UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MISSION TOXICOLOGY, LLC, et al.,

Plaintiffs,

v. **Case No. 5:17-CV-1016-JKP**

UNITEDHEALTHCARE INSURANCE COMPANY, et al., **(Consolidated with Case No. 5:18-CV-0347-JKP)**

Defendants.

MEMORANDUM OPINION AND ORDER

This consolidated action involving millions of dollars in alleged damages by both sides pits a group of related insurance entities against various entities performing lab services and other involved entities and individuals. The lead case of this consolidated action arises under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 et seq. Plaintiffs, Mission Toxicology, L.L.C. ("Mission") and Sun Clinical Laboratory, L.L.C. ("Sun Clinical") (collectively "Plaintiffs" or "the Labs"), therein seek to recover unpaid claims from Defendants (four entities related to United Healthcare (collectively "United Defendants" or "United"))[1] on behalf of Defendants' insureds. In the member case, two of the United Defendants in the lead case sue those two labs, other entities, and several individuals for various claims asserted under state law. The consolidated action has spawned several pending motions, two of which the Court addresses in this Memorandum Opinion and Order: (1) *United's Motion for Summary Judgment on the Labs' ERISA Benefits Claim* (ECF Nos. 170 (redacted) and 178 (unredacted and sealed)) and (2) *United's Motion to Strike Portions of the Declarations of Randy Dittmar and Lynn Murphy (Dkt. 186)* (ECF

[1] Although "United" refers collectively to multiple affiliates, the Court will generally refer to United in a singular sense as United does in its briefing.

No. 209).

The motions are fully briefed, including evidence submitted by both sides.[2] The Labs have responded to both the summary judgment motion, *see* ECF Nos. 185 (redacted), 193-1 (unredacted and sealed), and the motion to strike, *see* ECF Nos. 216 (redacted), 221-1 (unredacted and sealed). United has filed reply briefs (ECF Nos. 207 and 224) to support each motion.

I. BACKGROUND

In this action, the Labs assert a single claim against United under ERISA, 29 U.S.C. § 1132(a)(1)(B), "to recover benefits due to the assignee of the participants or beneficiaries of ERISA plans." *See* Pls.' Second Am. Compl. (ECF No. 28) ¶ 104. The Labs "act as ERISA beneficiaries by virtue of the assignment of benefits from the individual insureds who had contracts with United" and "therefore stand as beneficiaries under United plans and seek payment of claims owed under employee health and welfare benefit plans that fall within the scope of ERISA." *Id.* ¶ 9. Based upon the assignment from United's insureds, the Labs bring their ERISA claim against United to recover the insureds' benefits.[3] *Id.* ¶¶ 103-18. In an order denying a motion to dismiss, the Court previously set out a thorough background based upon the allegations of the Second Amended Complaint. *See* Order Denying Defs.' Mot. Dismiss (Dkt. # 47) (ECF No. 115). There is no reason to reiterate that background here.

[2] United filed an Appendix (ECF Nos. 171, 178-1 (sealed portion)) with its motion for summary judgment. The Labs have likewise supported their response with an Appendix (ECF Nos. 186 (redacted as to Exs. D through H; N through S; V; and NN through ZZ) and 193-2 (unredacted and sealed as to exhibits redacted in ECF No. 186)), which resulted in United's motion to strike Ex. W in its entirety, various specific pages of Ex. V, and various paragraphs of two declarations within the appendix. The Labs have also supported their response to the motion to strike with an Appendix (ECF Nos. 218 (redacted as to Ex. N2) and 221-2 (sealed version of Ex. N2).

[3] Although the Labs' response to the motion suggests that they might seek reimbursement as assignees of claims from a hospital and as assignees from insured members, they assert only the one claim in their Second Amended Complaint. "A claim not raised in the complaint but, rather, is raised only in response to a motion for summary judgment is not properly before the court." *See Cutrera v. Bd. of Sup'rs of La. State Univ.*, 429 F.3d 108, 113 (5th Cir. 2005). The Court thus has no occasion to consider such suggested assignment.

Like most cases, this one has both disputed and undisputed facts. One disputed aspect is the nature and existence of a "Lab Outreach Program" in which the Labs claim to have endeavored to assist vulnerable rural hospitals at the request of the Hospitals and their management company, People's Choice Hospital, LLC ("PCH"). United describes this program as made-up and fraudulent.

Of course, the summary judgment context requires the Court to view the facts in the light most favorable to the non-movant. Regardless of existence or nature of such a program, the parties do not dispute that the Labs are non-contracted (also known as out-of-network) providers that entered into arrangements with rural hospitals, Newman Memorial Hospital ("Newman") and Community Memorial Hospital ("Community" or "CMH") (collectively "the Hospitals"), which had in-network contracts with United. Further, the parties agree that, the Labs (or referred third-party laboratories) performed most laboratory testing, not the Hospitals. And they agree that, after such testing, Integrity Ancillary Management ("Integrity"), an entity formed by the owners of Sun Clinical (Dr. Michael Murphy) and of Mission (Jesse Saucedo), would submit claims for services allegedly provided by the Labs to beneficiaries of ERISA plans administered or insured by United on behalf of, and using the names and billing credentials, of the Hospitals. Although the submitted claim forms list the names and credentials of the Hospital providers rather than the Labs' names and credentials, the Labs provide declarations and deposition testimony that Integrity also submitted the claims on behalf of the Labs. United vigorously disputes that fact.

United's ERISA plans establish administrative remedies for members receiving an adverse benefit determination. These remedies include submitting an appeal within 180 days of a claim denial. With respect to service providers, United also has a two-step administrative remedy regarding denied claims – seeking reconsideration of the denial and appealing the decision. United

contends that the Labs have failed to exhaust their administrative remedies because they have neither submitted any claim nor any appeal at issue in this action. While recognizing that United's required administrative remedies "state what they state," the Labs dispute the factual assertion that they have not submitted any claims or appeals. And this dispute lies at the heart of United's motion for summary judgment. Furthermore, some of the Labs' evidentiary support is the crux of the motion to strike. Both motions are fully briefed and ripe for ruling. The Court will first address the motion to strike before considering the summary judgment motion.

II. MOTION TO STRIKE

Through its motion to strike, United attacks the Labs' evidentiary support on two fronts: (1) untimely disclosure relying on Fed. R. Civ. P. 26(a), 26(e), and 37(c)(1) and (2) inadmissible evidence. It seeks to strike Exhibit W entirely, specific pages of Exhibit V, and specific paragraphs of two submitted declarations – paragraphs 7, 8, 9, and 2 of a declaration from Randy Dittmar, an employee of Mission and Integrity who provided information technology ("IT") services on their behalf, and paragraphs 42 to 50 of a declaration from Lynn Murphy ("LM"), CEO of Integrity and wife of Dr. Murphy. Exhibit W is a spreadsheet Dittmar attaches to his declaration (ECF No. 186-4) that he created from notes of Integrity employees to identify thousands of claims denied by United. LM attaches Exhibit V to her declaration (ECF No. 186-2) while also relying on Exhibit W in some respects. Exhibit V consists of a few Fax cover pages that contain the word "appeal" and medical records that LM assembled.

"Prior to December 1, 2010, the proper method by which to attack an affidavit was by filing a motion to strike," but amendments to the Federal Rules of Civil Procedure changed that practice. *Cutting Underwater Techs. USA, Inc. v. Eni U.S. Operating Co.*, 671 F.3d 512, 515 (5th Cir. 2012) (per curiam). "As amended in December 2010, Fed. R. Civ. P. 56(c)(2) makes motions to strike unnecessary to challenge evidence presented in the summary judgment context." *Silo Rest. Inc. v.*

Allied Prop. & Cas. Ins. Co., 420 F. Supp. 3d 562, 569 (W.D. Tex. 2019) (quoting *Reitz v. City of Abilene*, No. 1:16-CV-0181-BL, 2018 WL 6181493, at *8 n.8 (N.D. Tex. Nov. 27, 2018)). Nevertheless, courts may strike presented evidence as a sanction under Fed. R. Civ. P. 37(c)(1) when circumstances warrant such a sanction. *Davidson v. AT&T Mobility, LLC*, No. 3:17-CV-0006-D, 2018 WL 1609756, at *1 (N.D. Tex. Apr. 3, 2018); *Campbell v. McMillin*, 83 F. Supp. 2d 761, 765 (S.D. Miss. 2000).

Whether to exclude evidence under Rule 37(c)(1) lies within the Court's sound discretion. *Primrose Operating Co. v. Nat'l Am. Ins. Co.*, 382 F.3d 546, 563 (5th Cir. 2004). Under Rule 37(c)(1), when "a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." While Rule 37(c)(1) is intended to provide "a strong inducement for disclosure of material" and "gives teeth to the Rule 26(a) disclosure requirements by forbidding, during any part of the case, the use of information required to be disclosed by Rule 26 that is not properly disclosed," courts may impose other appropriate sanctions in addition to or in lieu of the "self-executing" and "automatic" preclusion sanction. *Current v. Atochem N. Am., Inc.*, No. W-00-CA-332, 2001 WL 36101282, at *2 (W.D. Tex. Sept. 18, 2001) (quoting in part Fed. R. Civ. P. 37 advisory committee's note).

Rule 37(c)(1) sets out a two-step analytical process that starts with determining whether a party has failed to make a required disclosure or supplementation and, if so, whether that party has shown substantial justification for the failure or that the failure is harmless. "The party seeking Rule 37 sanctions bears the burden of showing that the opposing party failed to timely disclose information." *Coene v. 3M Co.*, 303 F.R.D. 32, 42 (W.D.N.Y. 2014). Once that burden is satisfied, Rule 37(c)(1) implicitly places the burden "on the party facing sanctions to prove harmlessness"

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