IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NORTH CYPRESS MEDICAL CENTER OPERATING CO., LTD. AND NORTH CYPRESS MEDICAL CENTER OPERATING COMPANY GP, LLC.	§ § § § §	
Plaintiffs,	§ §	
V.	§ §	**CIVIL ACTION NO. 4:09-CV-02556**
CIGNA HEALTHCARE AND CONNECTICUT GENERAL LIFE INSURANCE COMPANY	§ § § §	
Defendants.	§	

DEFENDANTS' RESPONSE IN OPPOSITION TO
PLAINTIFFS' MOTION TO DISMISS DEFENDANTS' COUNTERCLAIMS

LAW OFFICE OF ALAN W. HARRIS

Alan W. Harris
Attorney-in-charge
State Bar No. 09050800
Southern District ID No. 2171
325 N. St. Paul Street, Suite 2700
Dallas, Texas 75201
Telephone: (214) 965-8200
Telecopier: (214) 965-8209

COUNSEL FOR DEFENDANTS

TABLE OF CONTENTS

Page

INTRODUCTION..........1

ARGUMENT..........2

I. CIGNA'S CLAIMS ARE NOT PREEMPTED BY ERISA...........3

A. Cigna Could Not Have Brought Suit Under ERISA § 502(a)(3)..........4

B. Cigna's Claims Implicate Independent Legal Duties. 7

C. Cigna Must Have A Remedy To Recover Overpayments From NCMC..........9

II. CIGNA PLED ITS FRAUD CLAIM WITH PARTICULARITY. 10

III. CIGNA'S CLAIMS AGAINST DR. BEHAR ARE PROPER..........12

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Aetna Health Inc. v. Health Goals Chiropractic Center, Inc.,
No. 10-cv-5216, 2011 WL 1343047 (D.N.J. Apr. 7, 2011) 5, 8, 9

Aetna v. Davila,
542 U.S. 200 (2004) 4, 8

Ashcroft v. Iqbal,
129 U.S. 1937 (2009) 2, 3

Bell Atlantic Corp. v. Twombly,
550 U.S. 554 (2007) 2

Blue Cross & Blue Shield of Rhode Island v. Korsen,
746 F. Supp. 2d 375 (D.R.I. 2010) 11

Campbell v. *Wells Fargo Bank,*
781 F.2d 440 (5th Cir. 1980) 3

Castro v. United States,
560 F.3d 381, 386 (5th Cir. 2009), *rev'd en banc on other grounds*,
608 F.3d 266 (5th Cir. 2010) 3

Chevron Corp. v. Barrett,
No. 07-cv-3257, 2008 WL 2961778 (S.D. Tex. July 28, 2008) 7

Collins v. Morgan Stanley Dean Witter,
224 F.3d 496 (5th Cir. 2000) 2

Cooperative Ben. Adm'rs, Inc. v. Ogden,
367 F.3d 323 (5th Cir. 2004) 6, 7, 10

Cunningham v. *Dun & Bradstreet Plan Servs., Inc.*,
889 F. Supp. 932 (N.D. Miss. 1995) 11

Cuvillier v. Taylor,
503 F.3d 397 (5th Cir. 2007) 3

Fannie Mae v. U.S. Property Solutions, L.L.C.,
No. 08-cv-3588, 2009 WL 1968330 (S.D. Tex. July 6, 2009) 12

Fossen v. Blue Cross and Blue Shield of Montana, Inc.,
660 F.3d 1102 (9th Cir. 2011) 4

Franks v. Prudential Health Care Plan, Inc.,
164 F. Supp. 2d 865 (W.D. Tex. 2001) 9

Goss v. Firestone Polymers, LLC,
No. 04-cv-665, 2005 WL 1004717 (E.D. Tex. April 13, 2005)... 10

Great-West Life & Annuity Ins. Co. v. Knudson,
534 U.S. 204 (2002) 7, 8

Hansen v. Cont'l Ins. Co.,
940 F.2d 971 (5th Cir. 1991)... 11

Horizon Blue Cross Blue Shield of New Jersey v. East Brunswick Surgery Center,
623 F. Supp. 2d 568 (D.N.J. 2009) 5, 6

Lee v. E.I. DuPont de Nemours & Co.,
894 F.2d 755 (5th Cir. 1990)... 9

Lormand v. US Unwired, Inc.,
565 F.3d 228 (5th Cir. 2009)... 3

Reed v. Liberty Life Assur. Co. of Boston,
No. 10-cv-2664, 2010 WL 5173001 (S.D. Tex. Dec. 14, 2010)... 7

Scanlan v. Texas A&M University,
343 F.3d 533 (5th Cir. 2003)... 12

U.S. ex rel. Riley v. St. Luke's Episcopal Hosp.,
355 F.3d 370 (5th Cir. 2004)... 12

U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp.,
20 F. Supp. 2d 1017 (S.D. Tex. 1998) 13

UNUM Life Ins. Co. of Am. v. Long,
227 F. Supp. 2d 609 (N.D. Tex. 2002).. 10

STATUTES

29 U.S.C. § 1132.. 3

RULES

Fed. R. Civ. P. 12(b)(1).. 1

Fed. R. Civ. P. 12(b)(6)... 1, 2, 10

Fed. R. Civ. P. 16(b) 12

Fed. R. Civ. P. 8(a)(2).. 2

Fed. R. Civ. P. 9(b) 10, 11, 12

Defendants and Counterclaimants Connecticut General Life Insurance Company and CIGNA Healthcare of Texas (together, "Cigna") hereby submit this Response in Opposition to Plaintiffs and Counterclaim Defendants North Cypress Medical Center Operating Co., Ltd's and North Cypress Medical Center Operating Company GP, LLC's (together, "NCMC") Motion to Dismiss Defendants' Counterclaims and Memorandum of Law in Support Thereof, December 14, 2011 (D.E. 236) ("Motion").

INTRODUCTION

This dispute arises from false information that NCMC submits to Cigna when seeking reimbursements from Cigna's plans for NCMC's medical services. NCMC sued Cigna for reducing reimbursements based on NCMC's practice of "fee-forgiving" -- waiving some or all of the payments that Cigna plan members are required to make by their health plans. (*See* D.E. 110.) Although NCMC does not require Cigna plan members to pay large portions of NCMC's stated charges, NCMC routinely submits claims forms to Cigna demanding reimbursement based on the full amount of those stated charges, which it does not expect or intend to collect. Cigna brought its counterclaims against NCMC to recover overpayments that Cigna made based on NCMC's fraud.

In moving to dismiss Cigna's counterclaims pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), NCMC does not seriously refute that Cigna has adequately pled its claims against NCMC. Instead, it attempts to distract from its conduct through three unpersuasive arguments. First, it argues that Cigna's claims are preempted by ERISA, but Cigna could not have brought its counterclaims under ERISA and therefore they cannot be preempted. Second, NCMC asserts that Cigna has not pled its fraud claim with sufficient particularity, but Cigna has explained the basis of its claims in detail, and most of NCMC's arguments constitute an

improper attempt to litigate the merits of Cigna's allegations in a Rule 12(b)(6) motion. Redacted

ARGUMENT

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), Cigna is required to provide only "a short and plain statement of the claim" in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555 (2007); *see also*, *Ashcroft v. Iqbal*, 129 U.S. 1937, 1949 (2009); Fed. R. Civ. P. 8(a)(2). Cigna's allegations need to contain only "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570). "The complaint must be liberally construed in favor of the plaintiff, and all facts pleaded in the complaint must be taken as true." *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000); *see also, Iqbal*, 129 S. Ct. at 1950; *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007); *Campbell* v. *Wells Fargo Bank,* 781 F.2d 440, 442 (5th Cir. 1980). "Motions to dismiss under Rule 12(b)(6) are 'viewed with disfavor and are rarely granted.'" *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 232 (5th Cir. 2009) (internal citation omitted); *see also, Castro v. United States*, 560 F.3d 381, 386 (5th Cir. 2009), *rev'd en banc on other grounds*, 608 F.3d 266 (5th Cir. 2010) ("A motion under 12(b)(1) should be granted only if it appears certain that the plaintiff cannot prove a plausible set of facts that establish subject-matter jurisdiction.")

I. CIGNA'S CLAIMS ARE NOT PREEMPTED BY ERISA.

NCMC's primary ERISA preemption argument is based on the false premise that Cigna's counterclaims are the equivalent of NCMC's own claims. (Motion at 1-2.) NCMC argues that if its own claims are preempted because they depend on interpreting Cigna's ERISA plans, then Cigna's counterclaims must likewise be preempted. But this argument ignores the fundamental difference between the parties' claims. NCMC is suing Cigna as its patients' assignee for allegedly breaching Cigna's ERISA plans. Because Cigna cannot be liable unless it breached the plans, NCMC's claims depend on interpreting those plans and hence are preempted. Cigna, by contrast, is suing NCMC for fraud, negligent misrepresentation, and unjust enrichment. If NCMC committed the acts underlying these claims, then NCMC is liable based on its own conduct, regardless of what Cigna's plans say. Interpreting Cigna's plans might prove relevant in determining Cigna's damages, but it is not necessary to show NCMC's liability. Hence, NCMC's assertion that Cigna's counterclaims "arise out of" its plans is incorrect. (Motion at 2.)

That Cigna's counterclaims are not preempted becomes clear when one applies the two-part ERISA preemption test that the Supreme Court set forth in *Aetna v. Davila*, 542 U.S. 200 (2004). Under the *Davila* test, ERISA preempts a state law claim only where ***both*** "[1] an individual, at some point in time, could have brought his claim under ERISA § 502(a)(1)(B), ***and*** [2] where there is no other independent legal duty that is implicated by a defendant's actions." *Id.* at 210 (emphasis added). Of course, a claim under ERISA § 502(a)(1)(B) may be brought only by a "participant" or "beneficiary," 29 U.S.C. § 1132, and Cigna is neither. So the only civil enforcement section of ERISA under which Cigna could have conceivably acted is § 502(a)(3), which allows a "fiduciary" to seek equitable relief. *See, generally*, *Fossen v. Blue Cross and Blue Shield of Montana, Inc.*, 660 F.3d 1102, 1107 (9th Cir. 2011) (applying *Davila* test to ERISA § 502(a)(3)). But Cigna's claims are not preempted by ERISA because Cigna could not

have brought its counterclaims under § 502(a)(3) and because its counterclaims implicate independent legal duties.

A. Cigna Could Not Have Brought Suit Under ERISA § 502(a)(3).

ERISA § 502(a)(3) allows a "fiduciary" to bring claims for equitable relief. But Cigna could not have brought suit under the statute for two reasons: (1) it is not acting as a fiduciary in bringing its counterclaims, and (2) Cigna's counterclaims seek legal relief.

1. Cigna is not acting as a fiduciary in bringing its counterclaims.

The fact that a claims administrator might act as a fiduciary in some circumstances does not mean that it necessarily acts as a fiduciary in bringing a claim to recover funds from an out-of-network provider.[1] For example, in *Horizon Blue Cross Blue Shield of New Jersey v. East Brunswick Surgery Center*, Horizon brought state law claims against a provider that, like NCMC, was engaged in fee-forgiving. 623 F. Supp. 2d 568, 575 (D.N.J. 2009). Like NCMC, the provider argued that ERISA preempted the claims, but the court held that claims were not preempted because Horizon was not acting as a fiduciary. The court stated that "[Horizon's] state law claims do not seek to recover benefits, obtain declaratory judgment that a plan participant is entitled to benefits, or enjoin an improper refusal to pay benefits, claims traditionally subsumed by ERISA's panoptic enforcement provision." *Id.* It added: "Defendants cite to, and the Court is aware of, no case which has held that a health care plan, similarly situated to Plaintiff, which seeks damages from the overpayment of benefits to a health care provider arising from statutory

---

[1] NCMC mistakenly asserts that Cigna contradicts itself by asserting that it is a "claims administrator" while denying that it is a "plan administrator" under ERISA. (Motion at 11, n. 5.) Because Cigna administers benefit claims under its benefit plans, it is a claims administrator of those plans. But because Cigna is not the administrator of most of its plans as the term "administrator" is defined in the ERISA statute, it is not a "plan administrator."

and common law fraud claims, is acting in a way that enforces the rights of a patient-assignor so as to subject those claims to ERISA's enforcement mechanisms." *Id.* at 576.

The court reached the same result in a similar fee-forgiving case, *Aetna Health Inc. v. Health Goals Chiropractic Center, Inc.,* No. 10-cv-5216, 2011 WL 1343047, at *4 (D.N.J. Apr. 7, 2011) (Aetna's state law claims to recover overpayments from an out-of-network provider were not preempted because a "plaintiff that brings a claim on behalf of itself does not seek to enforce the terms of a plan and, therefore, does not act as a fiduciary.") NCMC does not point to a single case in which a similarly situated managed care company seeking to recover overpayments from an out-of-network provider based on fraud was deemed to be acting as an ERISA fiduciary. Instead, NCMC tries to preemptively distinguish *Aetna* and *Horizon* by arguing that the managed care companies in those cases brought suit under New Jersey's Insurance Fraud Prevention Act, which, in NCMC's telling, provided an "independent legal basis" for suits that does not exist in Texas, which does not have an equivalent statute. (Motion at 12-13.) This argument is incorrect. The New Jersey statute was at issue in only one of these two cases, *Horizon*, and even there it was only one of several counts brought by the managed care company against the provider. The *Horizon* court found that ERISA did not preempt any of these claims, including common law fraud and negligent misrepresentation claims similar to the claims that Cigna brings here. *Horizon*, 623 F. Supp. 2d at 578. There is nothing in *Horizon* suggesting that its outcome turned on unique aspects of New Jersey law or that otherwise detracts from its central holding that a managed care company suing to recover overpayments from a non-network provider does not act as a fiduciary.

2. Cigna's counterclaims seek legal relief.

Even if Cigna were acting as a fiduciary in bringing its counterclaims, § 502(a)(3) allows a fiduciary to seek only equitable relief. But Cigna is seeking money damages from NCMC's

general assets, which is "the classic form of ***legal*** relief." *Cooperative Ben. Adm'rs, Inc. v. Ogden*, 367 F.3d 323, 332 (5th Cir. 2004) (Congress specifically chose not to give fiduciaries the ability to sue for money damages, only equitable remedies) (emphasis in original). The only remedies that courts in this Circuit have found that a party may seek under § 502(a)(3) are those "typically available in equity," such as an equitable lien or constructive trust. *See, e.g., Reed v. Liberty Life Assur. Co. of Boston*, No. 10-cv-2664, 2010 WL 5173001, at *4 (S.D. Tex. Dec. 14, 2010) (insurer's attempt to place lien on specific Social Security benefits that a participant had agreed to hold in a trust was "equitable relief" under § 502(a)(3)); *see also, Chevron Corp. v. Barrett*, No. 07-cv-3257, 2008 WL 2961778, at *6-7 (S.D. Tex. July 28, 2008) (holding that because plaintiff no longer sought monetary damages but only an "equitable lien" or "constructive trust" on funds within the defendant's possession, the relief was equitable for § 502(a)(3) purposes.)

An action by a fiduciary to recover funds may only be considered equitable within the meaning of § 502(a)(3) under certain limited circumstances where the plaintiff seeks "recovery of specifically identifiable funds" within the defendant's possession. *Ogden*, 367 F.3d at 332; *see also*, *Reed,* 2010 WL 5173001, at *4 (when a party seeks to "recover from [defendant's] general assets," the relief is legal, not equitable); *see also*, *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002). Here, because Cigna seeks damages from NCMC's general assets, and does not seek specifically identifiable funds, Cigna could not proceed under § 502(a)(3) and its state law claims seeking this relief are not preempted by ERISA. *See Ogden*, 367 F.3d at 328 and 331 (insurer's attempted recovery of overpayments under a reimbursement agreement was legal relief not available under § 502(a)(3), as discovery would be required to "trace the location and amount of social security disability benefits in the possession, custody or

control of [the participant]"); *Knudson,* 534 U.S. at 210 (insurer's attempted recovery of funds that a beneficiary received in a tort lawsuit was legal relief not available under § 502(a)(3), because the funds could not "clearly be traced to particular funds or property in the defendant's possession"). Indeed, NCMC does not dispute that the relief Cigna seeks is legal, not equitable.

B. Cigna's Claims Implicate Independent Legal Duties.

Even if Cigna were acting as a fiduciary, which it is not, and even if were seeking only equitable relief, which it is not, Cigna's counterclaims would still not be preempted by ERISA, because those claims "implicate[ ] independent legal duties" under the second required prong of the *Davila* test. *Davila*, 541 U.S. at 207. To show that no separate legal duty exists, NCMC would have to "demonstrate that the state claims are derived entirely from the particular rights and obligations established by the plans." *Aetna*, 2011 WL 1343047 at *5. But this is not the case. When NCMC submitted fraudulent charges to Cigna, it breached the common law legal duties that prohibit it from committing fraud -- that independent legal duty is the source of Cigna's counterclaims. NCMC's argument that Cigna's claims must be preempted because the Court might consult Cigna's ERISA plans is the same argument rejected in *Aetna*:

> Defendants attempt to frame Plaintiffs' state claims as a mere billing dispute involving overpayment of benefits, and, therefore, governed by ERISA. … In support of their argument, ***Defendants erroneously conclude that if the Court consults the ERISA plan, the state claims arise from the duties imposed by the plan.*** This is not accurate. ERISA does not prohibit a court from consulting the plan during the litigation of Plaintiffs' state law claims. Although the plans at issue are governed by ERISA, Defendants must prove that Plaintiffs' "claims are derived entirely from the particular rights and obligations established by" the plans. This Defendants cannot do. ***Plaintiffs' state claims are derived from New Jersey's insurance fraud statute and its common law counterparts.*** The ultimate resolution of these claims does not require an interpretation or analysis of the terms of the plans. ***Defendants' conduct, not the terms of the ERISA plans, is the focal point of Plaintiffs' claims.***

Id. at *6 (emphases added) (citations and quotations omitted). Similarly here, the ***focal point*** of Cigna's claims is whether NCMC submitted fraudulent charges. While the Court might have to consult Cigna's plans to determine Cigna's damages (by determining the amounts that Cigna's plan would have paid if NCMC listed non-fraudulent charges), that review is not the source of NCMC's legal duty to Cigna. Instead, the source is the common law of fraud. *Id.* at *5-6. This discussion highlights the fundamental difference between NCMC's claims and Cigna's counterclaims. Cigna could be liable to NCMC only if it underpaid the claims at issue, and the Court can determine if Cigna underpaid the claims only by interpreting Cigna's plans. But NCMC can be liable on Cigna's counterclaims if it submitted fraudulent charges, regardless of what Cigna's plans might say.

NCMC cites no cases showing otherwise. Instead, three of the four cases that NCMC cites on this point simply hold that ERISA preempts claims to recover benefits by participants or beneficiaries against their benefit plans or employers. *See, e.,g. Lee v. E.I. DuPont de Nemours & Co.,* 894 F.2d 755 (5th Cir. 1990) (claims of employees to "recover benefits defined by their former employer's ERISA plan"); *Franks v. Prudential Health Care Plan, Inc.,* 164 F. Supp. 2d 865 (W.D. Tex. 2001) (claims of health plan member against plan insurer); *Goss v. Firestone Polymers, LLC,* No. 04-cv-665, 2005 WL 1004717 (E.D. Tex. April 13, 2005) (claims of participants against plan administrator). NCMC's last cited case deals with an insurer's action to recover overpayments from a plan member, but NCMC misrepresents its holding. *UNUM Life Ins. Co. of Am. v. Long,* 227 F. Supp. 2d 609 (N.D. Tex. 2002). NCMC asserts that the *UNUM* court held that an insurer brought a state law unjust enrichment claim that was preempted by ERISA. (Motion at 11.) In fact, the court allowed the insurer to bring its unjust enrichment claim under federal common law; there was no state law claim at issue. *UNUM*, 227 F. Supp. 2d at 614

(noting that nothing in ERISA law "precludes an insurer from enforcing its rights through traditional common law remedies.").[2]

In short, NCMC fails to demonstrate that Cigna's counterclaims are not based on an independent legal duty; hence it cannot show that those counterclaims are preempted.

C. Cigna Must Have A Remedy To Recover Overpayments From NCMC.

NCMC takes the extreme position that Cigna's claims are preempted "even if [ERISA] does not provide a remedy" to Cigna for NCMC's conduct. (*See e.g.,* Motion at 14.) But none of the three cases that NCMC cites support its radical view that a managed care company that is defrauded by an out-of-network provider has absolutely no legal recourse against that provider. For example, in *Hansen v. Cont'l Ins. Co.*, the court held that a plan member's state law claims against an insurer were preempted by ERISA, but held that ERISA § 502(a)(1)(B) provided the member with a remedy. 940 F.2d 971, 979 (5th Cir. 1991). Similarly, in *Cunningham* v. *Dun & Bradstreet Plan Servs., Inc.*, a plan member's state law claim was preempted by ERISA, but the court considered claims brought by the member under ERISA. 889 F. Supp. 932, 937 (N.D. Miss. 1995) (dismissing ERISA claims for reasons having nothing to do with preemption). And in *Blue Cross & Blue Shield of Rhode Island v. Korsen*, the court held that an insurer who brought state law claims against an in-network provider could bring those claims under ERISA § 502(a)(3) because the provider's contract incorporated terms of ERISA plans. 746 F. Supp. 2d 375, 384 (D.R.I. 2010).

---

[2] Indeed, even *UNUM*'s holding that an insurer could bring a federal common law unjust enrichment action against a beneficiary is questionable. Two years after the Northern District of Texas decided *UNUM*, the Fifth Circuit held that ERISA does not allow a plan fiduciary to assert a federal common law right of unjust enrichment against a participant. *Cooperative Ben. Adm'rs, Inc. v. Ogden*, 367 F.3d 323, 333 (5th Cir. 2004).

Indeed, it is completely contradictory for NCMC to argue both that Cigna's counterclaims are preempted because Cigna could have brought them under ERISA § 502(a)(3) and also argue that Cigna is without a legal remedy. If NCMC were correct that Cigna's counterclaims are preempted, then Cigna should be allowed to proceed against NCMC under ERISA § 502(a)(3), by the Court either transforming Cigna's state law claims into a § 502(a)(3) claim or granting Cigna leave to state an amended counterclaim.

II. CIGNA PLED ITS FRAUD CLAIM WITH PARTICULARITY.

NCMC's argument that Cigna has not adequately pled its fraud claims with particularity is, in fact, an inappropriate attempt to litigate the merits of Cigna's allegations, something that is not allowed on a motion to dismiss under Rule 12(b)(6). At this stage, the question is simply whether Cigna has adequately pled a legally cognizable claim; all of Cigna's factual allegations must be credited as true and all reasonable inferences drawn in Cigna's favor. *See U.S. ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370, 376 (5th Cir. 2004). Remarkably, while acknowledging that the Court "may not look beyond the face of the pleadings when determining whether Cigna has stated a claim under Rule 12(b)(6)," (Motion at 9) NCMC asks the Court to do just that, improperly attaching deposition transcripts, emails, and dozens of other documents in a style more appropriate to a motion for summary judgment.[3] But the Court may not consider such materials that are "outside the complaint." *Scanlan v. Texas A&M University*, 343 F.3d 533, 536 (5th Cir. 2003.)

Taking Cigna's allegations as true, there is no question that Cigna has pled its fraud claims with the particularity required by Federal Rule of Civil Procedure 9(b). Courts in the Fifth

[3] NCMC also blatantly mischaracterizes most of the evidence it cites, and, regrettably, repeats its practice of falsely accusing Cigna's witnesses of perjury. *See* Motion at 7; *see also,* D.E. 163 at 7.

Circuit have held that Rule 9(b) requires a party "pleading fraud to specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent." *Fannie Mae v. U.S. Property Solutions, L.L.C.*, No. 08-cv-3588, 2009 WL 1968330, at *3 (S.D. Tex. July 6, 2009). In other words, Rule 9(b) simply requires the allegations to set forth "the who, what, when, where, and how" of the events at issue, *id.* (internal quotation omitted); although a plaintiff is not required "to list every false claim, its dates, the individuals responsible" or provide details regarding every patient. *U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 20 F. Supp. 2d 1017, 1049 (S.D. Tex. 1998).

Cigna has more than met these requirements. Specifically, Cigna has alleged that beginning in January 2007, NCMC knowingly submitted thousands of fraudulent claim forms to Cigna that contained phony and fraudulent "charges" for NCMC's services. (*See, e.g.,* Counterclaims ¶¶ 2, 7, 41, 53.) Cigna explained that these charges were fraudulent because NCMC never expected or intended to collect the full amount of the charges that it submitted. (*Id.* ¶¶ 2, 6, 7, 13, 41, 43.) And Cigna even provided specific examples of claim forms that NCMC had submitted stating fraudulent charges, listing all of the relevant details. (*Id.* ¶ 44.)

Cigna's fraud pleadings here are similar to pleadings found to satisfy Rule 9(b) in *Thompson*. There, a plaintiff brought causes of action alleging that providers submitted numerous fraudulent medical claim forms over an extended period of time. The complaint alleged generally that defendants submitted claims which falsely certified that defendants were in compliance with relevant regulations and that payments were made pursuant to these false representations. *Thompson*, 20 F. Supp. 2d at 1046. In denying the defendants' motion to dismiss, this court held that Rule 9(b) only requires a plaintiff to plead "the basic framework,

procedures, the nature of fraudulent scheme, and the financial arrangements and inducements . . . that give rise to [plaintiff's] belief that fraud has occurred. *Id.* at 1049 (holding that plaintiff alleged fraudulent conduct with sufficient particularity to support claims under the False Claims Act and other statutes). Like the plaintiff in *Thompson*, Cigna has alleged the basic framework of NCMC's fraudulent scheme and provided specific examples of how it occurred. Cigna has pled what Rule 9(b) requires -- and then some. *Id.*[4]

III. CIGNA'S CLAIMS AGAINST DR. BEHAR ARE PROPER.

NCMC's last argument is that Cigna's suit against Dr. Behar is improper because it came after the deadline to add new parties. Cigna did not take this deadline to preclude the addition of Dr. Behar in a counterclaim. Indeed, NCMC added CIGNA Healthcare of Texas ("CHT") as a new party in its Second Amended Complaint well after this deadline had passed, and while Cigna objected to NCMC adding CHT after this deadline (D.E 115-2 at 3, n. 2), the Court allowed NCMC's amended claims against CHT to proceed (other than NCMC's RICO claims, which were dismissed). (D.E. 214.) Redacted

[4] In addition to citing materials outside of the complaint, NCMC raises a series of other irrelevant arguments. For example, NCMC asserts that it disclosed its discount policy to Cigna. (Motion at 15.) But even if NCMC had told Cigna that it would be offering a discount to Cigna's plan members, that fact did not give NCMC free license to submit claim forms to Cigna that did not state NCMC's actual charges and did not disclose the amount of any "discount" offered to Cigna plan members. NCMC also asserts that its discount program is "lawful," apparently based on an advisory opinion from Medicare's Inspector General that it concedes does not apply to commercial claims. (Motion at 16 and Ex. P.) But this too is irrelevant; even if NCMC's discounts complied with the OIG guidelines for Medicare (which they did not), NCMC still would not be allowed to submit claim forms to Cigna that fraudulently state its charges.

Redacted

Redacted

Redacted

Redacted

R
e
d
a

CONCLUSION

For the foregoing reasons, Cigna respectfully requests that the Court deny NCMC's Motion to Dismiss in its entirety.

DATED this 11th day of January, 2011.

Respectfully submitted,

/s/ Alan W. Harris
Alan W. Harris
Attorney-in-charge
State Bar No. 09050800
Southern District ID No. 2171
Law Office of Alan Harris
325 N. St. Paul Street, Suite 2700
Dallas, Texas 75201
Telephone: (214) 965-8200
Telecopier: (214) 965-8209

COUNSEL FOR DEFENDANTS

William H. Pratt
Andrew R. Dunlap
Melody Wells
Ryan McEnroe
Kirkland & Ellis LLP
601 Lexington Avenue
New York, New York 10022
Telephone: (212) 446-4800
Facsimile: (212) 446-4900

OF COUNSEL

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2011, I electronically filed the foregoing document with the clerk of court for the U.S. District Court, Southern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record who are known "Filing Users":

J. Douglas Sutter, Esq.
Kelly, Sutter & Kendrick, P.C.
3050 Post Oak Blvd., Suite 200
Houston, TX 77056
Telephone: (713) 595-6000
Facsimile: (713) 595-6001

In addition, I served a true and correct copy of the foregoing document via email on Mr. Sutter.

/s/ Alan W. Harris
Alan W. Harris