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12 **UNITED STATES DISTRICT COURT**

13 **NORTHERN DISTRICT OF CALIFORNIA**

14 RJ, as the representative of her beneficiary son
15 SJ; LW as the representative of her
16 beneficiary spouse MW; and, DS, an
individual, on behalf of themselves and all
others similarly situated,

17 *Plaintiffs,*

18 vs.

19 CIGNA HEALTH AND LIFE INSURANCE
COMPANY, and MULTIPLAN, INC.,

20 *Defendants.*

Case No. 5:20-cv-02255-EJD

**MULTIPLAN, INC.'S REPLY
MEMORANDUM IN FURTHER
SUPPORT OF ITS MOTION TO DISMISS
PLAINTIFFS' FIRST AMENDED
COMPLAINT**

Hearing Date: August 12, 2021

Time: 9:00 a.m.

Judge: Hon. Edward J. Davila

Courtroom: 4 (5th Floor)

Complaint Filed: April 2, 2020

FAC Filed: April 30, 2021

Trial date: Not set

1 Defendant MultiPlan, Inc. (“MultiPlan”) respectfully submits this Reply Memorandum¹ in
2 further support of its Motion to Dismiss the First Amended Class Action Complaint (“FAC”) filed
3 by Plaintiffs, RJ, as the representative of her beneficiary son, SJ; LW as the representative of her
4 beneficiary spouse, MW; and, DS an individual, on behalf of and all others similarly situated
5 (“Plaintiffs”), pursuant to Fed. R. Civ. P. 9(b) and 12(b)(6) [Rec. Doc. 75] (the “Motion”), and to
6 address the arguments made by Plaintiffs in their Response in Opposition to MultiPlan’s Motion to
7 Dismiss [Rec. Doc. 80] (the “Opposition” or “Pl. Opp.”), as follows:

8 INTRODUCTION

9 This Court dismissed Plaintiffs’ claim against MultiPlan for violation of RICO, 18 U.S.C. §
10 1962(c), based on a finding that “Plaintiff[s] fail[] to plead with particularity sufficient facts to
11 plausibly show that Cigna and Viant [MultiPlan’s affiliate, since dismissed as a party] knowingly
12 formed an enterprise to fraudulently underpay claims at below the UCR rates.” March 23, 2021
13 Order Granting in Part and Denying in Part Defendants’ Motions to Dismiss (“Dismissal Order”)
14 [Rec. Doc. 60], at pp. 13-14. The Court further held that “Plaintiffs’ RICO claim is subject to
15 dismissal for the further independent reason that the Complaint fails to allege predicate RICO acts.”
16 *Id.* at p. 14. The Court also found that Plaintiffs’ mail and wire fraud allegations failed to satisfy
17 Fed. R. Civ. P. 9(b). *Id.* at pp. 16-18.

18 Plaintiffs’ protestations to the contrary, the FAC does nothing to remedy these and the other
19 pleading inadequacies identified by the Court. Plaintiffs’ Opposition is unavailing in establishing
20 why Plaintiffs’ claim against MultiPlan in Count I of the FAC should proceed any further and merely
21 serves to reinforce the point MultiPlan has been making—that the FAC, just like Plaintiffs’ Initial
22 Complaint, fails to state a plausible claim against MultiPlan for violation of RICO, 18 U.S.C. §
23 1962(c). And, because there can be no claim for a RICO conspiracy in the absence of a substantive
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25 ¹ Unless otherwise indicated, all emphasis is added, all internal quotation marks and citations are
26 omitted, and this Reply Memorandum uses the same defined terms as set forth in MultiPlan’s
27 Memorandum of Points and Authorities in Support of its Motion to Dismiss Plaintiffs’ FAC (the
28 “Opening Memorandum”).

1 RICO clam, Count II of the FAC, alleging a violation of 18 U.S.C. § 1962(d), also must be
2 dismissed. Finally, Plaintiffs' claim for equitable relief fares no better; it too should be dismissed.

3 **STATEMENT OF ISSUES TO BE DECIDED (L.R. 7-4)**

4 The issues that are before the Court for decision in connection with MultiPlan's Motion to
5 Dismiss Plaintiffs' FAC are set forth in MultiPlan's Opening Memorandum.

6 **ARGUMENT**

7 **I. Plaintiff's RICO Claims Should Be Dismissed; Plaintiffs' Opposition Adds Nothing**
8 **To Remedy The Fact That The FAC Is Inadequately Pled.**

9 Plaintiffs argue strenuously that they have corrected the shortcomings in their pleading and
10 have now properly alleged a claim against MultiPlan under 18 U.S.C. §1962(c). They again suggest,
11 as they did in attempting in vain to defend the Initial Complaint, that: they have satisfied the
12 particularity requirement of Fed. R. Civ. P. 9(b); that they have met the plausibility requirement of
13 Fed. R. Civ. P. 8(a), as explained by *Twombly/Iqbal*; that they have properly alleged a RICO
14 enterprise; that they have properly spelled out the necessary predicate acts of racketeering and mail
15 and wire fraud; and that they have shown that they have RICO standing, based on proximate
16 causation. However, other than pointing to new allegations in the FAC that simply "name names"
17 of certain MultiPlan personnel, vaguely describe meetings and communications between Cigna and
18 MultiPlan, and then—without any other support—label those claims as evidence of fraud sufficient
19 to put MultiPlan on notice, Plaintiffs still have not satisfied the requirements of Rule 9(b) showing
20 "the who, what, when, where, and how of the fraud," Dismissal Order, at p. 4 (quoting *Vess v. Ciba-*
21 *Geigy Corp., USA*, 317 F.3d 1097, 1106 (9th Cir. 2003), and *Edwards v. Marin Park, Inc.*, 356 F.3d
22 1058, 1065–66 (9th Cir. 2004)). They still have not shown that the plausibility of their
23 characterization of MultiPlan's (and Cigna's) conduct as something other than legitimate cost-
24 containment activities pursuant to a routine commercial relationship, which this Court noted has
25 been "uniformly held [to be] insufficient to establish RICO liability." Dismissal Order, at p. 13 &

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1 n.5 (citing *Gardner v. Starkist Co.*, 418 F. Supp. 3d 443, 461 (N.D. Cal. 2019), and *Gomez v.*
2 *Gunthy-Renker, LLC*, 2015 WL 4270042, at * 8 (C.D. Cal. July 13, 2015), along with others).²

3 Plaintiffs also have not succeeded in pleading an association-in-fact enterprise because they
4 still have not shown a “common purpose to commit fraud.” Dismissal Order, at p. 14. Further, they
5 have done nothing to shore up their failure to identify predicate acts of racketeering and mail and
6 wire fraud, particularly with respect to the requisite showing of “specific intent to deceive or
7 defraud.” Dismissal Order, at pp. 14–18 (quoting *United States v. Miller*, 953 F.3d 1095, 1102 (9th
8 Cir. 2020)).³

9 Finally, although the issue was not addressed by the Court in its Dismissal Order, Plaintiffs
10 have not established RICO standing based on proximate causation, certainly insofar as MultiPlan is
11 concerned. Although Plaintiffs devote a significant portion of their Opposition to argue the point,
12 it remains the case that they cannot demonstrate the requisite causal link – that any conduct on the
13 part of MultiPlan “not only was a ‘but for’ cause of [their] injur[ies] but was the proximate cause as
14 well.” *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268 (1993). They cannot plausibly allege that
15 any conduct by MultiPlan—including, but not limited to, the OON letters⁴—“led directly to [their]
16 injuries,” *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 461 (2006), because there is no reliance that
17 resulted therefrom. Further, any actions undertaken by MultiPlan in this case, insofar as any steps
18 taken by Plaintiffs or any alleged injuries borne by them are concerned, are far “too remote” and

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20 _____
21 ² Plaintiffs attempt to shift the burden of plausibility from themselves, suggesting that it is MultiPlan
22 that is obligated to establish the “obvious alternative explanation” to Plaintiffs’ allegations of a
23 fraudulent scheme on the part of Defendants. Opposition, at pp. 5–6. However, the burden of
24 meeting the Rule 8(a) requirement of plausibility rests squarely on Plaintiffs.

25 ³ Indeed, the Court noted that Plaintiffs failed in this regard “especially [as to] Viant” in the Initial
26 Complaint, *see* Dismissal Order at p. 18; the FAC is no different as to MultiPlan.

27 ⁴ This is the designation used in the FAC; in Plaintiffs’ Opposition, they refer to this
28 correspondence—sent after the healthcare services at issue had been rendered—as PAD letters.

1 “indirect” to meet RICO’s proximate cause and standing requirements. *See Hemi Grp., LLC v. City*
2 *of New York*, 559 U.S. 1, 9 (2010).

3 In the end, Plaintiffs are stuck with the RICO allegations in the FAC, which have done
4 nothing to remedy the failings that MultiPlan pointed out in its Opening Memorandum. To mask
5 this, Plaintiffs continually cite portions of the decision of Judge Gonzalez-Rogers on defendants’
6 motions to dismiss plaintiffs’ *Second Amended Complaint* in *LD v. United Behav. Health*, No. 4:20-
7 CV-002254 YGR, 2020 WL 7432566 (N.D. Cal. Dec. 18, 2020). Judge Gonzalez-Rogers’ opinion
8 speaks for itself; however, its holdings with respect to the allegations in the most recent pleading
9 filed in that case, which involves different named plaintiffs, a different insurer/plan administrator,
10 different healthcare benefit plans, and different pricing methodology and outcomes, are not
11 dispositive in this case.

12 The FAC here must stand or fall on its own terms; Judge Gonzalez-Rogers’ analysis of a
13 different pleading, regardless of superficial similarities to the one before this Court, does not control
14 this Court’s obligation to review the plausibility of Plaintiffs’ allegations in the FAC in the light of
15 the Court’s own “judicial experience and common sense.” *Ashcroft v. Iqbal*, 566 U.S. 663, 679
16 (2009), quoted in *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir.
17 2014).

18 The Ninth Circuit held in *In re Century Aluminum Co. Secs. Litig.*, 729 F.3d 1104, 1108 (9th
19 Cir. 2013), that

20 when faced with two possible explanations, only one of which can be true and only
21 one of which results in liability, plaintiffs cannot offer allegations that are merely
22 consistent with their favored explanation but are also consistent with the alternative
23 explanation. Something more is needed, such as facts tending to exclude the
24 possibility that the alternative explanation is true, in order to render plaintiffs’
25 allegations plausible.

26 In that case, the Ninth Circuit found that the complaint established only a “possible” entitlement to
27 relief; therefore, the case was properly dismissed. The same result is mandated here. Plaintiffs have
28 alleged a fraudulent scheme based on their *interpretation* of the actual facts—facts which are
consistent with the “obvious alternative explanation” of MultiPlan’s and Cigna’s participating in a
legitimate commercial relationship to manage ever-increasing healthcare costs. There is nothing

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