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8 UNITED STATES DISTRICT COURT  
9 DISTRICT OF NEVADA  
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11 MELISSA COTHARD and FRANK GREEN, ) 3:12-cv-00270-HDM-WGC  
12 Plaintiffs, )  
13 vs. ) ORDER  
14 J.D. BENEFIT SERVICES, INC., et )  
15 al., )  
16 Defendants. )

17 Plaintiffs Melissa Cothard and Frank Green have filed a  
18 complaint against defendants J.D. Benefit Services, Inc. ("JDB"),  
19 MFJ Benefits, LLC ("MFG"), and Steven Dalinas (collectively  
20 "defendants") asserting four causes of action: (1) "Restitution of  
21 Plan Assets Pursuant to 29 U.S.C. § 1109(a)"; "Nevada State Law on  
22 Insurance Fraud"; (3) "\$510 ERISA RETALIATION, 29 U.S.C. §1140" and  
23 (4) "State Law Violations." On September 17, 2013, the court  
24 issued an order (#42) denying the plaintiffs' motion for partial  
25 summary judgment (#21). Presently before the court is the  
26 defendants' motion for summary judgment (#22). The plaintiffs have  
27 opposed with "Plaintiffs' Opposition to Defendants' Motion for  
28

1 Summary Judgment and Motion to Strike Surplusage," (#27) and the  
2 defendants have replied (#31).

3 Plaintiffs Cothard and Green were employees of defendant MFG.  
4 Defendant JDB sold insurance benefits such as short term  
5 disability. (Def. Mot. 3.) While the plaintiffs allege that "MFG  
6 BENEFITS LLC . . . was a successor to, and alter ego of, Defendant  
7 BENEFIT SERVICES, INC. (Compl. at 2), defendants state that  
8 defendants J.D. Benefit Services, Inc., and MFG Benefits, LLC,  
9 merely "decided to work collaboratively." (Def. Mot. 3.)

10 Plaintiffs allege that, in January 2012, plaintiff Cothard  
11 noticed that defendants began receiving "cancellation letters for  
12 non-payment of premiums from Allstate Insurance Company, even  
13 though the Circle of Life had paid its premiums to its third party  
14 administrator, J.D. BENEFIT SERVICES, INC." (Compl. at 2.)  
15 Plaintiffs claim that when Plaintiff Cothard requested an  
16 explanation, "she was . . . told by defendant STEVEN DALINAS . . .  
17 to start rolling this group into a new product, which was  
18 TransAmerica and to roll as many of the employees as we [sic] could  
19 so Steve [sic] didn't have to pay Allstate the balance due."  
20 (Compl. at 3.)

21 MFG terminated the employment of both plaintiffs effective May  
22 15, 2012. (Def. Opp'n at 4; Ex. 8.) Plaintiffs contend their  
23 employment was terminated following their discovery of the  
24 cancellation letters for nonpayment, and shortly after defendant  
25 Dalinas received information that plaintiffs were consulting a  
26 labor attorney. (See Compl. at 2-3.) Defendants assert that  
27 plaintiffs's employment was terminated as a result of plaintiffs  
28 being "unfit for their positions." (Def. Opp'n at 5.)

1 The plaintiffs filed their complaint (#1) in federal court on  
2 May 21, 2012, and a motion for partial summary judgment (#21) on  
3 February 26, 2013. The court denied the plaintiffs' motion on  
4 September 17, 2013. Defendants filed their motion for summary  
5 judgment, which is presently before the court, on March 1, 2013.

6 **I. MOTION TO STRIKE SURPLUSAGE**

7 In their opposition to the defendants' motion for summary  
8 judgment, plaintiffs "move to strike all Defendants' exhibits  
9 submitted in support of the motion for summary judgment if the  
10 exhibit or page and line number of testimony is not specifically  
11 referenced in the Defendants' moving papers." (P. Opp'n 4.) The  
12 plaintiffs assert that "it appears Defendants' counsel simply  
13 attached her entire file as exhibits to this motion," and that the  
14 plaintiffs' counsel "cannot respond to such unfocused clutter."  
15 (*Id.*) The plaintiffs also "object to the Defendants' declarations  
16 on the basis that many of the statements lack foundation, and are  
17 simply generalized lay opinions rather than facts." (*Id.*)

18 The Court first examines this "Motion to Strike Surplusage,"  
19 as the court's ruling on that motion affects the evidence available  
20 to the court in ruling on the defendants' motion for summary  
21 judgment.

22 **Standard**

23 Under Rule 56(c)(1) of the Federal Rules of Civil Procedure,  
24 [a] party asserting that a fact cannot be or is genuinely  
25 disputed must support the assertion by:  
26 (A) citing to particular parts of materials in the  
27 record, including depositions, documents, electronically  
28 stored information, affidavits or declarations,  
stipulations (including those made for purposes of the  
motion only), admissions, interrogatory answers, or other  
materials; or

1 (B) showing that the materials cited do not establish the  
2 absence or presence of a genuine dispute, or that an  
3 adverse party cannot produce admissible evidence to  
4 support the fact.

5 Fed. R. Civ. P. § 56(c)(1). However, under Rule 56(c)(3), [t]he  
6 court need consider only the cited materials, but it may consider  
7 other materials in the record." Fed. R. Civ. P. § 56(c)(3).

8 Furthermore, under Rule 56(c)(4),

9 [a]n affidavit or declaration used to support or oppose a  
10 motion must be made on personal knowledge, set out facts that  
11 would be admissible in evidence, and show that the affiant or  
12 declarant is competent to testify on the matters stated.

13 Fed. R. Civ. P. § 56(c)(4).

14 Motions to strike under the Federal Rules of Civil Procedure  
15 are governed by Rule 12(f), which states:

16 The court may strike from a pleading an insufficient defense  
17 or any redundant, immaterial, impertinent, or scandalous  
18 matter. The court may act:

- 19 (1) on its own; or  
20 (2) on motion made by a party either before responding to  
21 the pleading or, if a response is not allowed, within 21  
22 days after being served with the pleading.

23 Fed. R. Civ. P. § 12(f). "Pleadings" are defined by Rule 7(a),  
24 which designates the following as the "only . . . pleadings  
25 allowed."

- 26 (1) a complaint;  
27 (2) an answer to a complaint;  
28 (3) an answer to a counterclaim designated as a counterclaim;  
(4) an answer to a crossclaim;  
(5) a third-party complaint;  
(6) an answer to a third-party complaint; and  
(7) if the court orders one, a reply to an answer.

Fed. R. Civ. P. § 7(a).

## 29 **Analysis**

30 While it is true that not every page of the exhibits  
31 defendants attached to their motion for summary judgment is cited  
32 to in their motion, the defendants do still provide citations to

1 specific portions of the attached exhibits in many sections of  
2 their motion in accordance with Rule 56(c)(1). See, e.g., Def.  
3 Mot. 3-5.; see Fed. R. Civ. P. § 56(c)(1). Additionally, as  
4 discussed above, the court when evaluating a motion for summary  
5 judgment is not required to, but may, at its discretion, consider  
6 materials in the record that are not cited to in the motion. See  
7 Fed. R. Civ. P. § 56(c)(3). Thus, as a matter of law there is no  
8 reason why this court should "strike" the portions of the  
9 defendants' exhibits not specifically cited to in the motion for  
10 summary judgment.

11 Moreover, while the plaintiffs "object" to the defendants'  
12 attached declarations, they do not suggest that these declarations  
13 are made without personal knowledge, contain facts that would be  
14 inadmissible evidence, or do not show that the declarant is  
15 competent to testify on the matters stated. The plaintiffs  
16 therefore not do not allege that the defendants' declarations  
17 violate Rule 56(c)(4), which governs declarations used in support  
18 of a motion for summary judgment. See Fed. R. Civ. P. § 56(c)(4);  
19 Def. Opp'n 4. Accordingly, there is no reason for this court to  
20 "strike" or decline to consider these declarations.

21 Finally, Rule 12(f), which controls motions to strike, makes  
22 clear that motions to strike may only be made to "strike from a  
23 pleading an insufficient defense or any redundant, immaterial,  
24 impertinent, or scandalous matter." Fed. R. Civ. P. § 12(f). As  
25 discussed above, Rule 7(a) makes clear that motions are not  
26 pleadings. See Fed. R. Civ. P. § 7(a). The plaintiffs' motion to  
27 "strike surplusage" from the defendants' motion for summary  
28

1 judgment is therefore improper under the Federal Rules of Civil  
2 Procedure.

3 For all of the foregoing reasons, the plaintiffs' motion to  
4 strike surplusage is denied.

5 **II. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT:**

6 The defendants have moved for summary judgment on all claims.  
7 The court now considers this motion.

8 **Standard**

9 Summary judgment shall be granted "if the movant shows that  
10 there is no genuine issue as to any material fact and the movant is  
11 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).  
12 The burden of demonstrating the absence of a genuine issue of  
13 material fact lies with the moving party, and for this purpose, the  
14 material lodged by the moving party must be viewed in the light  
15 most favorable to the nonmoving party. *Adickes v. S.H. Kress &*  
16 *Co.*, 398 U.S. 144, 157 (1970); *Martinez v. City of Los Angeles*, 141  
17 F.3d 1373, 1378 (9th Cir. 1998). A material issue of fact is one  
18 that affects the outcome of the litigation and requires a trial to  
19 resolve the differing versions of the truth. *Lynn v. Sheet Metal*  
20 *Workers Int'l Ass'n*, 804 F.2d 1472, 1483 (9th Cir. 1986); *S.E.C. v.*  
21 *Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982).

22 Once the moving party presents evidence that would call for  
23 judgment as a matter of law at trial if left uncontroverted, the  
24 respondent must show by specific facts the existence of a genuine  
25 issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,  
26 250 (1986). "[T]here is no issue for trial unless there is  
27 sufficient evidence favoring the nonmoving party for a jury to  
28 return a verdict for that party. If the evidence is merely

1 colorable, or is not significantly probative, summary judgment may  
2 be granted." *Id.* at 249-50 (citations omitted). "A mere scintilla  
3 of evidence will not do, for a jury is permitted to draw only those  
4 inferences of which the evidence is reasonably susceptible; it may  
5 not resort to speculation." *British Airways Board v. Boeing Co.*,  
6 585 F.2d 946, 952 (9th Cir. 1978); see also *Daubert v. Merrell Dow*  
7 *Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993) ("[I]n the event  
8 the trial court concludes that the scintilla of evidence presented  
9 supporting a position is insufficient to allow a reasonable juror  
10 to conclude that the position more likely than not is true, the  
11 court remains free . . . to grant summary judgment."). Moreover,  
12 "[i]f the factual context makes the non-moving party's claim of a  
13 disputed fact implausible, then that party must come forward with  
14 more persuasive evidence than otherwise would be necessary to show  
15 there is a genuine issue for trial." *Blue Ridge Insurance Co. v.*  
16 *Stanewich*, 142 F.3d 1145, 1149 (9th Cir. 1998) (citing *Cal.*  
17 *Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.*,  
18 818 F.2d 1466, 1468 (9th Cir. 1987)). Conclusory allegations that  
19 are unsupported by factual data cannot defeat a motion for summary  
20 judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

21 Finally, if the nonmoving party fails to present an adequate  
22 opposition to a summary judgment motion, the court need not search  
23 the entire record for evidence that demonstrates the existence of a  
24 genuine issue of fact. See *Carmen v. San Francisco Unified Sch.*  
25 *Dist.*, 237 F.3d 1026, 1029-31 (9th Cir. 2001) (holding that "the  
26 district court may determine whether there is a genuine issue of  
27 fact, on summary judgment, based on the papers submitted on the  
28 motion and such other papers as may be on file and specifically

referred to and facts therein set forth in the motion papers"). The district court need not "scour the record in search of a genuine issue of triable fact," but rather must "rely on the nonmoving party to identify with reasonable particularity the evidence that precludes summary judgment." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (quoting *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir.1995)). "[The nonmoving party's] burden to respond is really an opportunity to assist the court in understanding the facts. But if the nonmoving party fails to discharge that burden—for example by remaining silent—its opportunity is waived and its case wagered." *Guarino v. Brookfield Township Trustees*, 980 F.2d 399, 405 (6th Cir. 1992).

### **Analysis**

*Plaintiffs' First Claim: "Restitution of Plan Assets Pursuant to 29 U.S.C. § 1109(a)"*

The plaintiffs' first claim for relief hinges on the argument that: (1) the insurance plans at issue were ERISA plans; (2) the defendants breached their fiduciary duties with regard to these plans; (3) defendants are "liable to make good . . . any such losses to the plan[s] resulting from . . . such breach" under 29 U.S.C. § 1109(a); (4) plaintiffs were co-fiduciaries of the plans pursuant to 29 U.S.C. § 1002(21)(A); (5) as co-fiduciaries the plaintiffs may now be held liable for the defendants' breach under 29 U.S.C. § 1105; and (6) because they may be held liable, plaintiffs are entitled to "a full forensic accounting of all Defendants, by a reputable third party Certified Public Accountant [sic] appointed by the Court, and restitution based upon the findings of such audit, together with interests, costs, and



1 attorneys [sic] fees." (Compl. 5-6.) As a threshold inquiry, the  
2 court must first examine whether or not the plans at issue were  
3 actually ERISA plans.

4 ERISA governs "employee welfare benefit plans," and defines  
5 these plans expansively to include:

6 any plan, fund, or program which was heretofore or is  
7 hereafter established or maintained by an employer or by an  
8 employee organization, or by both, to the extent that such  
9 plan, fund, or program was established or is maintained for  
10 the purpose of providing for its participants or their  
11 beneficiaries, through the purchase of insurance or otherwise,  
12 (A) medical, surgical, or hospital care or benefits, or  
benefits in the event of sickness, accident, disability, death  
or unemployment, or vacation benefits, apprenticeship or other  
training programs, or day care centers, scholarship funds, or  
prepaid legal services, or (B) any benefit described in  
section 186(c) of this title (other than pensions on  
retirement or death, and insurance to provide such pensions).

13 29 U.S.C.A. § 1002. However, the Secretary of Labor has issued a  
14 regulation creating what has become known as the ERISA "safe  
15 harbor." A group insurance plan offered to employees falls within  
16 the safe harbor regulation and is exempt from ERISA coverage when:

- 17 (1) No contributions are made by an employer or employee  
organization;  
18 (2) Participation the program is completely voluntary for  
employees or members;  
19 (3) The sole functions of the employer or employee  
organization with respect to the program are, without  
20 endorsing the program, to permit the insurer to publicize the  
program to employees or members, to collect premiums through  
21 payroll deductions or dues checkoffs and to remit them to the  
insurer; and  
22 (4) The employer or employee organization receives no  
consideration in the form of cash or otherwise in connection  
23 with the program, other than reasonable compensation,  
excluding any profit, for administrative services actually  
24 rendered in connection with payroll deductions or dues  
checkoffs.

25 29 C.F.R. § 2510.3-1. The Ninth Circuit has made clear that a  
26 group insurance plan cannot be excluded from ERISA coverage unless  
27 all four elements of the safe harbor provision are satisfied;  
28

1 failure to satisfy any one of the elements qualifies a group  
2 insurance plan as an ERISA employee welfare benefit plan. See  
3 *Stuart v. UNUM Life Ins. Co. of America*, 217 F.3d 1145, 1153 (9th  
4 Cir. 2000).

5 Defendants in their motion for summary judgment argue that the  
6 insurance plans at issue, for which JDB did third party billing,  
7 fall within the safe harbor regulation and are therefore exempt  
8 from ERISA coverage. (See Def. Mot. 8-9.) The defendants allege  
9 that

10 all of the insurance plans at issue involved 1) no  
11 contributions made by an employer or employee organization;  
12 instead they were all 100% individual employee paid; 2)  
13 participation was completely voluntary; 3) the sole function  
14 of the employer was to permit JDB to publicize its services  
and meet with the employees and to collect premiums; and 4)  
The employer received no consideration in the form of case  
otherwise for administrative services rendered in connection  
with payroll deductions.

15 (D. Mot. 9.) These factual assertions, if true, would clearly put  
16 the insurance plans at issue within the ERISA safe harbor  
17 regulation. See 29 C.F.R. § 2510.3-1. To support this claims, the  
18 defendants have attached a declaration from defendant Dalinas and  
19 testimony from defendant Dalinas' deposition testimony, among other  
20 materials. (See Def. Mot. 22 ("Exhibit List").)

21 In their opposition to the defendants' motion, the plaintiffs  
22 argue that at least some of the money they claim the defendants  
23 embezzled came from ERISA funds. The plaintiffs allege that the  
24 insurance plans at issue do not fall within the ERISA safe harbor  
25 regulation because some of the plans "fail the first criteria  
26 [sic]" and "at least three clients . . . if not all, fail the third  
27 criteria [sic]." (P. Opp'n 11-12.) Plaintiffs provide arguments  
28 and information, discussed below, related to the alleged failure of

1 the insurance plans at issue to meet the first and third elements  
2 of the safe harbor regulation. (See P. Opp'n 6-11.) However, the  
3 plaintiffs are silent in their opposition as to whether or not the  
4 insurance plans satisfy the second and fourth elements of the safe  
5 harbor regulation, and do not dispute in any way that, as set forth  
6 by the defendants, "participation [in the plans] was completely  
7 voluntary" and "[t]he employer[s, JDB's clients,] received no  
8 consideration in the form of case otherwise for administrative  
9 services rendered in connection with payroll deductions." (D. Mot.  
10 9; see generally P. Opp'n.)

11 Rule 56(e)(2) of the Federal Rules of Civil Procedure states  
12 that "[i]f a party fails to properly support an assertion of fact  
13 or fails to properly address another party's assertion of fact as  
14 required by Rule 56(c), the court may . . . consider the fact  
15 undisputed for purposes of the motion." Fed. R. Civ. P. §  
16 56(e)(2); see also *Heinemann v. Satterberg*, 731 F.3d 914, 916-17  
17 (9th Cir. 2013). Pursuant to Rule 56(e)(2), because the plaintiffs  
18 do not contest in their opposition the facts set forth by the  
19 defendants demonstrating that the plans satisfy the second and  
20 fourth elements of the safe harbor regulation, the court will  
21 consider those facts undisputed. Accordingly, the court determines  
22 that the plans do satisfy the second and fourth elements of the  
23 safe harbor provision.

24 With regard to the first element of the safe harbor  
25 regulation, that "[n]o contributions are made by an employer or  
26 employee organization," the defendants claim in their motion for  
27 summary judgment that the plans at issue "were all 100% individual  
28 employee paid." 29 C.F.R. § 2510.3-1; D. Mot. 9. In their

1 opposition, to support their argument that "some of the plans fail  
2 the first criteria [sic]," plaintiffs claim that

3       Employers like Art Wilson paid for the group medical premiums  
4       with employee contributions in one combined check. Other  
5       employers, like the Nevada Museum of Art, paid for employees  
6       even though these were supposedly voluntary supplemental  
7       plans. Thus, the single check that Defendants deposited into  
8       a single, commingled account contained ERISA plan  
9       contributions.

10 (P. Opp'n 11.) Plaintiffs allege that certain JDB clients  
11 regularly sent the defendants combined checks containing funds for  
12 both employee-paid insurance coverage and insurance coverage that  
13 included employer contributions, and that defendants deposited  
14 those combined checks into a single account, which was the account  
15 from which defendant Dalinas allegedly embezzled money. (See P.  
16 Opp'n 8, 11.) Thus, the plaintiffs argue, ERISA funds were  
17 compromised. (*Id.*)

18       In support of their arguments, plaintiffs provide a  
19 declaration from plaintiff Cothard and four exhibits. The only  
20 portion of plaintiff Cothard's declaration relevant to the first  
21 provision of the ERISA safe harbor regulation is the statement that

22       Art Wilson Company sent its check for both its basic medical  
23       plan and its supplemental or so-called voluntary insurance  
24       plans in one check made payable to JD Benefits, which JD  
25       Benefits deposited into its general account and use [sic] to  
26       pay personal expenses of Steve Dalinas."<sup>1</sup>

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27       <sup>1</sup> While group medical insurance plans often include employer  
28       contributions, they do not always contain employer contributions. The  
29       plaintiffs argue in part that the combination of client payments from both  
30       group health or medical insurance and other voluntary insurance programs  
31       into one account that was breached by defendant Dalinas is in and of itself  
32       evidence of wrongdoing under the ERISA statutes, because all group medical  
33       insurance plans are ERISA plans. The plaintiffs' opposition, after quoting  
34       the exact section of plaintiff Cothard's deposition quoted preceding this  
35       footnote, states that "[g]roup medical insurance is not exempted from ERISA  
36       as a voluntary plan under 29 C.F.R. § 2510.3-1(j)." (internal quotation  
37       marks ommitted. (P. Opp'n 8.)

38       This argument is without merit. The plaintiffs cite to no authority

1 (Cothard Dec. 3.) As exhibits, the plaintiffs provide deposition  
2 testimony from the plaintiffs, Melissa Cothard and Frank Green, as  
3 well as from defendant Dalinas. (See P Opp'n Ex. A, B, C.)  
4 However, none of the attached testimony corroborates the  
5 plaintiffs' arguments regarding the first element of the ERISA safe  
6 harbor provision. (See *generally id.*)

7 As their fourth and final exhibit, plaintiffs attach a  
8 document from "freeERISA.com" titled "Annual Return/Report of  
9 Employee Benefit Plan." (See *id.* Ex. D.) In their opposition,  
10 plaintiffs reference the form, stating

11 [f]or some reason, Mr. Dalinas refused to acknowledge that he  
12 or JD Benefits ever submitted a government IRS form 5500, even  
13 though he signed one for JD Benefits in 2009 and 20011, a copy  
of which is attached to the declaration of Mark R Thierman as  
Exhibit D.

14 (P. Opp'n 6 n.5.) The form lists defendant Dalinas' name as the  
15 "plan administrator," "employer/plan sponsor," and "plan  
16 administrator." (P. Opp'n Ex. D.) The "Name of plan" is listed as  
17 "J.D. Benefit Services, Inc. 401(k) Profit Sharing Plan." (*Id.*)

18 However, the plaintiffs have offered no information whatsoever  
19 about the significance of this form or how it reinforces their  
20 claims. (See *generally* P. Opp'n.) The names of the clients the  
21 plaintiffs have discussed in their opposition and in their  
22 complaint are listed nowhere on the form. (See P. Opp'n Ex. D.)

23

24

25 demonstrating that all group health insurance plans are ERISA plans by  
26 definition, and Ninth Circuit case law actually indicates to the contrary.  
27 See, e.g., *Qualls ex rel. Qualls v. Blue Cross of California, Inc.*, 22 F.3d  
28 839, 842-45. (9th Cir. 1994) (undertaking an analysis of whether or not a  
group health insurance plan is exempt from ERISA; the court does not assume  
the plan is not exempt simply because it is a health insurance plan, but  
instead applies the safe harbor provisions individually, reaching the  
eventual conclusion that the plan is not exempt).

1 The plaintiffs have failed to show how this form supports their  
2 arguments.

3 With regard to the third element of the safe harbor provision,  
4 that

5 [t]he sole functions of the employer or employee organization  
6 with respect to the program are, without endorsing the  
7 program, to permit the insurer to publicize the program to  
employees or members, to collect premiums through payroll  
deductions or dues checkoffs and to remit them to the insurer,

8 the defendants posit that "the sole function of the employer[s with  
9 regard to the insurance plans at issue] was to permit JDB to  
10 publicize its services and meet with the employees and to collect  
11 premiums." 29 C.F.R. § 2510.3-1; D. Mot. 9.

12 The plaintiffs argue in their opposition that the insurance  
13 plans of "at least three clients . . . if not all, fail the third  
14 criteria [sic] because the employer designed the plans, and, in  
15 many cases, the employer administered the plan." (P. Opp'n 11.)  
16 The plaintiffs claim that after defendant Dalinas embezzled funds,  
17 "Plaintiff Cothard was told to tell the employers that they should  
18 switch to a new carrier to avoid cancellation." (*Id.*) The  
19 plaintiffs' opposition quotes extensively from plaintiff Cothard's  
20 declaration, in which she alleges that she at times during her  
21 employment at JDB helped work with client employers to redesign  
22 some of the insurance plans at issue, answered various questions  
23 from employee plan participants, and assisted employee plan  
24 participants with insurance claims. (See P. Opp'n 8-11; Cothard  
25 Dec. 2-3.) The only additional piece of evidentiary support for  
26 these claims plaintiffs have offered appears to be a few

27

28

1 additional, similar statements made by plaintiff Cothard in her  
2 deposition. (See P. Opp'n Ex. B 54.<sup>2</sup>)

3 In their reply, defendants deny entirely the plaintiffs'  
4 allegations regarding the lack of ERISA exemption for the plans at  
5 issue. The defendants assert that

6 [t]he self-serving Affidavit of Melissa Cothard truthfully  
7 evidences how little she ever knew or understood about the  
8 business of JDB or MFG . . . What decisions employers were  
9 involved in or made was not something Cothard was ever privy  
to. How accounts were paid and where those funds were  
deposited was not something Cothard was ever involved in at  
MFG."

10 (Def. Reply 8.)

11 In a motion for summary judgment, once the moving party  
12 presents evidence that would call for judgment as a matter of law  
13 at trial if left uncontroverted, the respondent must show by  
14 specific facts the existence of a genuine issue for trial.  
15 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). In this  
16 case, the defendants have presented declarations and deposition  
17 testimony indicating that the insurance plans at issue fall within  
18 the ERISA safe harbor provision.

19 Since the defendants have discharged their initial burden with  
20 their motion and supporting evidence, the burden shifts to the  
21 plaintiffs, the nonmoving party, to demonstrate the existence of a  
22 genuine issue for trial by showing "specific facts." *Id.* The  
23 plaintiffs must do more than present opposing allegations;  
24 conclusory allegations that are unsupported by factual data cannot  
25 defeat a motion for summary judgment. *Taylor v. List*, 880 F.2d  
26 1040, 1045 (9th Cir. 1989). Additionally, "conclusory, self-

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27  
28 <sup>2</sup> The cited page number is the page number of the deposition,  
not the exhibit.

1 serving affidavit[s], lacking in detailed facts and any supporting  
2 evidence, [are] insufficient to create a genuine issue of material  
3 fact'" (*Nilsson v. City of Mesa*, 503 F.3d 947, 952 n.2 (9 th Cir.  
4 2007) (quoting *Fed. Trade Comm'n v. Publ'g Clearing House, Inc.*,  
5 104 F.3d 1158, 1171 (9th Cir. 1997))), and "[u]ncorroborated and  
6 self-serving testimony," without more, will not create a genuine  
7 issue of material fact precluding summary judgment (*Villiarimo v.*  
8 *Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cr. 2002)).

9       The declaration and testimony presented by the plaintiffs are  
10 indeed "unsupported by factual data," "uncorroborated and self-  
11 serving," and "lacking in any supporting evidence." One party's  
12 assertions in deposition testimony and sworn declarations can under  
13 some circumstances be enough to defeat a summary judgment motion.  
14 See *Robins v. Centinela State Prison*, 19 Fed. Appx. 549, 550 (9th  
15 Cir. 2001). However, the case at hand is not one in which "it is  
16 unremarkable that [plaintiffs] could not otherwise corroborate" the  
17 contents of their declarations and deposition testimony. *S.E.C. v*  
18 *Phan*, 500 F.3d 895, 910 (9th Cir. 2007) (holding that the district  
19 court could not disregard uncorroborated declarations based on the  
20 declarants' own actions, noting the difficulty of ever  
21 corroborating the "personal conversations" discussed in the  
22 declarations). The instant action turns not on personal  
23 conversations, but on organizational practices that involved  
24 multiple players and a significant amount of paperwork. (See  
25 generally Cothard Dec.) Yet, despite months of discovery,  
26 plaintiffs have not been produced a single piece of documentary  
27 evidence or even a single statement from anyone other than  
28 plaintiff Cothard that the defendants' practices with regard to the



1 insurance plans in question rendered the plans covered by ERISA.  
2 (See generally P. Opp'n.)

3 Accordingly, even when viewing the evidence as required "'in  
4 the light most favorable to the party opposing the motion,'" the  
5 court finds that plaintiffs have failed to show that there is a  
6 genuine issue of material fact as to whether the insurance plans at  
7 issue are covered by ERISA. *Matsushita Elec. Indus Co. v. Zenith*  
8 *Radio Corp.*, 475 U.S. 574, 587 (quoting *United States v. Diebold*,  
9 369 U.S. 654, 655 (1962)). The plaintiffs have not carried their  
10 burden of rebutting the defendants' evidence that the plans are  
11 exempt from ERISA coverage with specific facts and significantly  
12 probative evidence showing the existence of a genuine issue for  
13 trial as to whether the plans are in fact covered. See *Anderson*,  
14 477 U.S. at 249-250; see also Fed. R. Civ. P. § 56(e).

15 As discussed above, the court considers it undisputed that the  
16 insurance plans at issue meet elements two and four of the ERISA  
17 safe harbor regulation. See 29 C.F.R. § 2510.3-1; *supra* discussion  
18 at 10-11. Because the plaintiffs have failed to show that there  
19 is a genuine issue of material fact with regard to whether the  
20 plans satisfy elements one and three of the regulation, the court  
21 finds as a matter of law that the plans at issue do satisfy those  
22 elements, and therefore do fall within the safe harbor provision.  
23 See *id.* The plans are therefore exempt from ERISA coverage. See  
24 *id.*

25 Given that the insurance plans at issue are exempt from  
26 ERISA coverage, plaintiffs cannot as a matter of law prevail on  
27 their first claim for relief. Summary judgment is therefore  
28 granted to the defendants with regard to the plaintiffs' first

1 claim for relief, and the first claim of relief is dismissed with  
2 prejudice.

3 *Plaintiffs' Third Claim: "\$510 ERISA RETALIATION, 29 U.S.C. §1140"*

4 The plaintiffs' third claim, "\$510 ERISA RETALIATION," is  
5 contingent on the benefit plans at issue actually being ERISA  
6 plans. However, the court has already found that there is no  
7 genuine issue of material fact that the insurance plans at issue  
8 were actually exempt from ERISA coverage by the ERISA safe harbor  
9 regulation, 29 C.F.R. § 2510.3-1. (See *supra* discussion at 16-17.)  
10 The defendants are therefore granted summary judgment as a matter  
11 of law on the plaintiffs' third claim, and the plaintiffs' third  
12 claim is dismissed with prejudice.

13 *Plaintiffs' Second and Fourth Claims: "Nevada State Law on*  
14 *Insurance Fraud" and "State Law Violations"*

15 Having granted summary judgment and dismissed the plaintiffs'  
16 first and third claims, which are the plaintiffs' only federal  
17 claims, this court declines to exercise supplemental jurisdiction  
18 over the plaintiffs' second and fourth claims for relief, which are  
19 both state law claims. A district court need not actuate  
20 supplemental jurisdiction if it has dismissed all claims over which  
21 it has original jurisdiction. 28 U.S.C. § 1367(c)(3); see *Moore v.*  
22 *Kayport Package Express, Inc.*, 885 F.2d 531, 537 (9th Cir. 1989).  
23 Thus, the state supplemental claims shall be dismissed without  
24 prejudice.

## 25 **CONCLUSION**

26 In accordance with the foregoing, the defendants' motion for  
27 summary judgment (#22) is **GRANTED** as to the plaintiffs' first and  
28 third claims for relief, and those claims are dismissed with

1 prejudice.

2           The court declines to consider the plaintiffs' second and  
3 fourth claims for relief for the reasons set forth above, and  
4 dismisses those claims without prejudice.

5 IT IS SO ORDERED.

6 DATED: This 15th day of January, 2014.

Howard D McKibbin  
UNITED STATES DISTRICT JUDGE