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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MELISSA COTHARD and FRANK GREEN,) 3:12-cv-00270-HDM-WGC
Plaintiffs,)
vs.) ORDER
J.D. BENEFIT SERVICES, INC., et al.,)
Defendants.)
_____)

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

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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

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

Fed. R. Civ. P. § 56(c)(1). However, under Rule 56(c)(3), [t]he court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. § 56(c)(3). Furthermore, under Rule 56(c)(4),

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

Fed. R. Civ. P. § 56(c)(4).

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

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

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

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

- (1) a complaint;
- (2) an answer to a complaint;
- (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).

Analysis

While it is true that not every page of the exhibits defendants attached to their motion for summary judgment is cited 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 uncontested, 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

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

13 **Analysis**

14 *Plaintiffs' First Claim: "Restitution of Plan Assets Pursuant to*
15 *29 U.S.C. § 1109(a)"*

16 The plaintiffs' first claim for relief hinges on the argument
17 that: (1) the insurance plans at issue were ERISA plans; (2) the
18 defendants breached their fiduciary duties with regard to these
19 plans; (3) defendants are "liable to make good . . . any such
20 losses to the plan[s] resulting from . . . such breach" under 29
21 U.S.C. § 1109(a); (4) plaintiffs were co-fiduciaries of the plans
22 pursuant to 29 U.S.C. § 1002(21)(A); (5) as co-fiduciaries the
23 plaintiffs may now be held liable for the defendants' breach under
24 29 U.S.C. § 1105; and (6) because they may be held liable,
25 plaintiffs are entitled to "a full forensic accounting of all
26 Defendants, by a reputable third party Certified Public Account
27 [sic] appointed by the Court, and restitution based upon the
28 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
endorsing the 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; and
- 20 (4) The employer or employee organization receives no
consideration in the form of cash or otherwise in connection
with the program, other than reasonable compensation,
excluding any profit, for administrative services actually
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
plans. Thus, the single check that Defendants deposited into
a single, commingled account contained ERISA plan
contributions.

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

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

19 Art Wilson Company sent its check for both its basic medical
20 plan and its supplemental or so-called voluntary insurance
21 plans in one check made payable to JD Benefits, which JD
Benefits deposited into its general account and use [sic] to
pay personal expenses of Steve Dalinas."¹

22

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

28 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
14 of which is attached to the declaration of Mark R Thierman as
15 Exhibit D.

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

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

25 _____
26 demonstrating that all group health insurance plans are ERISA plans by
27 definition, and Ninth Circuit case law actually indicates to the contrary.
28 See, e.g., *Qualls ex rel. Qualls v. Blue Cross of California, Inc.*, 22 F.3d
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
8 employees or members, to collect premiums through payroll
9 deductions or dues checkoffs and to remit them to the insurer,
10 the defendants posit that "the sole function of the employer[s with
11 regard to the insurance plans at issue] was to permit JDB to
12 publicize its services and meet with the employees and to collect
13 premiums." 29 C.F.R. § 2510.3-1; D. Mot. 9.

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

1 additional, similar statements made by plaintiff Cothard in her
2 deposition. (See P. Opp'n Ex. B 54.²)

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 uncontested, 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-

28 ² 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. § 1337(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.

7 
8 UNITED STATES DISTRICT JUDGE

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