DAC Surgical Partners P.A. v. United Healthcare Services, Inc. et al

2016 | Cited 0 times | S.D. Texas | December 8, 2016

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION DAC SURGICAL PARTNERS P.A., WELLNESS SURGICAL ASSOCIATES, P.A., PROFESSIONAL FOOT and ANKLE SURGICAL CENTER, P.A., SSPA SURGICAL CENTER, P.A., LAKE BREEZE SURGICAL AFFILIATES, P.A., SURGERY PRO, P.A., MAISLOS PODIATRY, P.A., HOPESTAR FOOT & ANKLE SURGERY CENTER, P.A., LIBERTY FOOT & ANKLE SURGERY CENTER, P.A. CADENZA SPECIALTY CARE, P.A., GOOD FEET SURGERY, P.A., PREMIER SURGICAL GROUP, P.A., FSS-HOUSTON FOOT, P.A. MANZANO SURGICAL AFFILIATES, P.A. MMN ENTERPRISE SURGERY CENTER, P.A. SPRINT FOOT & ANKLE SURGERY CENTER, P.A., FAIRWAY SURGICAL LCENTER, P.A. SJS SURGERY, P.A. ASPEN SURGICAL CENTER, P.A. REDBIRD FOOT & ANKLE SURGERY CENTER, P.A. KLA FOOT & ANKLE SURGICAL CENTER, P.A. ALEX SURGICAL CENTER, P.A. ELITE SURGICAL CENTER, P.A. LONESTAR SURGERY CENTER, P.A. LYNN SURGICAL AFFILIATES, P.A. LSO SURGERY CENTER, P.A., SOUTH SIDE ENT, P.A. AMS SURGICAL CENTER, P.A. GALLERIA SURGICAL ASSOCIATES, P.A. CC HOUSTON SURGICAL CENTER, P.A. ANKLE AND FOOT SURG EXCEL, P.A. STARBOARD SPECIALTY CARE, L.L.P. JMB SURGICAL AFFILIATES, P.A. RDJ SURGICAL CENTER, P.A.

§ CIVIL ACTION NO. 4:11-CV-1355

United States District Court Southern District of Texas

ENTERED December 08, 2016 David J. Bradley, Clerk

IRISH SURGICAL CENTER, P.A. GATOR SURGICAL, P.A. COMPREHENSIVE SURGICARE CENTER, LLC,

§ Plaintiffs,

VS.

UNITED HEALTHCARE SERVICES, INC. and INGENIX, INC. Defendants and Counter-Plaintiffs, VS. DAC SURGICAL PARTNERS, P.A., CONG THU NGUYEN, M.D., FAIRWAY SURGICAL CENTER, P.A., KEVIN R. SMITH, M.D., LAKE BREEEZE SURGICAL AFFILIATES, P.A., ROY S.

LEWIS, M.D., LONESTAR SURGICAL CENTER, P.A., BECKY MCGRAW-WALL, M.D., LYNN SURGICAL AFFILIATES, P.A., LARRY P. CONRAD, M.D., MANZANO SURGICAL AFFILIATES, P.A., MARK A. NICHOLS, M.D., SOUTH SIDE ENT, P.A., ALFREDO JIMENEZ, M.D., SURGERY PRO, P.A., JAMES H. LIU, M.D., ANKLE AND FOOT SURG EXCEL, P.A., JERRY MILES, D.P.M. CC HOUSTON SURGICAL CENTER, P.A., CHAD C. CLAUSE, D.P.M., ELITE SURGICAL CENTER, P.A. BRYAN YUEH LEE, D.P.M., FSS-HOUSTON FOOT, P.A., SHERMAN NAGLER, D.P.M., GATOR SURGICAL, P.A., MARCO VARGAS, D.P.M.,

GOOD FEET SURGERY, P.A., ROBERT J. MOORE, III, D.P.M., HOPESTAR FOOT & ANKLE SURGERY CENTER, P.A., GREGORY L. MANGUM, D.P.M., KLA FOOT & ANKLE SURGICAL CENTER, P.A., STEPHEN G. EICHELSDORFER, D.P.M., MAISLOS PODIATRY, P.A., GABRIEL MAISLOS, D.P.M., MMN ENTERPRISE SURGERY CENTER, P.A., MEYNARD M. NUSSBAUM, D.P.M. PREMIER SURGICAL GROUP, P.A., MARK H. MOSS, D.P.M., PROFESSIONAL FOOT & ANKLE SURGICAL CENTER, P.A., DAVID S. JENSON, D.P.M., RDJ SURGICAL CENTER, P.A., D. SEAN SWEENEY, D.P.M., REDBIRD FOOT & ANKLE SURGERY CENTER, P.A., BRIAN W. ZALE, D.P.M., SPRINT FOOT & ANKLE SURERY CENTER, P.A., JEFFREY J. PENSO, D.P.M., SSPA SURGICAL CENTER, P.A., ELIZABETH A. KROBORTH-LYON, D.P.M., WELLNESS SURGICAL ASSOCIATS, P.A., MARKUS GIACOMUZZI, D.P.M., ASPEN SURGICAL CENTER, P.A., STEVEN D. THOMPSON, M.D., IRISH SURGICAL CENTER, P.A., MICHAEL C. MAIER, M.D. JMB SURGICAL AFFILIATES, P.A., SJS SURGERY, P.A., EUGENE LOU, M.D., LIBERTY FOOT & ANKLE SURGERY CENTER, P.A., BRUCE MILLER, M.D., LSO SURGERY CENTER, P.A., KENNETH G. BERLINER, M.D., ALEX SURGICAL CENTER, P.A., RICHARD GARZA, M.D., GALLERIA SURGICAL ASSOCIATES, P.A., RAFAEL A. LUGO, M.D.,

§ §

AMS SURGICAL CENTER, P.A., AHMED KHALIFA, M.D., COMPREHENSIVE SURGICARE CENTER, LLC, RICHARD M. WESTMARK, M.D., CADENZA SPECIALTY CARE, P.A., STARBOARD SPECIALTY CARE, LLP, ROBERT A. MOORE, JR., M.D., EUSTON ASSOCIATES, PLLC, PAR SURGICAL PLLC, SCOTT A. COHEN, M.D., Counter-Defendants

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OPINION AND ORDER On April 8, 2011 Plaintiffs DAC Surgical Partners, P.A., Wellness Surgical Associates, P.A.; Professional Foot and Ankle Surgical Center, P.A.; SSPA Surgical Center, P.A.; Lake Breeze Surgical Affiliates, P.A.; Surgery Pro, P.A.; Maislos Podiatry, P.A.; Hopestar Foot & Ankle Surgery Center, P.A.; Liberty Foot & Ankle Surgery Center, P.A.; Cadenza Speciality Care, P.A.; Good Feet Surgery, P.A.; Premier Surgical Group, P.A.; FSS-Houston Foot, P.A.;

Manzano Surgical Affiliates, P.A.; MMN Enterprise Surgery Center, P.A.; Sprint Foot & Ankle Surgery Center, P.A.; Fairway Surgical Center, P.A.; SJS Surgery, P.A.; Aspen Surgical Center, P.A.

and

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filed suit against United Healthcare Services, Inc., and

On September 14, 2011 the DAC plaintiffs filed a First Amended Complaint (Doc. 46) to add plaintiffs KLA Foot & Ankle Surgical Center, P.A.; Alex Surgical Center, P.A.; Elite Surgical Center, P.A.; Lonestar Surgery Center, P.A.; Lynn Surgical Affiliates, P.A.; Kenneth G. Berliner, M.S., P.A., d/b/a/ Lonestar Orthopedics; 2 Clear Lake ENT, P.A.; Ams Surgical Center, P.A.; Galleria Surgical Associates, P.A.; CC Houston Surgical Centr, P.A.;

1 2 A misnomer for LSO Surgery Center, PA, corrected in the Third Amended Complaint (Doc. 140).

Ankle and Foot Surg Excel, P.A.; Starboard Speciality Care, LLP; JMB Surgical Affiliates, P.A.; RDJ Surgical Center, P.A.; Irish Surgical Center, P.A. and Gator Surgical, P.A. (also referred to collectiv

A second amended complaint was also filed September 14, 2011, (Doc 47). A third amended complaint (Doc. 69) was filed February 29, 2012, adding Plaintiff Comprehensive Surgicare Center, L.L.C. The judge to whom the case was originally assigned, the Honorable Nancy F. Atlas, recused herself on March 27, 2012, and the case was reassigned to the undersigned. DAC filed a fourth amended complaint (Doc. 140) on July 2, 2012. In this pleading South Side ENT P.A. was substituted in place of Clear Lake ENT. This fourth amended

Also on July 2, 2012, defendants United Healthcare Services, Inc., and Ingenix, Inc. filed a counterclaim against each of the named DAC plaintiffs and the medical doctors United alleged

DAC Surgical Partner, P.A. and Cong Thu Nguyen, M.D.; Fairway Surgical Center, P.A., and Kevin R. Smith, M.D.; Lake Breeze Surgical Affiliates, P.A., and Roy S. Lewis, M.D.; Lonestar Surgical Center, P.A. and Becky McGraw-Wall, M.D.; Lynn Surgical Affiliates, P.A. and Larry P. Conrad, M.D.;

Manzano Surgical Affiliates, P.A. and Mark A. Nichols, M.D.; South Side Ent, P.A. and Alfredo Jimenez, M.D.; Surgery Pro, P.A. and James H. Liu, M.D.; Ankle and Foot Surg Excel, P.A. and Jerry Miles, D.P.M.; CC Houston Surgical Center, P.A. and Chad C. Clause, D.P.M.; Elite Surgical Center, P.A. and Chad C. Clause, D.P.M.; Elite Surgical Center, P.A. and Bryan Yueh Lee, D.P.M.; FSS-Houston Foot, P.A. and Sherman Nagler, D.P.M.; Gator Surgical, P.A. and Marco Vargas, D.P.M.; Good Feet Surgery, P.A. and Robert J. Moore, III, D.P.M.; Hopestar Foot & Ankle Surgery Center, P.A. and Gregory L. Mangum, D.P.M.; KLA Foot & Ankle Surgical Center, P.A. and Stephen G. Eichelsdorfer, D.P.M.; Maislos Podiatry, P.A. and Gabriel Maislos, D.P.M.; MMN Enterprise Surgery Center, P.A., Meynard M. Nussbaum, D.P.M.; Premier Surgical Group, P.A., and Mark H.

Moss, D.P.M.; Professional Foot & Ankle RDJ Surgical Center P.A. and D. Sean Sweeney, D.P.M.; Redbird Foot & Ankle Surgery Center, P.A. and Brian W. Zale, D.P.M.; Sprint Foot & Ankle Surgery Center, P.A., and Jeffrey J. Penso, D.P.M.; SSPA Surgical Center, P.A. and Elizabeth A. Kroborth-Lyon, D.P.M.; Wellness Surgical Associates, P.A. and Markus Giacomuzzi, D.P.M.; Aspen Surgical Center, P.A. and Steven D. Thompson, M.D.; Irish Surgical Center, P.A. and Michael C. Maier, M.D.;

JMB Surgical Affiliates, P.A., SJS Surgery, P.A. and Eugene Lou, M.D.; Liberty Foot & Ankle Surgery Center, P.A. and Bruce Miller, M.D.; LSO Surgery Center, P.A. and Kenneth G. Berliner, M.D.; Alex Surgical Center, P.A. and Richard Garza, M.D.; Galleria Surgical Associates, P.A. and Rafael A. Lugo, M.D.; AMS Surgical Center, P.A. andAhmed Khalifa, M.D.; Comprehensive Surgicare Center, LLC and Richard M. Westmark, M.D.; Cadenza Specialty Care, P.A., Starboard Specialty Car, LLP and Robert A. Moore, Jr., M.D. Doc. 141. The doctor counter-defendants are hereinafter collectively referred to as the

counter-defendant companies. On January 25, 2013 United removed a case filed on December 17, 2012 in the 113 th Judicial District Court of Harris County Texas, styled Par Surgical, PLLC and Euston Associates, PLLC v. United Healthcare Services, Inc. and Ingenix, Inc., Civil Action No. 2012- 73871. The removed case, 4:13-cv-00197, was assigned to the Honorable Ewing Werlein. On April 8, 2013 United filed an opposed motion to consolidate the Par/Euston case with the instant case; the motion to consolidate was granted June 24, 2013. Thereafter, on July 5, 2013, United filed a first amended counterclaim (Doc. 316), which added Euston Associates, PLLC, Par Surgical PLLC, and Scott A. Cohen, M.D. as counter

Pending before the Court are: Action (Doc. 485);

Counterclaims (Doc. 491); U Affirmative Defenses (Doc. 500);

(Doc. 505);

3 I. Background

from United Healthcare Services, Inc. to the plaintiff DACs and their doctor owners. The DAC

plaintiffs assert in their Fourth Amended Complaint that United represented in the course of

4 Doc. 140 and a physician fee. The hospital or ASC is typically paid the facility fee and the doctor is

-3. In the instant case, however, the DAC 3 This motion will be addressed in a separate Opinion and Order. 4

plaintiffs, wholly owned by doctors who performed surgeries at Palladium, contracted with Palladium for the provision of surgical facility services during the surgeries performed. 5

Each of the DAC plaintiffs and Palladium entered into two forms of separate, but essentially identical written agreements, facility use agreements and billing services agreements (referred to -1 through Doc. 489-7. 6

Pursuant to these agreements, the DAC companies and Palladium agreed

provi other things, submitting facility fee claims to insurers such as United. Doc. 489-1 at ¶¶ 7&8;

Doc 489-4 at ¶¶ 1.1 and 4.1. After the facility fees were collected by the DACs from insurers, such as United, the DAC companies paid to Palladium 50% of the collected amount to Palladium (45% for use of the facility plus 5% for billing services) and retained the remaining 50%, which then passed through the DAC companies to their Doctor owners. Kovnat Tr. Doc. 486-30 at 4:25-6:24; R.A. Moore Tr. Doc. 487-12 at 21:14-20.

and collection matters related to the facility fees. Doc. 489-4. Palladium was given access to the

-in- 5 n Palladium. Nevertheless, these DACs presumably had

agreements with the other ASC that were similar to the DACs who contracted with Palladium, and these ASCs will 6 References to exhibits are cite to exhibits 68 and 69 to Doc. 506, is Doc. 489-1 through 489-7. References to deposition excerpts use the page numbers of the document, as filed in the system, found in the top line of each filed page, not to the actual page number of the deposition itself. Line numbers remain the same.

Id. ¶ 3.5.

In January 2009, United refused to pay the facility fees, asserting that the DAC plaintiffs misrepresented facility fees on claims forms submitted to United, representing the DAC plaintiffs as licensed facilities when they were really single- -defendant Doctors for the sole purpose of submitting

fraudulent facility fee claims. United alleges it would have denied the facility fee claims pursuant to coverage limitations in its insurance policies had it known the facility fees were passing through to the Doctors II. Summary Judgment Standard Summary judgment under Federal Rule of Civil Procedure 56(c) is appropriate when, viewing the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is would allow a reasonable jury to find in favor of the nonmovant. Anderson v. Liberty Lobby,

Inc., 477 U.S. 242, 248 (1986). Where the non-movant bears the burden of proof at trial, the movant must offer evidence that undermines the non- essential elements of the non- ate the elements of the non- Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Lujan v. National Wildlife Federation, 497 U.S. 871, 885 (1990); Edwards v. Your Credit, Inc., 148 F.3d 427, 431 (5 th

Cir. 1998).

If the movant meets its burden and points out an absence of evidence to prove an essential element of the non- -movant bears the burden of proof at trial, the non-movant must then present competent summary judgment evidence to support the essential elements of its claim and to demonstrate that there is a genuine issue of material fact for trial. , 40 F.3d 698, 712 (5 th

Cir.

Celotex, 477 U.S. at 323. The non-movant may not rely merely on allegations, denials in a pleading or unsubstantiated assertions that a fact issue exists, but must set forth specific facts showing the existence of a genuine issue of material fact concerning every element of its cause(s) of action. Morris v. Covan World Wide Moving, Inc,, 144 F.3d 377, 380 (5 th

Cir. 1998). Conclusory allegations unsupported by evidence will not preclude summary judgment. , 40 F.3d at 713; Eason v. Thaler, 73 F.3d 1322, 1325 (5 th

some alleged factual dispute between the parties wil State Farm Life Ins. Co. v. Gutterman, 896 F.2d 116, 118 (5 th

Cir. 1990), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247- Id., quoting Liberty Lobby, 477 U.S. at 252. The Fifth Circuit requires the non-movant to submit

Id., quoting In re Municipal Bond Reporting Antitrust Litig., 672 F.2d 436, 440 (5 th

Cir. 1978), and citing Fischbach & Moore, Inc. v. Cajun Electric Power Co-Op., 799 F.2d 194, 197 (5 th

significantly p Thomas v. Barton Lodge II, Ltd.,

174 F.3d 636, 644 (5 th

Cir. 1999), citing Celotex, 477 U.S. at 322, and Liberty Lobby, 477 U.S. at 249-50. Wallace v. Texas Tech Univ., 80 F.3d 1042, 1047 (5 th

Johnston v. City of Houston, Tex., 14 F.3d 1056, 1060 (5 th

Cir. 1995)(for the party opposing the motion for - not argument, not facts in the complaint-- citing Solo Serve Corp. v. Westown Assoc., 929 F.2d 160, 164 (5 th

Cir. 1991). The non- answers to interrogatories and admissions on file, designate specific facts showing that there is a Giles v. General Elec. Co., 245 F.3d 474, 493 (5 th

Cir. 2001), citing Celotex, 477 U.S. at 324. S.W.S. Erectors, Inc. v. Infax, Inc., 72 F.3d 489, 495

(5 th

Cir. 1996); see also Thurman v. Sears Roebuck & Co., 952 F.2d 128, 137 n. 23 (5 th

Cir.

The court must consider all evidence and draw all inferences from the factual record in the light most favorable to the non-movant. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986); , 40 F.3d at 712-13. The Court may not make credibility determinations. Deville v. Marcantel, 567 F.3d 156, 164 (5 th

Cir. 2009), citing Turner v. Baylor Richardson Medical Center, 476 F.3d 337, 343 (5 th

Cir. 2007).

Forsyth v. Barr, 19 F.3d 1527, 1533 (5th Cir. 1994). Rather the nonmovant must identify evidence in the record and demonstrate how it supports his claim. Ragas v. Tenn. Gas Pipeline Co., 136 F.3d 455, 458 (5th Cir. 1998). While a failure to state a claim is usually challenged by a motion for dismissal under Rule 12(b)(6), it may also constitute the basis for a summary judgment under Rule 56 because

Walen v. Carter, 954 F.2d 1087, 1098 (5 th

Cir. 1992). In such circumstances the motion for summary judgment challenging the sufficienc Ashe v. Corley, 992 F.2d 540, 544 (5 th

Cir. 1993). A motion for summary judgment should be granted if, accepting all well-pleaded facts as true and viewing them in the nonetheless fails to state a claim. Id.

- independently, viewing the evidence and inferences in the light most favorable to the nonmoving

Amerisure Ins. Co v. Navigators Ins. Co., 611 F.3d 2o99, 304 (5 th

Cir. 2010), quoting ., 264 F.3d 493, 498 (5 th

Cir. 2001). III. Discussion t (Doc. 485)

In its 108 page Motion for Summary Judgment (Doc.485) United attacks the allegations (2) lack of a real party in interest under Rule 17; (3) statute of limitations; (4) ERISA those United maintains were not submitted to United by the DACs. Doc. 485.

Putting aside for the moment the arguments for lack of standing, lack of real party in interest under Rule 17, statute of limitations issues, ERISA preemption issues, and claims not submitted, the overriding subjects of the motion on the merits fall into two categories. First, United maintains that the DACs, the pr to the Doctor owners of the DACs kickback payments to the Doctors for scheduling procedures

at Palladium. Palladium, the actual licensed ambulatory surgical facility, instead of claiming facility fees from United, the insurer, contracted with each of the DACs, which were wholly ling and receiving facility fees from the insurer, which fees would be deposited by the agent, Palladium, into the bank accounts of the DACs. The DACs, again through their agent Palladium, would then pay to Palladium, 45% of the fees received from United as payment for the facilities Palladium provided and 5% as payment for its services as billing and collection agent. The remaining 50% of the insurance payments were retained by the DACS and passed through to the Doctor owners. The DACs, each wholly owned by a Doctor, and most calling themselves a name suggestive of a surgical facility, actually had no license, owned and ran no facility, and incurred only the minimal expenses necessary to continue as viable corporations. Cf Doc. 490-7 through 490-21. The DACs do not dispute any of these material facts.

a facility fee and thus had no out-of-pocket expenses. DAC argues that for the 50% fee the -5. Putting aside the question whether such a scheme

is even legal, the fact remains that the DACs were not procuring anything; they had nothing to do, but serve as a conduit for payments from United to the Doctor owners.

Second, United maintains there were no oral implied contracts, as alleged by the DACs, formed between the DACs and United for payment of the facility fees. United further argues that the negligent misrepresentations the DACs allege United made, were not, in fact, made.

resentation rely on the same factual footing. When Palladium, acting as the billing agent of the DAC, made verification telephone calls to United, requesting confirmation of coverage of a patient, the DACs argue that United told them that the patient was covered for the procedure indicated and guaranteed payment to the DAC for the facility fees before the procedure was done. Although there is no dispute that verification telephone calls were made by Palladium, as billing agent for the DACs, to United, there is almost no evidence in the summary judgment record of the content of those conversations. Plaintiffs allege United represented during verification calls that

United would not pay for them. Doc. 510 at 37. In support of this allegation, plaintiffs offer the testimony of Beverly Randall- -25 at 5:22-25.

Q. Did you actually make phone calls to United to verify payment to verify coverage?

A. Yes. Q. And in those phone calls, what were the topics that you had discussed?

A. The topics when you call to verify the insurance is the

the CPT code. Doc. 512-25, at 12:18-13:2

Q. For instance, if you told them that you had a particular D Number, date of birth, United never communicated to you that they--it would only be covered if it was to take place in a licensed ASC facility? A. No. Id. at 11:22-16.

Q. Did United ever tell Palladium that it would only pay facility fees to a licensed ASC? No. Id. at 11:10-12. Plaintiffs do not provide any other relevant testimony as to the content of the verification calls. The only witness who actually participated in these verification calls, Beverly Randall- Tillis, testified that in verification telephone calls she had with United she did not recall if United

Randall-Tillis Tr., Doc. 512-25 and 487-19 at 5:17-6:3. The case is replete with exhibits showing there were telephone calls, but no evidence to establish that United contracted with the DACs to pay for facility fees or negligently misrepresented that it would pay for those fees. (1) Implied Contract and Breach of Contract Claims The elements of a breach of contract claim are the same, whether the alleged contract is express or implied. Cf. Plotkin v. Joekel, 304 S.W.3d 455, 476 (Tex. App. Houston [1st Dist.] 2009, review denied). The elements of breach are: (1) existence of a contract, (2) performance or tender of performance by the plaintiff, (3) breach by the defendant, and (4) damages resulting from that breach. Bridgmon v. Array Sys. Corp., 325 F.3d 572, 577 (5th Cir. 2003) (citing Frost , 29 S.W.3d 580, 593 (Tex. App. Houston [14th Dist.] 2000, no pet.)).

The existence of an unwritten implied-in-fact contract may be shown by conduct indicating a mutual intent to be bound, R.R. Mgmt. Co., L.L.C. v. CFS La. Midstream Co., 428 See

Gillum v. Republic Health Corp., 778 S.W.2d 558, 568-69 (Tex. App. Dallas 1989) (affirming summary judgment for defendant on breach of implied contract claim). Plaintiffs argue implied contracts were formed by verification calls, use of the Ingenix database 7

, and past payments of facility fees. First, Plaintiffs provide no authority that a verification phone call to an insurer

to enter into a binding agreement with United. Indeed, if the verification calls were not for the

purpose of communicating an offer that United could accept, then the calls would have no

obtain information whether patients have insurance coverage to pay for a medical medical treatment before providing treatment. See Doc 486-13 (DACs testifying that verification is not a promise of payment); Doc. 489-38 (disclaimer). Second, Plaintiffs have shown no connection between the Ingenix database licensed to Palladium and the usual and customary rates provision in the Eligibility Document or any other written or oral representation in regards to fees. Third, past payments alone do not show mutual intent to be bound, without performance facility services or incur any expenses. Doc. 490-5 (reported expenses). Plaintiffs argue they had

obligations to Pallad 7

See below for a discussion of the Ingenix database.

and professional matters relating to its use of the ASC, including, without limitation, compliance forts to assure that the operations in the ASC meet a high degree of quality of health care consistent with the acts that plaintiffs must perform, aside from giving advice. The DACs have failed to bring

forward any evidence of a genuine issue of material fact to establish the existence of an implied

Breach of Contract and an Implied Contract will be granted. (2) Negligent Misrepresentation

business or a transaction in which he had an interest; (2) supplied false information for the guidance of others; (3) without exercising reasonable care or competence in communicating the information; (4) the plaintiff justifiably relied on the information; (5) proximately causing the Kastner v. Jenkens & Gilchrist, P.C., 231 S.W.3d 571, 577 (Tex. App. -- Dallas 2007, no pet.); see also In Re Stonebridge Techs., Inc., 430 F.3d 260, 267 n.4 (5th Cir. 2005). In order to prove a claim of negligent misrepresentation DAC must show that United made representations in the course of its business for the guidance of others, but did not exercise reasonable care or competence in obtaining or communicating the information, and that DAC suffered pecuniary loss by justifiably relying on the representations United made. Alexander v. Grand Prarie Ford, L.P., 2007 WL, at *6 (N.D. Tex. May 31, 2007). CF also Schwartz v. Gregg, 2010 WL 2977479, at *3-7 (Tex. App. Jul. 28, 2010) and Doubletree Partners, L.P., 866 F. Supp. 2d 604, 631 (E.D. Tex. 2011). As was discussed above,

the DAC plaintiffs have pointed to no evidence of a genuine issue of material fact that United made any guarantees of payments or representations of coverage to them beyond the health care plans. As a result there can be no evidence of reliance or damages. United argues in its Motion for Summary Judgment that DAC has no evidence to support its allegations that United made actionable negligent misrepresentations to their billing agent concerning coverage and payment of fees. The Fourth Amended Complaint filed by DAC. makes a number of negligent misrepresentation claims against United:

United Healthcare specifically represented that the patients receiving medical services and treatment were covered under an associated with the medical services and treatment, would be paid by United Healthcare. Doc. 140, ¶ 65

United represented that the facility fees incurred and submitted by Plaintiffs would be compensated in accordance with the usual and customary rates, provided that such rates did not exceed the maximum pre-allowable facility fee set forth on United Id.

In ¶ 44 of the Fourth Amended Complaint (Doc. 140), DAC alleged that in calls to verify

In ¶ 46 of the Fourth Amended Complaint (Doc. 140) DAC alleged that in calls to verify coverage made to United by

In ¶ 52 of the Fourth Amended Complaint (Doc. 140) DAC alleged

[P]ursuant to Industry custom, services and surgical treatment were provided to United provided by United Healthcare to receive verification and authorization for the surgery. A representative of United

confirm that the medical services were valid and billable, and provide a preauthorization of the medical services. United Healthcare also explained what it would pay for the claim, i.e., the percentage of the usual and customary amount charged for the planned procedure. This encompassed, not only approval of the particular surgery, but also the use of the facility in which that surgery would be performed.

DAC continued in ¶ 53 of the Fourth Amended Complaint (Doc. 140)

In other words, before each procedure was performed, United Healthcare expressly represented not once, but twice that Plaintiffs would be compensated by United Healthcare for the fees associated with the use of the ASC. The representations regarding coverage and payment made by United Healthcare were made by an authorized agent or representative of United Healthcare. In ¶ 57 of the Fourth Amended Complaint (Doc. 140) DAC alleged

United Healthcare represented on multiple occasions that the facility fees associated with the medical services and treatment were covered under the insurance contract between United Healthcare and regarding the allowable facility fee associated with each covered insureds at the ASC.

Healthcare never mentioned that the UCR [usual and customary rate] Data was flawed and

foregoing are not actionable as negligent misrepresentations because they are not allegations of negligent misrepresentation claim In addition, United argues that the DACs have presented no

evidence that there were any promises allegedly made that were not kept. United cites Ambulatory Infusion Therapy Specialists, Inc. v. Aetna Life Insurance Company, 2007 WL 320974 (S.D.Tex, Jan. 30, 2007). e day

Ambulatory Infusion contends that it should be paid these claims because Prudential improperly 2007 WL 320974 *4. The witness also testified that no ill for services provided Id what the Plan paid for out-of- Id. When a claim was presented, the

insurance company processed the claim and sent plaintiff the payment along with an explanation of benefits. On occasion only partial payment of a claim was sent, along with an explanation of benefits. Based upon this evidence, the Honorable Lee H. Rosenthal found that there were no misrepresentations. The evidence for misrepresentations in the instant case is more slender than that in Ambulatory Infusion. United cites to the many depositions of the DAC doctor owners who had no knowledge of communications with United on coverage matters, including specific dates, months, or years when the communications took place. Doc. 486-12 at 64-65. Exhibit 12 to plaintiffs doctor owners in which they confirmed that a verification of coverage is not a promise

of payment. Doc. 486-12. Exhibit 101 to (Doc. 489-38)

and the other dated May 7, 2008. These Fax Eligibility Status documents were received by DAC

plaintiff Redbird Foot and Ankle Surgery Center owned by Dr. Brian Zale. Both documents BENEFITS. ACTUAL PLAN COVERAGE AND BENEFIT PAYMENTS ARE

DETERMINED WHEN A CLAIM IS RECEIVED. FOR MORE INFORMATION ABOUT PLAN BENEFITS, PLEASE VISIT OUR IN NETWORK HOSPITAL AND PHYSICIAN

Exhibit 102 to Summary Judgment (Doc. 489-39) is a series of copies of eleven letters, dated in 2006 and 2007, sent to patients and DAC owner doctors, Meynard Nussbaum, D.P.M., Kevin Smith, M.D. and Brian Zale, D.P.M. with copies going to Palladium. These letters set forth the patient names and a reference number. The letters acknowledge that United had been notified that the patient was to be given outpatient treatment. The letter to Dr. Nussbaum contained the following language:

This letter is not a statement of benefit coverage or a guarantee of services, they will be reimbursed at the OUT-OF-NETWORK benefit level. . . . If you need eligibility or benefit coverage information, please call the toll-free number shown on the they will be considered according to the terms of the employees benefit plan.

The letters to the other DAC owner doctors, patients, and Palladium in Doc. 489-39 contained similar language. of any representations by United that the claims at issue would be paid. Doc. 486-31 at 18:15-

20:2, 21:14-25:2. Similarly, DAC witness Brad

conversations with any insurance companies. Doc. 486-30 at 9:8-10:3. Again, DAC witness, Beverly Randall-Tillis testified that in verification telephone calls she had with United she did

insurance -19 at 5:17-6:3. Although

-allowable ¶ 65), there is evidence

agreed- -30 at 11:9-1-of-network -30 at 16:13-17:1, 86-30 at 18: 1-

¶57 of the Fourth Amended Complaint (Doc. 140) was referring. Doc. 486-31 at 26:24-27:19. He further testified er the reference to a Fee Schedule [in ¶ 57] is the one [he had] referred to that was provided as part of an in- Doc. 286-31 at 28:8- -network Fee Schedule to

Pallad - the rates were at too steep a discount. Doc. 486-31 at 29:3-24.

Exhibit 15 to -15) is a

chart of excerpts of testimony from the DAC doctor owner witnesses testifying that they knew that their DAC entities and Palladium were out-of-network, and, as such, did not have contracts with United. All of which leads to a discussion of the Ingenix database. Ingenix, one of the named defendants in the Fourth Amended Complaint (Doc. 140), is a wholly owned subsidiary of United that collects information on, inter alia argument is that the Ingenix database licensed by Palladium acting as an ASC facility, rather

payment of facility fee bills referenced in the Fourth Amended Complaint (Doc. 140). Donald

Kramer, in his deposi solely on the Ingenix database Doc. 486-31 at 32:6-11. Kovnat testified that it was Palladium

that subscribed to the Ingenix database, which contained a range of ASC facility charges for different CPT codes. Doc. 486-30 at 14:10-15:23. and Palladium Management, LLP on September 20, 2004. Doc. 489-8. A Product Schedule,

which accompanied the MSLA, provided at ¶ I(C), ¶ IV(A):

Any reliance upon, interpretation of and/or use of the Data by Customer is solely and exclusively at the discretion of Customer. reimbursement level or fee regardless of whether Customer uses the Data. Ingenix does not reimbursement levels for Customer and its business. Customer may use the Data (1) to create fee schedules . . . and (2) for reviewing or setting an allowable fee in adjudication

and/or payment of healthcare bills submitted to Customer.

Exhibit 73 to -9), is a Acquisitions, L.L.C. [Northstar] and The Palladium for Surgery Houston, Ltd. [Palladium] so

d s -9 at 2. The Management and Cost Sharing Agreement

Procedure Fee Schedule for facility fees (and not for professional fees) to be used in the day-to- day billing for [Palladium] services. . . . based on prevailing local rates as provided by surgeon/owners and other sources, fee information contained in databases owned by Northstar Id. at 6. In his deposition testimony Brad Kovnat, director of business development of Palladium - cility services. Doc 486-30 at 12:8-13:9; 14:1-8. constitutes a United promise or guarantee to pay for facility services rendered at Palladium at

rates contained in the datab suggested out-of- d

Kramer (Doc. 512- Ingenix, Inc. database for facility fee charge data. This subscription began on September 20,

2004. The fees listed on the Ingenix database was the sole source of data that Palladium used to

Ingenix database. Doc. 486-31 at 32:7-11. 8

Incorporated into the MSLA is a product schedule that expressly disclaims such use of or reliance on the database and leaves to Palladium the sole discretion on how it will use the database. Doc. 489-8 at ¶¶ I(C) (Doc. 489-8 at 13) and IV(A) (Doc. 489-8 at 15). United, in its Reply,

50-54. United, the entity that processed and paid claims was not the licensor of the Outpatient

OPFM from Ingenix, an entity separate from United Healthcare Services, Inc., that does not

process and pay claims. Doc. 489-8. There is no evidence that the OPFM was used to process any claims in this case. Nor is there evidence that United marketed or sold the OPFM. Id. There is no evidence that United had access to or used the OPFM. Cf. Deposition of Carla Gee, Doc. 521-8.

Id. at 8:24-9:11); Id. at 4:4-13, Id. at 7:3- Id. at 3:11-17).

The Ingenix database was licensed to Palladium, not DAC. Only Palladium was permitted to use the data by the terms of the MSLA. Doc. 489-8. The MSLA expressly provides -

8 Such a post 30(b)(6) deposition, self-serving, statement cannot be used to raise a fact issue

preventing a summary judgment. Cf. page 13 above.

any person or entity who is not a party to this Agreement or an Affiliate of a party, to access the Id. ¶ 1.3(a) and (b). The MSLA provides

with a party to this Agreement Id. The MSLA further provides that if the customer, Palladium, wants to use a third party as its agent to access the software, the data, or a database of customer data produced through any software, Ingenix must approve the third party access, and further, the third party must sign an appropriate Id. at ¶ 1(c). The MSLA forbids the assignment or transfer of the agreement or any of the rights or licenses granted under it, without prior written consent of Ingenix. Any attempted assignment without consent shall be considered Id. ¶ 10.3. Palladium and its affiliates were allowed to use the Ingenix data in the OPFM without the permission in writing of Ingenix, but DAC does not qualify as an affiliate of Palladium because the DACs are each separately owned and controlled by the Doctors, and there is no evidence Palladium sought or obtained permission in writing to allow the use the OPFM data by DAC. Palladium entered into the MSLA with Igenix on September 20, 2004, before any of the DAC entities were formed and before DAC entered into the Billing Services Agreements with Cf. Doc. 521-9. DAC ha

-of- -40. inter alia in ¶¶ 56 and 57 of the Fourth Amended Complaint because DAC can point to no evidence that raises a genuine issue of maximum allowable facility fee associated with each medical procedu Doc. 140 ¶56. Nor can the DACs point to evidence that raise genuine issues of material fact to

representations regarding the allowable facility fee associated with each covered medical service

and had reason to believe that they were entitled to the usual and customary facility fee, provided

that such fee did not exceed the pre- schedule Id

convincing. Related to this Ingenix database argument is plaint

the UCR data was flawed - 66. If the usual and customary rate data is meant to equate to the information contained in the Ingenix database, DAC points to no evidence that there is a genuine issue of material fact that the data in the Ingenix database was flawed or that United paid DAC using flawed or inadequate

reporting an investigation of United by the Attorney General of New York. Doc 486-31at 34:6- Id. at 34:22- personal knowledge and mere speculation, does not constitute evidence creating a genuine issue

Misrepresentation Claims will be granted.

(3). Violations of Texas Insurance Code, DTPA

Plaintiffs assert misrepresentation under Texas Insurance Code §§ 541.051, 541.052, 541.061; and the Texas Deceptive Trade Practices Act, Tex. Bus. & Com. Code Ann. § 17.46 510 at 48. Based upon the reasoning above regarding negligent misrepresentation, plaintiffs

point to no evidence establishing that there is a genuine issue of material fact that representations were made during the verification telephone calls, that an agreement conferring

as to the plain (4). Promissory Estoppel

that was foreseeable to the promisor; and (3) substantial reliance by the promisee to his

Miller v. Raytheon Aircraft Co., 229 S.W.3d 358, 378-79 (Tex. App.-- Houston [1st Dist.] 2007, no pet.) (citing English v. Fischer, 660 S.W.2d 521, 524 (Tex. 1983)). Although the existence of a contract, including

Landmark Org., LP v. Tremco Inc., 2010 WL 2629863, at *6-7 (Tex. Ct. App. Jul. 30, 2010). Finally, a court will not enforce See Zenor v. El Paso Healthcare Sys., Ltd., 176 F.3d 847, 864 (5th Cir. 1999). Plaintiffs allege United promised during verification phone calls that it would pay Facility Fees. Doc. 140 ¶ 92. Again, plaintiffs have failed to point out any evidence that United specifically promised to pay facility fees and that it would be re

(5). Quantum Meruit & Unjust Enrichment

Unjust enrichment and quantum meruit claims fail because they seek disgorgement based on healthcare services provided to patients. Plaintiffs cannot recover under these causes of action from United, because plaintiffs did not provide healthcare services to United. See Electrostim Med. Services, Inc. v. Health Care Serv. Corp., 962 F. Supp. 2d 887, 898 (S.D. Tex. 2013), , 13-20649, 2015 WL 3745291 (5th Cir. June 16, 2015) quantum meruit cause of action based on healthcare services provided to a participant or beneficiary of a healthcare insurance

quantum meruit will be granted. 9

Having granted Unite Insurance Code/DTPA, promissory estoppel, and quantum meruit and unjust enrichment claims,

interest under Rule 17, statute of limitations, and ERISA preemption.

9

es. Doc. 500

Counterclaims Doc. 491 10

In its First Amended Counterclaim United seeks a declaratory judgment that it is not liable for any pending facility fees for services provided at Palladium because the facility fees are unlawful and fraudulent. Doc. 316 ¶¶ 226, 227. In addition, United seeks a declaratory -sharing agreements are void ab initio on the basis of illegality. Doc. 316 ¶ 231. (1). Private Right of Action

Plaintiffs rely on Gaalla v. Citizens Med. Ctr., in which the Honorable Janis Jack denied a

motion for declaratory judgment that a hospital violated the federal anti-kickback statute, because the statute did not provide a private right of action. No. 6:10-cv-14 (S.D. Tex. June 30, 2010), 2010 WL 267170 courts within this Circuit to have considered this issue have concluded that declaratory judgment

under 28 U.S.C. § 2201 is not available where the substantive statute at issue does not provide a Id. at *4. Gaalla cites two other district court cases denying declaratory judgment. 10

or Summary Judgment on the United Counterclaims are so similar to the motion filed by Par, Euston, and Dr. Cohen, that they will be analyzed together.

Human Servs., 224 F.Supp. 2d 1115, 1129 (S.D. Tex. 2002) (denying declaratory judgment as to

right of action but only a defense to administrative enforcement) and RGB Eye Associates, P.A. v. Physicians Resource Group, Inc., 1999 WL 980801, at *10 n. 9 (N.D. Tex. Oct. 27, 1999) (denying declaratory judgment as to violation of anti-

United argues private rights of action are not required. Doc. 506 at 84. federal courts throughout the country have explained that, even if a statute under which a party seeks a declaration does not provide a private cause of action, a plaintiff may still maintain a declaratory judgment action to obtain a ruling that the de United cites four cases supporting its position: Hancock v. Baker, 263 Fed. Appx. 416, 419-420 (5th Cir. 2008); , 907 F. Supp. 1019, 1026 n.6 (W.D. Tex. 1995), 105 F.3d 1035 (5th Cir. 1997); Sec. Indus. Assoc. v. Bd. of Governors of the Fed. Reserve, 628 F. Supp. 1438, 1441 (D.C.C. 1986); Zimmer, Inc. v. NU TECH Med. Inc., 54 F. Supp. 2d 850, 864-64 (N.D. Ind. 1999).

-reply in Opposition to Counter- -74

er these [state and federal] laws, but rather, based its C cannot recover for claims that arise from its own illegal or fraudulent conduct, as well as [on]

gues that Gaalla is not applicable to this case

violated . . .the Texas Health and Safety Code and the Anti- Case 4:11-cv-01355 Document 541 Filed in TXSD on 12/08/16 Page 33 of 56 provides for a p -defendants] violated the Texas Health and Safety Code and [/or] the

Anti- Gaalla at 2010 WL 2671705 at *5), nor is it asserting in its policy in Texas that a party cannot recover for claims that arise from its own illegal or fraudulent

that the Shell Companies entered into with Palladium are void ab initio Amended Counterclaim, Doc. 336, ¶¶ 227, 231 and Doc. 506 at 69 n. 35, 73-74, and 78-79.

United and anti-kickback laws.

surgeries conducted in its operating rooms to t person may not establish or operate an ambulatory surgical center in this state without a

that plaintiffs were shell companies without operational control of Palladium. Whether or not plaintiffs fraudulently represented that they operated an ASC, they point to no evidence any of them ever actually operated one.

Second, United alleges the Use A Id. surgical center (ASC) license is issued only for the premises and person or governmental unit

named on the appl not bar licensed ASCs from letting others use their facilities for a fee.

to [plaint Id.

In August 2006 Texas Mutual Insurance Company submitted a complaint to the Texas Department of State Health Services (TDSHS) alleging Palladium was in violation of 25 Tex. Admin. Code § 135.23(a) and/or (d). Ex. N, Doc. 500-14. TDSHS reported:

Unable to substantiate that this practice allows assignment of license # 008009 for The Palladium for Surgery - Houston, L.L.P. to another entity. The ASC retains responsibility for the activities conducted on the premises. The ASC requires that physicians be credentialed by the ASC and that the non-owner regulations. Doc. 500-14 at 4. This report from the TPSHS does not establish as a matter of law that Palladium did not unlawfully transfer its license to the DACs by means of the use agreements. In regard to anti- plaintiffs violates three state criminal anti-kickback statutes: the Texas Patient Solicitation Act,

Tex. O securing or soliciting a patient or patronage for or from a person licensed, certified, or

registered

55 (prohibiting remuneration

promises to reward any person, firm, association, partnership, or corporation for securing or Tex. Pen. Code § 32.43 (Commercial Bribery) accept any benefit from another person on agreement or understanding that the benefit will influence the conduct United alleges the fee-sharing arrangement violated the Federal Anti-Kickback Statute, which hing or arranging for the furnishing of any item or service for which payment may be made in whole or in part -7b. The Federal Anti-Kickback Statute is similar to the Texas Patient Solicitation Act but applies only to referrals for services paid by federal health care programs, not by private insurers such as United. Id. The second prong of the Federal Anti-Kickback statute, for example, broadly prohibits , or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole -7b(b)(1)(B). Here, United alleges Palladium use Palladium, as to the terms of the Use Agreement. Doc. 500- SS-Houston]

leasing, ordering, or arranging for . . . [a] f Id. The Texas statute

§ 102.001. Id.

Gaalla

question do not provide for private causes of action, United cannot secure a declaratory judgment that it is not liable for facility fee charges because the DACs violated state and federal r summary

In its counterclaim, United asserts common law fraud. Doc. 316 ¶ 215-219. The elements

knew the representation was false or made the representation recklessly without any knowledge of its truth; (3) the defendant made the representation with the intent that the other party would the plaintiff suffered an injury by Exxon

Corp. v. Emerald Oil & Gas Co., L.C. may include an omission when there is a duty to disclose. Reynolds v. Murphy, 188 S.W.3d 252,

270 (Tex. App. Fort Worth 2006, pet. denied). state with particularity the circumstances constituting fraud or mistake. Malice, intent,

knowledge, and other conditions fraudulent, the speaker, when and why the statements were made, and an explanation of why

they Plotkin v. IP Axess, Inc., 407 F.3d 690, 696 (5th Cir. 2005) (citing Williams v. WMX Technologies,

Inc., 112 F.3d 175, 177 78 (5th Cir.1997), cert. denied, 522 U.S. 966 (1997)). United alleges the DACs concealed their fee-splitting arrangement with Palladium by

submitting fraudulent claims. The DACs each entered into fee-splitting arrangements which Fees between Palladium and a plaintiff, the latter passing its half of the fees to a counter-

defendant Doctor, the sole owner and employee of the DAC entity. The Use Agreement granted

For and in consideration of entering into this Agreement, [FSS-Houston] agrees to pay to Company a monthly fee -five percent by Practice or its authorized agent as payment for patient services provided by Practice at the ASC. Doc. 489-1 ¶ 7. As noted above, The Doctors collected their physician fees. The DAC plaintiffs collected facility fees. The Use Agreement specifically provided that the Use Fee did not include Physician Fees. Doc. 500- ASC shall be billed

misleading because Palladium, not the Plaintiff DAC, provided the services for which Facility

Fees were charged.

sion of staff in addition to

equipment and space. Doc. 318-8, Doc. 318-3. In emails to other Doctors, Palladium admitted it

-9, Doc. 318- those services were. Plaintiffs have provided no evidence that they provided space, equipment, or any services at the facility, except for physician services for which the Doctors charged and were paid physician fees. On the contrary, the Use Agreement sh Doc. 500-2 ¶¶ 1, 7, 11. Plaintiffs delegated to Palladium the filing of their formation documents,

TIN applications, bank account and lockbox applications, and Facility- returns show they had no operating assets, employees, or facility expenses, except for minimal administrative fees. Doc. 490-5, 490- Doc 490-36, indicating the business from which the taxpayer -36; discussion at Doc. 506 at 14-17. Some plaintiffs paid Palladium its share of Facility Fees with checks ma -4.

The only obligation placed on the Plaintiff under the Use Agreement was to maintain general liability insurance, including professional liability insurance, against claims arising from its own negligence in its use of the facility. Doc. 489-1,¶ 12. The Plaintiff and Palladium each agreed to indemnify each other for losses caused primarily by the other party. In sum, according to United, the Plaintiff was essentially a shell company purporting to provide facility services, but that did not provide any facility services and that was formed for the purpose of collecting a 55% kickback or share of the Facility Fees charged to United for space, equipment, and services provided by Palladium.

Fraud. The DACs and the Doctors h Case 4:11-cv-01355 Document 541 Filed in TXSD on 12/08/16 Page 39 of 56 for fraud. United first points out that

As a preliminary matter, summary judgment is rarely proper on fraud claims because they involve issues such as intent and reliance which turn heavily on circumstantial evidence and the credibility of witnesses and, thus, are within the purview of the trier of facts. See HEI Resources East OMG, JV v. Evans, 413 Fed. Appx. 712, 715 (5 th

Cir. 2011) (quoting Rimade Ltd. v, Hubbard Enters., Inc., 388 F.3d 138, 144 (5 th

required to establish fraud is a factual question uniquely within the realm of the trier of fact because it depends upon the credibility of Doc 506 at 52. United has mustered copious evidence, circumstantial and otherwise, to establish that there are genuine issues of material fact that exist as to each of the elements required to establish fraud. Cf. Doc. 506 at 10-38, 52-72, 91-95, 116-126 together with cited exhibits. United has explained the affirmative misrepresentations made to United on the facility fee bills. After the Doctor performed a procedure at Palladium, Palladium, on behalf of the corresponding DAC, would submit a claim to United using a standard UB-04 health insurance claim form. Examples of this form are at Doc. 507-1. These claim forms themselves constitute

Beverly Randall- designated billing expert in this case. She testified that she understood that CMS [Centers for

Medicare and Medicaid] is a federal agency that oversees the Medicare and Medicaid programs. Doc 487-19 at 11:3-8. She further testified that she and her employees consulted the CMS Manuals for guidance as to how to bill. Doc. 487-19 at 11:9-25- 12:1-9. She also testified that

487-19 at 12:11-15; 18-

-19 at 12:17-13:3. Randall-Tillis identified the CMS Manual on ractice that -19 at 13:8-15:20. Testifying about a chart in the CMS for the UB-04 form, Doc. 507-2, Randall-Tillis Box 1 of the UB-04 -19 at 15:22- -19 at 17:12- 23. She also agreed that nowhere on the claim form is there a place to show the location where the services are rendered. Id at 1-19. She also agreed that according to the chart in the CMS for the UB-04 form, if Palladium were listed in Box, 1, Line 1 of the UB-04 form, that would be a representation that Palladium was the Provider Name. Id. at 19: 18-24. United argues that claims forms were submitted to United in four different ways, each of which contained affirmative fraudulent misrepresentations:

(1) Palladium is identified as the provider in Box 1, the Shell Company is identified in Box 2 as the payee/billing agent, and the TIN [tax identification number] does not belong to the licensed ASC [Palladium], but to the unlicensed Shell Company; (2) Palladium is identified as the provider in Box 1,

the Shell Company is identified in the bottom right-hand corner box as the (3)Palladium is identified as the provider in Box 1 and uses the Shell (4) the Shell Company is identified as the provider in Box 1, its own TIN is used, and there is no reference to Palladium. Doc. 506 at 54. Categories one and two of the claim forms misrepresent that the claim is submitted on behalf of Palladium, as the provider of the facility services (box 1), and the DAC is represented -23, at 4:16-6:2 (transcript of Stacy

Chalupsky 11

; Doc. 486-9 (chart refl services.) ; Doc. 487-19 (transcript of Beverly Randall Tillis) at 11:24-13:25, 14:8-15:20, 8:22-

9:12, 17:12-18:19, 19:18-14; Doc. 507-2 (Excerpt of CMS Manual). This information is arguably false for two reasons: First, because the DACs were not providers of ASC facility services and Second; under the use agreements Palladium was serving

-9 at 14:11-16:19; Doc. 140 at ¶ 45 n. 1 and ¶ 82. These claims raise a genuine issue of material fact that United did not and could not -9 at 16:11-19.

The third category of claim forms misrepresent that Palladium, the licensed ASC, seeks to collect facility fees for services it provided itself, when actually the DACs, whose TINs were used on these claims, were seeking to collect the payments under the terms of the EU Agreements, for providing ASC facility services, which they did not in fact provide. Doc. 508-9 at 16:20-17:15, 18:18-19:23. In the fourth category of claim forms the DACs misrepresent in box 1 that they are licensed ASC providers, entitled to payment because they lawfully provided facility services. Doc. 508-9 at 20:24-21:4. Texas Health & Safety Code ***Sec. 243.003 provides that an ASC cannot operate without a license, each ASC must be separately licensed, and an ASC license is not transferable or assignable. The DACs admitted they are not licensed and they are not facilities. Doc. 486-1 and 486- 11

Stacy Chalupsky was a Senior Recovery Investigator who worked for United on the investigation of the DAC claims. Excerpts from her deposition can be found at Doc. 486-22, Doc. 486-23, and Doc. 508-8 and Doc. 508-9

licensed and are not facilities, respectively). , misrepresent that the claim was submitted on

behalf of Palladium as the provider of the facility services and that Par or Euston was the payee, identified as the payee/billing agent in Box 2, and the TIN does not belong to the licensed ASC,

but to the unlicensed Par or Euston. Doc. 486-23 at 4:16-6:2; Doc. 494 and 494-1 bills submitted to United by Par; Doc. 495 (bills submitted to United by Euston). Dr. of the facility services. Doc. 508-10 at 34:13-23, 38 at 11-21. United argues in its response to

the counter- 2008, after noticing high billing rates and being notified about the Use Agreements, United

began a fraud investigation, tracking the different numbers on each Palladium claim. Doc. 506 at 45. In October 2008, United further argues, that it determined that at least some of the claims were seeking payment for facility services to entities that were not licensed facilities, and it started de Id. at 46. The summary judgment record raises genuine issues of material fact that the DAC plaintiffs made (1) material misrepresentations in submitting Facility Fee claims to United, (2) knowingly or recklessly as to the falseness of the claims, (3) with intent that United pay Facility Fees in reliance on the claims, and (4) causing United to justifiably rely on the representation. See Exxon, 348 S.W.3d 217. The claims forms are unambiguous documents that satisfy the who, what, when, and why of Rule 9(b). United has also provided excerpts of relevant testimony from

the Doctors, demonstrating they all understood the DACs were unlicensed companies that did not provide ambulatory surgical facility services and provided a conduit whereby Palladium and the Doctors shared facility fees. Docs. 486 1 through 486-21, Docs. 486-26, 486-28, 486-29, 486-31, 486-33 ; 487-2 through 487-18, 487-20, 487-21, 487-23; 489-1 through 489-47; 507-9, 507-18, 507-28, 507-42, 5007-47; 508-2 through 5, 408-10, 508-11, 508-18, 508-19 through 508-23; 509-2 through 509-6. The arrangement here is similar to billing fraud schemes in criminal cases. United States v. Iloani, 143 F.3d 921, 923 (5th Cir. 1998); see also State Farm Mut. Auto. Ins. Co. v. Universal Health Group, Inc., 14-CV-10266, 2014 WL 5427170, at *3 12

Received

United also asserts a counterclaim for money had and received to recover the facility fee amounts paid to the DACs. This claim depends upon the genuine issues of material fact raised by United in its fraud counterclaim discussed above.

ve a claim for money had and received, a plaintiff must prove a defendant holds Staats v. Miller, 243 S.W.2d 686, 687-88 (Tex. 1951). The only issue that is left to be addressed with respect to this counterclaim is the issue of whether the money had and received should be barred by the statute of limitations.

money hand and received counterclaim is barred by

limitations because the limitations period for such an action is two years. They cite the Texas

12 Statement regarding the fraud claims (Doc. 500 at 37) are also denied.

two-year statute o Elledge v. Friberg-Cooper Water Supply Corp., 240 S.W. 3d 869, 871 (Tex. 2007).

Two arguments are raised by the counter-defendants in their Reply in Support of the received claims are barred by the applicable two- t 9. The

counterclaims are based on the submission and payment of fraudulent facility fee bills (Doc. 316 at ¶ ¶ 221- the counterclaims (Doc. 141) were first

filed on July 2, 2012.

The law in Texas is not clear on this topic. The Supreme Court of Texas has not spoken, and we are left with two conflicting cases. The first case, Amoco Production Company v. Smith, 946 S.W. 2d 162, 165 (Tex. App. El Paso 1997) held, after an analysis of the history of four-year statute of limitations. See Stone v. First City Bank of Plano, N.A. 794 S.W.2d 537,

542-43 (Tex. App. Merry Homes, Inc., v. Luc Dao, 359, S.W. 3d 881, 883 (Tex. App. Houston [14 th

and received is an equitable doctrine designed to prevent unjust enrichment, the proper statute of

Court of Appeals relied for this holding on another Fourteenth Court of Appeals case , Autry v. Dearman, 933 S.W. 2d 182, 190 n.7(Texas App Houston [14 th

Dist.] 1996, writ denied) which noted in dicta be barred by the two- received

claim on a different ground. Id. at 189-90. The Fourteenth Court in Merry Homes also cited three Supreme Court of Texas cases, Elledge v. Friberg-Cooper Water Supply Corp., 240 S.W. 3d 869, 871 (Tex. 2007) (per curium); Wagner & Brown, Ltd. v. Horwood, 58 S.W. 3d 732, 737 (Tex. 2001; and HECI Exploration Co. v. Neel, 982 S.W. 2d 881, 885 (Tex. 1998) as supporting the two year statute of limitations for money had and received, but all three of those cases were unjust enrichment cases, not for money had and received.

Both parties agree that if there is any confusion in the state law, the Court is bound by the -defendants cite Mayo v. Hartford Life Ins. Co., 354 F.3d 400 (5 th

Cir. 2004) for the application of a two year statute of limitations to money had and received, but it concerns only an unjust enrichment claim. The latest holding on the issue, Peerless Ins. Co. v. Tex. Commerce Bank, 791 F.2d 1177, 1179 (Fifth Cir. 1986), which applies a four year statute of limitations for causes mitations.

In Section B of the motion for summary judgment, the DACs and the Doctors argue that

dispute of material fact that United had actual knowledge of the cause of action United filed its counterclaims. Doc 500 at 39. that the counter-defendants acted fraudulently in billing United for

facility fees that they did not

provide. United also claims money had and received by the counter-defendants, by reason of common law fraud. Both claims of fraud and money had and received have a four year statute of limitations. United argues that its declaratory judgment claim has a four year statute of

limitations because the underlying act was fraud. Beginning on page 39 of their motion to ough and onto page 59, counter- before United filed them on July 2, 2012, that they are time-barred and for that reason should be dismissed. Doc. 500 at 39-59.

The Supreme Court of act causes some legal injury, even if the fact of injury is not discovered until later, and even if all S.V. v. R. V., 933 S.W. 2d 1, 4 (Tex. 1996). Based upon alleged undisputed facts listed in the motion, the DACs and the Doctors maintain that United knew they had claims for payments made to the DACs before July 2, 2008, four years before the counterclaims were filed.

There are exceptions to the legal injury rule, but United has the burden to prove it is entitled to exercise the exception. KPMG Peat Marwick v. Harrison County Fin. Corp., 988 S.W. 2d 746, 749 (Tex. 1999); J. M. Krupar Constr. Co. v. Rosenberg, 95 S.W. 3d 322, 329 (Tex. App. Houston [1 st

Dist] 2002, no pet.).

accrual of the limitations period from its actual date to a later date: either (1) the date the injury is actually discovered, or (2) the date the injury should have been discovered if the plaintiff had BP Am. Prod. Co. v. Marshall, 342 S.W. 3d 59, 65-66 (Tex. 2011); S.V., 933 S.W. 2d at 4. In some sixteen pages of their brief (Doc 500 at 42-57), the DACs and the Doctors argue the facts that they the alleged injury and the facts giving rise to the injury more than four years before United filed

The counter-defendants quote from a Supreme Court of Texas case, BP Am. Prod. Co., 342 S.W. 3d 59, 65-66 (Tex. 2011), w nature of the injury is inherently undiscoverable and the evidence of injury is objectively

Trinity River Auth. v. U.S. Consultants, Inc. 899 S.W. 2d 259, 264 (Tex. 1994). Doc. 500 at 42.

After quoting ¶215 t amended counterclaim (Doc. 316), counter- defendants spend fourteen pages outlining all of the information available to United, which counter-defendants argue is proof that the nature of the injury was not inherently undiscoverable and the evidence of injury is objectively verifiable. 500 at 43-57. Their argument is that United access to the public records and other information that allowed it to (1) confirm tax identification

numbers, (2) identify each entity associated with tax identification numbers, (3) determine the owner of the entity, and (4) determine whether each entity held an ambulatory surgical center

oc. 506) United counters these arguments by maintaining that flawed for a number of reasons. . . . Doc 506 at 95. United, beginning on page 32 of its Response to Counter- Judgment, sets out

and the relationship among the DACs, the Doctor Owners, and Palladium. Doc. 506 at 39.

United has raised genuine issue of material fact concerning its discovery of the fraud scheme it alleges against the counter-defendants. If United can prove these facts are correct, and United did not discover the fraud scheme until late which have a four year limitations period, were timely. There remains a genuine issue of

-defendants is no genuine issue of material fact about when [United] discovered, or in the exercise of

reasonable diligence should have discovered the nature of the injury. Harrison Cnty. Hous. Fin. Corp., 988 S.W. 2d 746, 748 (Tex. 1999).

United alleges the counter- -9 at 22:16-23:18; 29:7-21. In order to determine that the DAC collecting the fee was owned by the doctor who actually performed the

Id. United argues that, under these circumstances, the fraudulent concealment exception to limitations is also applicable. The DACs and the Doctors argue that the fraudulent concealment exception to limitations does not apply. To establish this exception a despite the exercise of due diligence on his part, to discover the facts that form the basis of his

Texas v. Allan Constr. Co. Inc., 851 F.2d 1526, 1528 (5 th

Cir. 1988). The DACs and the 500 at 57. The information cited by the counter-defendants, in hindsight, may seem compelling,

but there are genuine issues of material fact raised by United that make it impossible to determine, as a matter of law, that there was no fraudulent concealment. Because there are genuine issues of material fact concerning the facts surrounding the discovery of the injury and judgment, fraud, and money had and received must be denied.

Not only does United maintain that under the discovery exception and the fraudulent concealment doctrine, it could not have discovered until late 2008 or early 2009, less than four years before the counterclaim was filed, but because the counterclaims were compulsory, they relate back to the filing of the original complaint by DAC, April 8, 2011.

The Court held, in ruling on a motion to dismiss (Doc. 344) filed by the companies, Par and Euston, owned by Dr. Cohen, plaintiffs in a removed state case that was consolidated with the case filed by DAC, as discussed

]ere, the claims and counterclaims are all based on the validity of the facility fee

Although DAC and the Doctors argue that the counterclaims are not compulsory, the rclaims would, in any case, relate

--any claim that at the time of service-- the pleader has against an opposing party if the claim: (A) arises out of the from the same t Plant v. Blazer Financial Services, Inc. 598 F.2d 1357, 1360 (5 th

Cir. 1979).

These four tests are

1. Are the issues of fact and law raised by the claim and counterclaim largely the same? 2. Would res judicata bar a subsequent suit absent the compulsory counterclaim rule? 3. Will substantially the same evidence support or refute 4. Is there any logical relation between the claim and the counterclaim? Id., citing 6 Wright & Miller, Federal Practice and Procedure Sec. 1410 at 42-43 (1971).

Id. issues of law and fact in both sets of claims are the same, i.e. whether the DACs are entitled to collect payment for facility services that were provided by Palladium, pursuant to the EU agreements.

The same evidence will support or refute the respective causes of action of the DACs and United, including the claims submitted by the DACs and Palladium to United, the explanation of benefits, the provider remittance forms, checks, correspondence between United and Palladium and correspondence between United and the DACs, the EU Agreements, internal communications and memos, and testimony of the various persons with knowledge. There is a

in Plant ich has commended itself to most courts. . .is the logical relation[ship]

Plant, at 1360-61.

The plaintiffs filed the Original Complaint (Doc. 1) on April 8, 2011, alleging that United had not paid or had underpaid all payments made to plaintiffs. The Fourth Amended Complaint

was filed July 2, 2012, alleging claims for quantum meruit, negligent misrepresentation, breach of implied contract, promissory estoppel, and violations of the Texas Insurance Code. Doc. 140. filed July 2, 2012. Doc. 141. The same claims at issue in the Fourth Amended Complaint, that

all claims that United paid were underpaid and all unpaid claims should be paid, are also at issue Doc. 316, that all unpaid claims are not owed and it should recover from counter-defendants all amounts paid because of counter- -

causes of action, the counterclaims are compulsory, and the time for filing the counterclaims relates back to the time the original complaint was filed on April 8, 2011. 6 Wright & Miller Federal Practice & Proc. Sec. 1419 (2d ed. derived from fraud, are subject to the four year statute of limitations, and were not barred as of

The side issue in need of discussion is that of which law, federal or state, applies to the relation back doctrine. United counterclaims are compulsory and relate back to the filing date of the Original Complaint, April 8, 2011. Counter-defendants argue that the Court should apply - federal relation- Doc. 517 at 16-17. Under Texas law compulsory counterclaims are not tolled indefinitely.

United points out that the Fifth Circuit has held that pleadings, amendments, and the relation-back doctrine are procedural matters to be governed by federal law. Hensgens v. Deere & Co., 869 F.2d 879, 880 (5 th

Cir. 1989), cert denied regarding relation back of amendments to pleadings is controlling in diversity cases in federal

Kansa Reins. Co. v. Cong. Mortg. Corp. of Texas, 20 F.3d 1362, 1366 n.4 (5 th

Cir.

not be protected by [statutes of limitations] from later asserted claims that arose out of the same Flores v. Cameron Cty., Tex. 92 F.3d 258, 272 (5 th Cir. 1996) (quoting Kansa, 20 F.3d at 1366-67. The Court finds that because federal, not state, law relation- would not time-barred.

Because the counterclaims are compulsory pursuant to Rule 13(a), they relate back to April 8, 2011 when plaintiffs/counter- Original Complaint. (Doc. 505)

-had-and-received claims

should, have been made before entry of [the order] or to re-urge matters that have already been eTool Dev., Inc ., 881 F. Supp.2d 745, 749 (E.D. Tex. 2012). treating him as a counter-defendant in the case, pointing out that he was not a plaintiff when the

case was first filed in Texas state court, and thus could not be a counter-defendant. He is, rather,

a third-party defendant, brought into the case by defendants, when they filed counterclaims against Par and Euston who were plaintiffs in the state case. Thus, he argues, the filing of the c state court petition against defendants. United responds by first pointing out that this argument

could have been, bu re

5.

state as a counterclaim any claim that at the time of its service the pleader has against an

opposing party if the claim: (A) arises out of the transaction or occurrence that is the subject and the relation back doctrine broadly. Plant v. Blazer Fin. Servs. 598 F.2d 1357, 1360 (5 th

counterclaim arise from the same transaction or occurrence. Id. at 1360-

pa 390; , 478 F.2d 191, 193 (2 nd Cir. 1973). him cannot be compulsory because he was not a named plaintiff in the original suit filed in state court against Par and Euston, and

was the subject matter of Case 4:11-cv-01355 Document 541 Filed in TXSD on 12/08/16 Page 54 of 56 United, are not convincing. Doc. 505 at 4-5. 316) United has sufficiently alleged that Par and Euston were the alter egos of Dr. Cohen. The

Court has previously found as noted on page 51 of this Opinion and Order that the counterclaims filed against Par and Euston are compulsory and relate back to the date of their state court petition. The other two iss 505), (1) relation back was not properly applied by United and (2) the statute of limitations on

DACs in their motion for summary judgment and are addressed above in this Opinion and Order. Conclusion For the foregoing reasons, it is hereby . 485) is GRANTED. It is further

rclaims (Doc. 491) is DENIED. It is further . It is further

to Dismiss (Doc. 505) is DENIED.

SIGNED at Houston, Texas, this 8th day of December, 2016.

_____ MELINDA HARMON UNITED STATES DISTRICT JUDGE