all
22 done with "information or belief" or there won't be any
23 further amendments. Okay?

02:04 24 There's a split. I think it's the Fourth and the
25 Eleventh and the Ninth. The Ninth seems to be rather

1 favorable to your position.

02:04 2 MS. RIDLEY: It does.

02:04 3 THE COURT: It does. Last time I looked, I think
4 I was dutibound to follow the Ninth; is that correct?

02:04 5 MS. RIDLEY: That was my understanding,
6 Your Honor.

02:04 7 THE COURT: That was my understanding also.

02:04 8 So when Counsel gets up and argues for a moment,
9 he's going to tell me why I shouldn't follow Ninth Circuit
10 precedence. Okay?

02:04 11 MS. RIDLEY: Yes, Your Honor.

02:04 12 THE COURT: All right.

02:04 13 MS. RIDLEY: The only thing I would note is I have
14 one colleague who has "a" idiosyncratic argument *vis-a-vis*
15 her client.

02:05 16 THE COURT: I welcome those.

02:05 17 MS. RIDLEY: And so I'm going to yield the floor.

02:05 18 THE COURT: Come on up here and reintroduce
19 yourself to me. It's a pleasure to meet you again. And I
20 love idiosyncratic arguments.

02:05 21 First of all, it's nice to see you.

02:05 22 MS. JAFFE: Thank you, Your Honor.

02:05 23 THE COURT: And would you state your name again.

02:05 24 MS. JAFFE: My name is Jill Jaffe. I represent
25 HL Financial, connected to this litigation just by one

1 patient: Patient 134.

02:05 2 THE COURT: Patient 134.

02:05 3 MS. JAFFE: HL Financial --

02:05 4 THE COURT: Just a minute. We have lots of time.

02:05 5 Okay. Patient 134, please.

02:05 6 **ARGUMENT BY MS. JAFFE**

02:05 7 MS. JAFFE: HL joins the arguments of the other
8 defendants, but I present arguments today on our separate
9 addendum, which is ECF-1097.

02:05 10 In our addendum we argue that the record before
11 the Court and the Court's prior order on the previous Motion
12 to Dismiss briefing requires that HL Financial be dismissed
13 as to Plaintiff's Claim 1-B.

02:06 14 When plaintiff's counsel began their argument
15 yesterday, he stated that plaintiff's Claim 1 was brought
16 only against defendants that did not have an anti-assignment
17 provision in their plan, or only had an anti-assignment
18 provision that did not reach plaintiffs. That is not
19 correct for my client.

02:06 20 In HL's addendum, we clarify for the Court that
21 HL Financial has submitted its ERISA plan documents to the
22 Court. In the Court's order at pages 101 to 102, the Court
23 expressed confusion as to whether HL Financial's primary
24 plan document was an SPD, a plan, or both.

02:07 25 HL Financial clarifies in its addendum that its

1 plan is consolidated but, importantly, contains all of the
2 necessary and required operative plan terms and is
3 HL Financial's plan.

02:07 4 Also, importantly, the plan contains an
5 anti-assignment provision that requires dismissal and -- of
6 HL for Claim 1-B.

02:07 7 Plaintiffs do not dispute the merits of
8 HL Financial's arguments; rather, without citing any legal
9 authority, they say that HL Financial has waived this claim.
10 That's also not correct. This Court is well within its
11 discretion to consider HL Financial's arguments in
12 connection with the Motion to Dismiss briefing and under
13 Federal Rule of Civil Procedure 54(b).

02:07 14 Moreover, it would be unfair for HL Financial to
15 be stuck in this litigation to respond to Claim 1-B when
16 plaintiffs do not even argue that it's properly pled.

02:08 17 Unless you have any questions, that's all I have
18 for today.

02:08 19 THE COURT: No. I want to thank you for your
20 argument, though. It's appreciated.

02:08 21 MS. JAFFE: Thank you.

02:08 22 THE COURT: Now, why don't you gather as a group
23 amongst the defense, have a discussion concerning the
24 primary person who's argued. Make sure that she's covered
25 the grounds that you want to.

02:08 1 And, Counsel, I think you addressed the Court last
2 time, or any other counsel present in court are welcome to
3 address the Court again. So why don't you have a quick
4 meeting.

02:08 5 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

02:08 6 THE COURT: In other words, how did she do?
7 Thumbs up for everybody? She did well? Okay?

02:08 8 MS. RIDLEY: I missed apparently one point.

02:08 9 THE COURT: Counsel, you're more than welcome.
10 And what's your name again, please.

02:08 11 MR. McCLELLAN: Good afternoon, Your Honor. My
12 name is Nate McClellan. I represent Ropet -- Rocket
13 Software Group Insurance Benefits Plan.

02:08 14 THE COURT: And your argument, Counsel.

02:08 15 MR. McCLELLAN: Thank you. Nice meeting you as
16 well.

02:08 17 **ARGUMENT BY MR. McCLELLAN**

02:08 18 MR. McCLELLAN: And I wanna clarify Ms. Ridley in
19 fact did not miss --

02:09 20 *(Court reporter requests clarification for the*
21 *record.)*

02:09 22 MR. McCLELLAN: Sure. I'll try'a speak as slow as
23 I can. This is also something that I have trouble with.

02:09 24 Uh, I wanna clarify that Ms. Ridley did not miss
25 an argument, but --

02:09 1 THE COURT: You just wanna reemphasize it.

02:09 2 MR. McCLELLAN: I want to reemphasize it in light
3 of Your Honor's comments about the possibility of amending
4 the Complaint.

02:09 5 My client, Rocket Software, is associated with one
6 patient in this case, Patient 138.

02:09 7 THE COURT: Okay.

02:09 8 MR. McCLELLAN: In this -- in the Court's previous
9 order, uh, granting the previous Motion to Dismiss, uh, the
10 Court found that my client's plan has an operative
11 anti-assignment clause.

02:09 12 THE COURT: Would you move the microphone a little
13 closer.

02:09 14 MR. McCLELLAN: Sure.

02:09 15 THE COURT: It slides. Closer.

02:09 16 MR. McCLELLAN: *(Complies.)*

02:09 17 THE COURT: Closer.

02:09 18 MR. McCLELLAN: This is about as close as I can
19 get, I think.

02:09 20 THE COURT: Perfect.

02:09 21 MR. McCLELLAN: In the Second Amended Complaint,
22 plaintiffs did not allege that there was any, uh, misleading
23 with respect to the anti-assignment provision in the, uh --
24 in the plan associated with Patient 138. As a result, uh,
25 my client, along with several other *(sic)* in -- others in

1 this case -- I think 26 in total, who, as Ms. Ridley
2 mentioned are identified in Exhibit B to the -- uh,
3 Exhibit C to the Motion -- *(unreportable)*.

02:10 4 THE COURT: My court reporter lost you on
5 realtime. So let the record reflect, if we don't have a
6 clear record, that the court reporter's doing her best to
7 accurately take this record.

02:10 8 MR. McCLELLAN: I -- I will keep working on
9 speaking as slowly as I can.

02:10 10 As Ms. Ridley noted, and also as included in
11 Exhibit C to the Motion to Dismiss, there are 26 other -- 26
12 total defendants who are in this group.

02:10 13 In plaintiff's Opposition to the Motion to
14 Dismiss, they note that, given the Court's prior rulings,
15 uh, there are no live claims against these 21 defendants.
16 Uh, given that fact, I believe that it would be appropriate
17 for the Court to enter an order to dismiss without prejudice
18 and not grant leave to amend with respect --

02:10 19 THE COURT: I understand that.

02:10 20 I'm speaking broadly now. Especially if MedLink
21 is allowed to be amended and added. Okay?

02:11 22 MR. McCLELLAN: That's all I have to say.

02:11 23 THE COURT: Counsel, thank you.

02:11 24 Any other counsel?

02:11 25 Okay. That's been two rounds -- right? -- for

1 defendants. Are you satisfied? There's no time clock.

2 This is the second round. All right, Counsel?

02:11 3 And let's start with just a discussion about some
4 of the concerns I might have so you can respond --

02:11 5 MR. MAHER: Absolutely.

02:11 6 THE COURT: -- specifically, and then I give you
7 the lectern.

02:11 8 MR. MAHER: Yes, sir.

02:11 9 **QUESTIONS BY THE COURT**

02:11 10 THE COURT: The first is that, although you note
11 that you don't have the policy, the argument from the
12 defendants is that, if you truly are an assignee, then you
13 should have, in an assignment relationship, access to that
14 policy.

02:12 15 And your response?

02:12 16 MR. MAHER: Well, Your Honor, just practically
17 speaking --

02:12 18 THE COURT: Now take your time with this. I love
19 lawyers who dance around the head of the pin. You might
20 want to talk to your co-counsel, who's very able, and think
21 this out. But massive words have no effect. Think very
22 carefully and succinctly about your answer 'cause there's no
23 time clock here.

02:12 24 But obfuscation, like a mushy Complaint, might
25 meet with disapproval. So take your time with this.

02:12 1 **RESPONSE BY MR. MAHER**

02:12 2 MR. MAHER: Well, I have two levels of analysis in
3 response.

02:12 4 THE COURT: Okay.

02:12 5 MR. MAHER: The first is, as a practical matter,
6 we could not get our hands on the Complaint -- on -- excuse
7 me. We could not get our hands on the plans.

02:12 8 THE COURT: Then why are you an assignee? In
9 other words, in an assignment relationship --

02:13 10 MR. MAHER: Um-hm.

02:13 11 THE COURT: -- I can get my hands usually, as the
12 assignee, on that contract.

02:13 13 MR. MAHER: Well, if the -- it depends on the
14 scope of the assignment; right?

02:13 15 THE COURT: No. It depends upon accessibility.

02:13 16 MR. MAHER: So, in my view, the question about
17 plan access is one that needs to be answered with reference
18 to facts that describe how providers operate; right?

02:13 19 So when you're talking about, in contrast, the
20 beneficiary, ERISA assumes that they have the plan and they
21 allocate their resources -- their retirement planning, based
22 on what the plan says in the SPD.

02:13 23 But when you're dealing with a provider,
24 particularly a provider who's calling up a payer before
25 starting treatment -- remember, we contact the provider at

1 intake. And so it's not possible for us to obtain a plan
2 consistent with the timing that we need to meet to serve a
3 person who requires treatment in a timely fashion.

02:14 4 THE COURT: Okay. Now, what's your second
5 argument?

02:14 6 You said you had two-prongs.

02:14 7 MR. MAHER: Yeah, I -- I think -- well, the two
8 levels of analysis are that I don't think that an assignment
9 itself entitles you to have access to the plan.

02:14 10 THE COURT: Okay.

02:14 11 MR. MAHER: But even if it did, in the provider
12 setting, I don't see how that can be accomplished in a way
13 that's consistent with treating patients who are coming in
14 and need to be served in a reasonably short period.

02:14 15 THE COURT: Now, do you have time for a story?

02:14 16 MR. MAHER: Of course.

02:14 17 THE COURT: It's a great story.

02:14 18 **COMMENTARY BY THE COURT**

02:14 19 THE COURT: Back in 1999, I had a chicken case.
20 It involved a bunch of chickens and workers who were
21 apparently out in Riverside. That's a foreign country, but
22 it's -- I'm just kidding you. It's a county nextdoor to us.
23 And it involved the Department of "something or other" from
24 Washington DC, and it was worth about \$280,000 in overtime
25 wages.

02:15 1 And I had more people from the Department of
2 whatever -- chickens -- from Washington DC who came into
3 court, and I had the top-flight counsel from this
4 department. And after listening to this case for about
5 three or four days, I handed down a verdict of a couple
6 hundred thousand dollars. And I didn't see counsel for
7 about another two or three years and the case had concluded.

02:15 8 And they were back in court down the hallway, and
9 I happened to see them in the cafeteria and said, "How did I
10 have the very lead counsel on this chicken case?"

02:15 11 And they said, "You don't understand yet, Judge,
12 that when you write, it can have nationwide precedence; that
13 you weren't just deciding a minimal amount of \$280,000 and a
14 couple workers, you were setting precedence." And that was
15 my first introduction in 1998 or 1999 to the practical
16 issues that involve us as well as the law. Because there's
17 lots of law and different cases and different nuances that
18 face us when we write.

02:16 19 So now I want to assume two things: I'm writing
20 an opinion and I have two different kind of plaintiffs in
21 front of me, which I don't -- I think you're going to have a
22 good answer to this in just a moment, by the way; and if
23 not, I'll supply it for you, for your benefit -- but let's
24 assume that I had Mr. and Mrs. Smith. They are rather
25 lower-middle class. They don't have a lot of money in the

1 bank, and they're paid \$10,000. And now they're told that
2 to collect from the assignee who has payment of the \$10,000
3 that they need to pay their \$10,000 back because, otherwise,
4 it would be a double payment.

02:17 5 I can guarantee you that Mr. and Mrs. Smith
6 probably spent that \$10,000 that they received. And it's
7 very difficult with the average American to come up with
8 money, let's say to pay back the entities so that the money
9 then comes from the new assignee.

02:17 10 Now, your response should be, *You know, Judge, in*
11 *this case, we don't have that situation. We've got*
12 *sophisticated defendants who have the purse, if you will, to*
13 *pay the money, than to have it come through the assignee*
14 *back to them. Okay? I understand that argument.*

02:18 15 And if I held that, I have to be very of careful
16 about how I write that because it can't be precedent
17 sweeping and it cannot affect the poor. It has to be fact
18 specific. So that's one concern I have: If I was to craft
19 this, how I would craft it.

02:18 20 The second concern I have is it strikes me that
21 these assignments were never designed to be a commodity;
22 that I'm very, very concerned that this turns into a
23 commodity that I don't believe ERISA ever intended.

02:18 24 Now, Congressional intent is not a good place for
25 any court to go. Okay? So when you address me, there's a

1 little bit of practicality involved because, as you are
2 quoting the law, it seems to be, at least in the Ninth
3 Circuit -- and unlike the Fourth and Eleventh -- and I think
4 that that's the split; I could be wrong on the district --
5 but the Ninth Circuit law doesn't strike in your favor.

02:19 6 So now I give you the lectern and as much time as
7 you'd like.

02:19 8 **RESPONSE BY MR. MAHER**

02:19 9 MR. MAHER: So, Your Honor, thank you. That's
10 helpful in focusing the things I'd like to say as I have
11 this opportunity standing before you.

02:19 12 THE COURT: And, by the way, you -- knowing that
13 I'm hinting that if in fact you do not prevail on the
14 motion, that I may allow an amendment. Because MedLink's
15 inclusion, which you're trying to get in now, in a sense --
16 but I haven't allowed you to amend yet -- I think you're
17 kind of waiting to see what I do now, and I would expect an
18 amendment. And probably in the Ninth Circuit with our
19 liberality it would meet with approval.

02:19 20 But we also know that we're no longer pleading "on
21 information and belief" to save us time because, if I go
22 through that again, there won't be a fourth opportunity;
23 right?

02:19 24 MR. MAHER: Well, I have a question on that -- I
25 agree, but I have a question about that.

02:19 1 THE COURT: Good.

02:19 2 Your question?

02:19 3 MR. MAHER: Well, I understand why

4 "information/belief" is not appropriate to matters that

5 within your knowledge, but "information/belief "-- under

6 the -- under black letter law is appropriate when you're

7 pleading to -- as to something that's in the knowledge of

8 the other party.

02:20 9 THE COURT: Counsel, all I can do is say,

10 "Welcome," and you'll do what you want.

02:20 11 MR. MAHER: *(Laughs.)*

02:20 12 THE COURT: Now your argument.

02:20 13 MR. MAHER: Okay.

02:20 14 Um, so, Your Honor, with respect to the question

15 of you writing a careful opinion, um, about what it means in

16 a case like this to not honor an assignment, um, I think

17 with --

02:20 18 THE COURT: No, no.

02:20 19 Whether there even was a proper assignment. It's

20 not honoring an assignment.

02:20 21 MR. MAHER: I see.

02:20 22 THE COURT: Whether there was even a proper

23 assignment, especially under ERISA. I can understand other

24 factual situations with --

02:20 25 MR. MAHER: Okay.

02:20 1 THE COURT: -- an assigner and assignee. I
2 understand that.

02:20 3 But here, this commodity is causing me a
4 tremendous amount of difficulty.

02:20 5 MR. MAHER: Are we just speaking about the MedLink
6 assignments? Are we the Sovereign assignments at large?

02:20 7 THE COURT: Both.

02:20 8 MR. MAHER: Okay.

02:20 9 THE COURT: In other words, I don't want you
10 caught flatfooted. The MedLink assignments in the future
11 may not have the same concern. They may cure part of your
12 problems. I don't know yet. That's not fair to the
13 defendants, and I'd want them to address the Court if I
14 allowed the amendment. We'll get to that.

02:21 15 MR. MAHER: So, Your Honor, in my view -- I
16 have -- I -- maybe the misfortune of having dealt with ERISA
17 cases for over a decade.

02:21 18 THE COURT: Yeah, me too. I can second-story you.
19 Probably 20 years now.

02:21 20 MR. MAHER: *(Laughs.)*

02:21 21 THE COURT: So your wisdom is probably upped by my
22 wisdom. So what else?

02:21 23 MR. MAHER: ERISA does not bar assignments in the
24 welfare-plan setting; and the reason is because it's
25 intended that the assignments can be used by providers to

1 promote access to care for patients. Sovereign's
2 assignments, the ones that are held in its own name, um, are
3 a classic example of those type of assignments.

02:21 4 I mean, Sovereign does not wanna be in a position
5 of demanding from people who come in, uh, that they pony up
6 a bunch'a money. So it "get" an assignment so that it can
7 then, after the fact, operate with -- insurance company.
8 It -- it's -- falls squarely within -- *(unreportable)*.

02:21 9 *(Court reporter requests clarification for the*
10 *record.)*

02:21 11 THE COURT: Just a minute. We lost you.

02:21 12 Did you notice you didn't have a record? Do you
13 want to look at realtime?

02:22 14 MR. MAHER: I think I should just speak more
15 slowly. I'll take your word for it.

02:22 16 THE COURT: No, no, no. I want to read back to
17 you what we have. It's a great lesson in terms of you
18 perfecting a record.

02:22 19 *(Realtime read by the Court.)*

02:22 20 THE COURT: That's what Debbie literally wrote.
21 That's what you're going to have as a record.

02:22 22 MR. MAHER: Fair enough. Let me restate that.

02:22 23 The assignments that Sovereign obtains are the
24 classic example of the assignments that the Ninth Circuit
25 and every Circuit has said are valid under ERISA which,

1 itself, contains no prohibition on welfare plan assignments.

02:22 2 Specifically, Sovereign does not want to be in the
3 position of, as a provider, demanding that people pony up a
4 significant amount of money before receiving care when they
5 can obtain an assignment that allows Sovereign, an
6 experienced party, to communicate with insurance companies
7 and ensure that payment is made and that the patient doesn't
8 have to worry about it.

02:23 9 THE COURT: Fair enough.

02:23 10 MR. MAHER: That's the idea behind Sovereign's
11 assignments.

02:23 12 Now, I would like with your permission to briefly
13 speak to MedLink. Because MedLink actually does provide
14 services, it does provide treatment, and it has assigned all
15 of its assignments to Sovereign.

02:23 16 I realize that that fact is not the fact that
17 we're relying on, but I'm -- I'm telling you that as an
18 officer of the court. Because I can add MedLink. I can ask
19 them to join, and I'm confident they will. But I can also
20 plead additional facts to the extent that there's any
21 confusion about whether or not MedLink and Sovereign are
22 anything like the fellow in *Simon*. Because they're not.
23 They're not using assignments as commodities. And if that's
24 the inquiry, they pass it.

02:24 25 So, uh, if, you know, Your Honor, I overlooked

1 responding to something that you've asked me, please
2 interject and demand an answer, 'cause I'm happy to give
3 them. But I did wanna do -- excuse me. I did wanna give my
4 friend Eileen the courtesy of responding to the arguments
5 that she made when she was up here just a moment ago.

02:25 6 So my friend first talked about Count One, the
7 claim against plans that don't have anti-assignment
8 provisions in there. And she said, "Well, that's not what
9 the claim actually says." But I -- with respect, I don't
10 follow her argument because, if you look -- I apologize --
11 if you look, Your Honor, at Paragraph 279 of the Complaint,
12 it says,

02:25 13 "Here, plaintiff's seek relief against
14 any defendant who is associated with an
15 ERISA plan that does not by its own
16 terms contain an anti-assignment
17 provision enforceable against
18 plaintiffs."

02:25 19 There are two reasons an anti-assignment provision
20 is not enforceable against plaintiffs. One is if it's
21 absent from the plan entirely. There are several plans in
22 this case that have no anti-assignment language at all of
23 any type. However, an anti-assignment provision is also not
24 enforceable if it is either written in a way that does not
25 reach providers like Sovereign, or if it's contained in a

1 document that is not part of the plan.

02:26 2 So every defendant in Count One either lacks an
3 anti-assignment provision totally, has an anti-assignment
4 provision that dis -- does not reach providers, or has an
5 anti-assignment provision that is in a document that is not
6 part of the plan. So I don't understand what defendant's
7 objection to that is.

02:26 8 Obviously, I understand they want to contest the
9 facts, and they'll do that subsequently; but at the
10 pleadings, I don't follow their objection.

02:27 11 Now, again, defendants train their fire on
12 Count Two and the other counts which hinge on
13 misrepresentations. And their central complaint -- pardon
14 the pun -- their central complaint that we did not give them
15 enough information.

02:27 16 Now, I realize, Your Honor, that the patient
17 appendixes all begin with "upon information and belief," and
18 I'munna talk about that in just a second. But they complain
19 we don't give them enough information.

02:27 20 I don't agree at all, and here's why. Here's what
21 we give them. We told them, when we called them, the
22 patient who was treated -- sorry -- when the patient was
23 treated -- that we asked them about assignments and that
24 they told us there were assignments, and that the call we
25 made was on the provider hotline, and we gave the dates of

1 treatment. So there's nothing about what we're saying that
2 they cannot investigate and respond to factually.

02:28 3 Their big complaint is that sometimes we did not
4 know whether or not the home "Blue" or the host "Blue"
5 answered the call. Blue Cross uses "home Blues" and "host
6 Blues," as our Complaint explains. But who answered the
7 call is in their possession, not ours.

02:28 8 What we know is that we called the provider
9 hotline that they held out for us to call. So I'm not sure
10 that I'm obligated to name which of the "Blues" answered the
11 phone, when they have the information and I don't, and I've
12 already told them the time, the date, and the who.

02:29 13 THE COURT: You are if you're the proper assignee.
14 And there's the initial threshold question, whether you
15 really stand in an assignor-assignee relationship. And,
16 therefore, you're a sophisticated entity, just as they are.
17 You claim, you know, obliviousness or inability or
18 incapacity to understand the contract or the plan.

02:29 19 My concern that I've voiced now for the second
20 time is it doesn't seem then to place you in the proper role
21 of an assignee.

02:29 22 MR. MAHER: With all due respect, Your Honor, I
23 think --

02:29 24 THE COURT: Oh, that means you have no respect, so
25 just your argument.

02:29 1 MR. MAHER: Well, I do have respect, so I insist
2 on saying it.

02:29 3 THE COURT: It's one of those peculiarities that
4 drives me absolutely crazy.

02:30 5 MR. MAHER: Fair enough.

02:30 6 In my view, the scope of the assignment does not
7 relate to what information we could've practically been
8 expected to obtain when interfacing with insurance
9 companies, given how the industry works.

02:30 10 However, virtually everything else in the
11 appendices that we've pled is not information; it's belief.
12 It's something that we can amend to eliminate, um, to -- to
13 satisfy, um -- a desire to clarify the allegations that are
14 being made.

02:30 15 Because we have a process and we have records and
16 we do it the same each time, we can, to the extent
17 necessary, strike "information and belief" largely from our
18 Complaint. But, again, I think there are some things that
19 are beyond our ken.

02:30 20 So I wanted to return to something that my friend
21 had said about Count Two. She said Count Two seeks relief
22 under 502(a)(1)(B), and 502(a)(1)(B) does not permit
23 reformation or estoppel.

02:31 24 THE COURT: Okay.

02:31 25 MR. MAHER: That's not what the Count says. The

1 Count does not allege that we seek relief under
2 502(a)(1)(B). It alleges facts that permit us to recover
3 under ERISA. The remedial provision of ERISA is 502. And
4 we specify the basis on which we want relief, so --

02:31 5 THE COURT: She points to the third section. She
6 points to 501(a)(3), I think, doesn't she?

02:31 7 MR. MAHER: She does. But we are, on Count Two,
8 seeking relief under (a)(3), but we're not obligated to say
9 the words "(a)(3)" in the Complaint because reformation and
10 estoppel lie under (a)(3). And we're using (a)(3) to
11 advance those theories to obtain benefits -- the monetary
12 value of benefits. That's why we think Form A covers it --
13 we were using (a)(3) to 'tain some relief that wasn't
14 benefits, uh, then it would be different scenario, but we're
15 not. *(Verbatim.)* We are using (a)(3) to "reform" the plan
16 to get paid or "stop" the plan to get paid.

02:32 17 THE COURT: Okay. Fair enough.

02:32 18 MR. MAHER: So, uh, my friend said some other
19 things that I disagree with, but I'm not gonna add any more
20 because I think --

02:32 21 THE COURT: Oh, no, no. Heap it on her. Don't
22 worry about that.

02:32 23 MR. MAHER: *(Laughs.)*

02:32 24 THE COURT: She's not afraid of you.

02:32 25 MR. MAHER: No, she isn't. She's a toughy. But

1 to spare her, one, the sound of my voice -- which I think is
2 quite a gift...

02:32 3 *(Laughter in the courtroom.)*

02:32 4 MR. MAHER: My friend said, "Look, reformation
5 doesn't reach post-plan statements." On that, our positions
6 are clear: We disagree. We advert to the briefs, as do
7 they. But we, of course, don't concede.

02:32 8 Now, she made an argument about greater rights.
9 She says it can't be that if you're an assignee you can seek
10 estoppel when the beneficiary can't seek estoppel if the
11 plan's unambiguous -- if the plan is am- -- unambiguous.
12 She says, "Look, that means you, as assignee, have broader
13 rights."

02:33 14 That's not right. We have the same right. We
15 just have to show reasonable reliance in a different way.
16 And here is where I want to address your question, which is,
17 uh, *I'm a District Judge in the Ninth Circuit. Perhaps I*
18 *should follow Ninth Circuit authority.*

02:33 19 Now, of course, I agree with that: You should and
20 you must and you will. But I think the Ninth Circuit's
21 opinions need to be read very carefully on this subject
22 because, upon inspection, the conditions that defendants
23 want to impose are not appropriate in these circumstances.

02:34 24 Now, one has to do with access to the plan. And
25 Your Honor and I have already gone back and forth so you

1 know my position.

02:34 2 THE COURT: Sure.

02:34 3 MR. MAHER: The other is with respect to a
4 condition -- excuse me -- it's with respect to the Ninth
5 Circuit's observation that the reason they don't like
6 estoppel claims -- again, made by beneficiary -- the reason
7 that they don't like estoppel --

02:34 8 *(Court reporter requests clarification for the*
9 *record.)*

02:34 10 MR. MAHER: The reason they don't like estoppel
11 claims, especially by beneficiaries, is because an estoppel
12 claim by a beneficiary means the beneficiary is seeking
13 money that is more than they are entitled to under the plan.

02:34 14 We are not seeking that. We are seeking the money
15 that the beneficiary was due; that it be sent to the right
16 address. So there's no concern that our claims, if they
17 proceed, are going to deplete plan assets. That's an
18 important distinction. That is another reason, in addition
19 to not having access to the plan, why the *Gabriel* case does
20 not restrict you from allowing our claims to proceed.

02:35 21 THE COURT: And, as a practical matter, if you
22 didn't prevail, it would allow, from your perspective, this
23 conduct to continue.

02:35 24 MR. MAHER: Yes, sir.

02:35 25 THE COURT: And you don't have the situation that

1 I presented to you of having an unsophisticated or a poor
2 party who, as a practical matter, is having to give back
3 money that they may have spent.

02:36 4 MR. MAHER: Correct. We're not unsophisticated --

02:36 5 THE COURT: Right.

02:36 6 MR. MAHER: -- but we are --

02:36 7 THE COURT: So, in other words, the entity that
8 received this, when I had the double-payment problem
9 presented to me -- you have a strong argument that *Judge,*
10 *this can be paid back. And it can come through the proper*
11 *channel, the assignee, for payment.*

02:36 12 MR. MAHER: Well, it would come from Blue Cross;
13 right.

02:36 14 THE COURT: Right.

02:36 15 MR. MAHER: But, Your Honor, I feel like I need to
16 make a pleading point; which is, whether our claims are
17 cognizable as a matter of law does not depend, in my view,
18 on any defense that may be made as to the amount of moneys
19 that have, in fact, been collected. Now --

02:36 20 THE COURT: I --

02:36 21 MR. MAHER: -- as you know, though, we haven't
22 actually collected all of the money. Right? So some of it
23 would just be -- all right -- um, and it's not even clear
24 Blue Cross played it -- paid it to the patients, so -- so we
25 don't even know if there's been a double -- uh -- I'm

1 sorry -- let me say that slower.

02:37 2 THE COURT: Let me tell you what she's got.

02:37 3 *(Reads realtime.)*

02:37 4 THE COURT: You sound terrific.

02:37 5 *(Laughter in the courtroom.)*

02:37 6 MR. MAHER: No. That's terrible.

02:37 7 THE COURT: It's a great record.

02:37 8 MR. MAHER: *(Laughs.)*

02:37 9 THE COURT: It's a great record.

02:37 10 MR. MAHER: So -- so, Your Honor, to restate my

11 point, in my view, the degree to which the moneys have

12 already been collected does not constitute a basis to

13 dismiss on the pleadings --

02:37 14 THE COURT: Okay.

02:37 15 MR. MAHER: -- a claim that you had a valid

16 assignment and it was not honored 'cause the money went

17 somewhere else.

02:37 18 Also, in this case, we haven't fully collected.

19 And so, to the extent that matters, that's the position

20 we're in.

02:38 21 THE COURT: Okay.

02:38 22 MR. MAHER: Okay. So I wanted to address the last

23 two things.

02:38 24 THE COURT: And take your time. Just know that in

25 22 minutes I have to take a cross-nation phone call.

02:38 1 MR. MAHER: Of course.

02:38 2 THE COURT: And so, you know, I don't want you in
3 a box, but come back and see me at 5:00. Okay?

02:38 4 MR. MAHER: Under 5 minutes.

02:38 5 THE COURT: No, no. You're not being pushed.
6 Trust me. I've got all the time and I'll stay late.

02:38 7 MR. MAHER: My friend said that under Count Three
8 we needed to allege a statute to qualify for the unlawful
9 prong. The cases say differently. We cite them in our
10 brief.

02:38 11 My friend challenged the application of *Bell*. But
12 reading *Bell* and reading the Supreme Court cases it invokes,
13 it makes clear that there is no obligation that a UCL
14 claimant be a competitor or a consumer.

02:39 15 As for Count Four, that count pleads facts that
16 permit relief under a variety of legal theories, all of
17 which we explicitly pled in the Complaint. And so I don't
18 see what grounds they have to object.

02:39 19 Finally, I wanted to close by making clear that
20 the example I invoked in my previous remarks about a fake
21 policy being ginned up and sent to providers, I was not
22 suggesting that the defendants did that. And when I later
23 said, "We're not talking about fraud like that," I was --
24 wanted to make clear that example, as fraud, is not what
25 we're saying.

02:39 1 THE COURT: Sure.

02:39 2 MR. MAHER: Okay? That's all I mean about that
3 example and fraud. We're not accusing 'em of ginning up
4 fake documents, like I said.

02:40 5 Okay. With that, Your Honor, thank you.

02:40 6 Thank you.

02:40 7 THE COURT: Let me say to all of you for just a
8 moment that you're delightful. The briefing's been
9 excellent and you -- each side, each party has my
10 compliments about that.

02:40 11 And I know that when I was practicing, as soon as
12 I walked out the door, I knew that if I would've said one
13 more sentence that I forgot to say, that that judge would've
14 given me a better result. So here's the surprise:

02:40 15 One last sentence on behalf of each of you, or one
16 last paragraph. What have you forgotten? What do you
17 believe is a salient point that you've either forgotten or
18 you'd like to reemphasize to the Court on the defense side
19 and the plaintiff's side? And you can do that succinctly.

02:40 20 **FINAL STATEMENT BY MS. RIDLEY**

02:41 21 MS. RIDLEY: I think the one point I'd like to
22 raise -- that actually a colleague of mine raised -- is, if
23 you took plaintiff's arguments regarding reformation to the
24 extreme, what you have is a situation where you have a
25 provider, uh -- and specifically regarding their claim, for

1 example, for reformation -- you have a provider suggesting
2 that if they are provided with what they allege to be a
3 misrepresentation in one instance, that that provider can
4 have a reformation changing the plan, which could be
5 national, without the member knowing it and without any
6 effect to a multitude of other providers that might be
7 providing different medical services.

02:41 8 And that doesn't seem to be how these plans are
9 envisioned or practically how they can be applied and
10 doesn't go to the basic heart of ERISA in trying to make
11 benefits available for members.

02:42 12 THE COURT: Okay. Counsel, on behalf of the
13 defense, is everybody else satisfied? You all are, as I get
14 nods.

02:42 15 Counsel, the one point that you'd like to
16 reemphasize or something that you might've missed?

02:42 17 **FINAL STATEMENT BY MR. MAHER**

02:42 18 MR. MAHER: Your Honor, if the facts of this
19 Complaint are taken as true, my clients had a process for
20 ascertaining the very thing that they were misled about.

02:42 21 Either there's a complaint issue, "It wasn't in
22 there." Okay? Or they were misled. It seems to me that it
23 cannot be that if someone is misled this many times in this
24 fashion that the law does not allow them relief.

02:42 25 THE COURT: All right. All right. Now, let's do

1 this. I have a feeling we may be getting together in the
2 future.

02:43 3 Some of you folks are from Los Angeles, which is a
4 pretty hard drive down. And I don't wanna catch you, you
5 know, at 5:00 o'clock going back in the traffic. Some of
6 you folks are from Texas or other parts in the country, in
7 the future maybe as far away as Michigan -- I think one of
8 the parties was on the line from Michigan or Chicago. I'm
9 more than happy, if it doesn't take time away from your
10 family, to schedule a hearing at 2:00 o'clock in the
11 afternoon.

02:43 12 In other words, if you're coming out from Texas,
13 coming up from Dallas, or whatever, if you fly up in the
14 morning, I'm happy to do that. But that means we go late.
15 In other words, if we don't finish, I'll try to carry on
16 into the evening -- with you complaining, of course, but...

02:43 17 *(Laughter in the courtroom.)*

02:43 18 THE COURT: -- carry on in the evening so I can
19 get you back on the plane, on the redeye special, or get you
20 back in one setting.

02:43 21 And if you, as a body, decide to do that, talk to
22 each other on both sides and tell me. Okay?

02:44 23 Otherwise, I know you flew in the night before and
24 you spent the night. That's very courteous. But if I can
25 give you back to your family, or some'a the folks from outta

1 town, let me know.

02:44 2 Also, for all the folks who I don't wish to speak
3 to but might still be on the phone listening, if they wish
4 to participate in the future, they have to be here. But
5 they're always welcome to listen.

02:44 6 And I wanna compliment you, Counsel, for setting
7 this up. If I would've known this before, I would've made
8 the effort with the initial arguments. But coming to me at
9 the last moment, I don't want five appearances, people
10 speaking who aren't here, phones getting clicked off.

02:44 11 So I just thank the parties on the phone who are
12 still present with us for their courteousness. But they're
13 always welcome to listen, if they don't make an appearance,
14 and it's just too cumbersome. Okay?

02:44 15 All right. Good night.

02:44 16 ALL IN UNISON: Thank you, Your Honor.

02:45 17 THE COURT: Oh, Counsel, we might have one more
18 question. Have a seat.

02:45 19 *(Exits the bench.)*

02:45 20 THE COURT: I think we've got one more question
21 that we raised. I'm gonna talk to you.

02:45 22 Have a seat.

02:48 23 *(Counsel comply.)*

02:48 24 *(Informal conversation held, not reported.)*

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FURTHER QUESTIONS BY THE COURT

THE COURT: All right. Then we're back on the record and all counsel are present.

And the Court has asked the following question informally and now I will state on the record:

The first question to all counsel is how does this Court have supplemental jurisdiction for non-ERISA claims?

And the second question I've asked counsel is the practical question: Should this Court exercise supplemental jurisdiction for plans with anti-assignment provisions?

And I alerted them to those questions -- so I have a record -- informally, a couple minutes ago so they could think about them. And I don't care which Counsel starts first. In fact, if we have time, I'll give you two rounds at it. Okay?

RESPONSE TO COURT'S QUESTIONS BY MR. MAHER

MR. MAHER: Your Honor, in response to your questions -- I'm gonna speak slowly -- in response to your question -- and correct me if I misinterpret it -- we believe that there's a common nucleus of operative fact here -- satisfies 1367(a); namely, this case is about misrepresentations made by the administrators/insurers of these plans, Blue Cross, concerning the unassignability of claims through the same method each time.

And so even if the one plan in question is not an

1 ERISA plan, it still arises out of the same series of
2 occurrences and transactions that normally define "common
3 nucleus of operative fact" under 1367(a).

02:50 4 THE COURT: Okay.

02:50 5 MR. MAHER: And I think it makes sense to exercise
6 supplemental jurisdiction -- although I would like more time
7 to think about it -- but I think it makes sense to exercise
8 supplemental jurisdiction because it will make the ultimate
9 litigation resolvable by whole. It'll be more efficient to
10 resolve everything at once.

02:50 11 THE COURT: Okay.

02:50 12 And, Counsel, what are your thoughts on behalf of
13 the defense?

02:50 14 **RESPONSE TO COURT'S QUESTIONS BY MS. RIDLEY**

02:50 15 MS. RIDLEY: Your Honor, for defendants, I think
16 we'd like to thank about it as well. I think it's obviously
17 discretionary.

02:50 18 Um, shockingly, I think we probably agree with the
19 assessment of plaintiffs --

02:50 20 THE COURT: Don't do that.

02:50 21 MS. RIDLEY: -- so something's wrong; right?
22 Something's horribly wrong.

02:50 23 *(Laughter in the courtroom.)*

02:51 24 MS. RIDLEY: I think, for example -- and I'm gonna
25 give the example within the Anthem and Anthem-related

1 entities.

02:51 2 There will be -- there are some who are, um --
3 clearly have ERISA plans, and the issue of the application
4 of the ande- (*verbatim.*)

02:51 5 (*Court reporter requests clarification for the*
6 *record.*)

02:51 7 MS. RIDLEY: -- the issue of the application of
8 the anti-assignment provision.

02:51 9 There are others that are not. And I -- the
10 prospect of having, candidly, two forums is not attractive
11 for a variety of reasons, not the least of which is
12 potentially having two courts dealing with the same issue --

02:51 13 THE COURT: Yeah.

02:51 14 MS. RIDLEY: -- potentially coming out with
15 different results.

02:51 16 THE COURT: I've dealt with it so many times. And
17 I've come out usually on the side of exercising supplemental
18 jurisdiction where possible. It just stopped conflicting
19 decisions, and scattering and dissipation of resources and
20 increased costs, and running from forum to forum.

02:52 21 So I think you've got a willing court to take on
22 that extra, you know, burden, in a sense, for the benefit of
23 the parties. Okay?

02:52 24 MS. RIDLEY: And for that, we thank you.

02:52 25 THE COURT: Well, think about it for a while.

1 And, if not, get back to me by carrier pigeon.

02:52 2 *(Laughter in the courtroom.)*

02:52 3 THE COURT: Thanks a lot, Counsel. Go on your
4 way.

02:52 5 *(Proceedings concluded at 2:52 p.m.)*

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CERTIFICATE

I hereby certify that pursuant to Section 753,
Title 28, United States Code, the foregoing is a true and
correct transcript of the stenographically reported
proceedings held in the above-entitled matter and that the
transcript page format is in conformance with the
regulations of the Judicial Conference of the United States.

Date: September 6, 2017

/s/ Debbie Gale

DEBBIE GALE, U.S. COURT REPORTER
CSR NO. 9472, RPR, CCRR