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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

DAVID WIT et al.,

Plaintiffs,

v.

UNITED BEHAVIORAL HEALTH,

Defendant.

Case No. 14-cv-02346 JCS
Related Case No. 14-cv-05337 JCS

UNITED BEHAVIORAL HEALTH'S POST-TRIAL SUR-REPLY BRIEF

Hon. Joseph C. Spero

GARY ALEXANDER et al.,

Plaintiffs,

v.

UNITED BEHAVIORAL HEALTH,

Defendant.

In their Post-Trial Reply Brief (ECF No. 404), Plaintiffs cite to three new categories of evidence and argue for the first time that this new evidence warrants a classwide judgment in their favor. This evidence includes:

- Class list entries relating to 24 individual class members, who Plaintiffs contend sought treatment in Texas under plans governed by Texas law (ECF No. 404, pp. 77:17–78:3);
- A new "Exhibit A," which purports to summarize the amendment process for the benefit plans in evidence (ECF Nos. 404-1, 405; ECF No. 404, pp. 11:4–19:18); and
- Definitions of the words "acute," "presenting," "presenting symptom," "lead," and "precipitate" contained in the Oxford English Dictionary, the Merriam-Webster Dictionary, and Stedman's Medical Dictionary. (ECF No. 404, pp. 28–32.)

Although Plaintiffs now argue this evidence is relevant to satisfy their burden of classwide proof, they did not ask a single witness about any of this evidence during the three-week trial, and did not discuss it in their 93-page opening Post-Trial Brief. As UBH explained in its Objections to Plaintiffs' Reply Evidence (ECF No. 406), Plaintiffs' eleventh-hour evidence and related argument should not be considered at all.

But, even if the Court considers Plaintiffs' untimely evidence and argument, it only highlights the ways in which Plaintiffs fundamentally failed to satisfy their burden of classwide proof at trial.

I. EVIDENCE NOT INTRODUCED AT TRIAL RELATING TO A HANDFUL OF TEXAS STATE MANDATE CLASS MEMBERS IS NOT SUFFICIENT TO SATISFY PLAINTIFFS' BURDEN OF CLASSWIDE PROOF

In their Post-Trial Brief, Plaintiffs concede that, to satisfy their burden of proof on their claims that UBH violated Texas law, Plaintiffs were required to prove at least three things: (1) that UBH failed to utilize criteria issued by the Texas Department Insurance (the "TDI" or "TCADA" guidelines) when evaluating requests for substance use disorder treatment; (2) that the class member's "plan is governed by Texas law"; and (3) that "the treatment was sought from a provider or facility in Texas." (ECF No. 392, pp. 65:19–22, 82:4–7.) Plaintiffs are correct that the Texas Administrative Code ("TAC") only requires use of the TDI guidelines for services

provided in Texas. 28 TAC § 3.8005 ("Treatment providers and payors shall provide for utilization review in accordance" with guidelines issued by the TDI); 28 TAC § 3.8001(24) ("Utilization review" means a "system for prospective or concurrent review of…services being provided or proposed to be provided *in this state*") (emphasis added).

In their Post-Trial Reply Brief, Plaintiffs articulate a method for sorting the class list and then identify 24 entries on the class list where, according to Plaintiffs' counsel, the "class members sought coverage" for treatment from "Texas Providers."[1] (ECF No. 404, p. 77:24–25.) Although Plaintiffs now contend that evidence relating to these 24 class members satisfies their burden of classwide proof for a class of several hundred, they failed to raise this sorting method at trial or cite it in their Post-Trial Brief or Proposed Findings of Fact, denying UBH the opportunity to respond.[2] And Plaintiffs' attempt to explain the significance of these entries through post-trial attorney argument rather than a sponsoring witness at trial is in direct violation of the Court's directive that the parties "explain everything to [the Court] during trial" through a "witness [who] has to explain . . . why it's important." (Oct. 5, 2017 Pretrial Hrg. Tr., pp. 35:13–17, 42:20–24; *see also* ECF No. 351, p. 9 (requiring all evidence to be introduced at trial).)

Plaintiffs introduced the class list (Trial Ex. 255) at trial through a stipulation without any sponsoring witness. (Trial Tr. 825:4–19.) The only witness to testify about the class list at trial

[1] Plaintiffs' "method" is nothing more than supposition, unsupported by testimony or evidence. Sorting the list as Plaintiffs describe returns over 800 results. Plaintiffs contend that the 24 entries they cherry-pick involved "Texas providers" because the provider's name includes some reference to "Texas" (*e.g.*, "Texas West Oaks Hospital"). Plaintiffs' assumption that the name of a provider necessarily indicates the location of the proposed treatment is not supported by any evidence. Plaintiffs did not ask a single witness to confirm, for example, whether those providers offer services exclusively in Texas or whether they also maintain facilities outside of Texas. Moreover, review of the 800 class list entries identified through Plaintiffs' sorting method confirms that the 24 members they identify are not representative of the class. Using Plaintiffs' own assumptions about a provider's name, many of the 800 class members identified through Plaintiffs' method *did not* seek treatment in Texas. (*See e.g.*, Trial Ex. 255 (sorted per Plaintiffs' instructions and listing providers such as "Phoenix Houses of the Mid Atlantic," "UNIVERSITY OF COLORADO CEDAR," "South Dakota Human Services," "Florida Center for Recovery," "PARADIGM MALIBU," "Minnesota Teen Challenge," etc.).)

[2] Per the Court's instruction, Plaintiffs' Proposed Findings of Fact were required to "put forward the detail of the exact thing that you think I need to find and cites to where the evidence is" and Plaintiffs' Post-Trial Brief was required to "make [their] case" by presenting the same comprehensive set of facts "in an argument form." (Trial Tr., 1934:13–1935:1.)

was UBH's witness Frances Bridge, whose uncontroverted testimony was that the class list does not indicate where treatment took place or whether a TDI guideline was used in the class members' benefit decision. Plaintiffs' counsel cross-examined Ms. Bridge at length, but declined to ask her any questions about the class list or its contents. (Trial Tr. 1505:14–1538:21 (Bridge).)

Plaintiffs' attorney argument about the class list should be rejected. Plaintiffs waived any argument that they satisfied their classwide burden of proof based on evidence or arguments that were not addressed at trial and reflected in their Post-Trial Brief, and such evidence should not be considered. *See United States v. Anderson*, 472 F.3d 662, 668 (9th Cir. 2006) ("Issues raised for the first time in an appellant's reply brief are generally deemed waived."); *All Pac. Trading, Inc. v. Vessel M/V Hanjin Yosu*, 7 F.3d 1427, 1434 (9th Cir. 1993) ("Failure to raise the issue in the opening brief waived that issue"); *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) ("[W]here new evidence is presented in a reply . . . the district court should not consider the new evidence without giving the [non-]movant an opportunity to respond."); *Wallace v. Countrywide Home Loans, Inc.*, No. SACV 08–1463 AG (MLGx), 2009 WL 4349534, at *7 (C.D. Cal. Nov. 23, 2009) ("A district court may refuse to consider new evidence submitted for the first time in a reply if the evidence should have been presented with the opening brief.").[3]

Even if the Court does consider Plaintiffs' untimely argument and evidence, it does not prove that UBH failed to apply the TDI guidelines consistent with Texas law. UBH witness Frances Bridge was the only witness to testify about or explain the information contained on the class list. Ms. Bridge explained that there are no data fields on the class list that indicate: (1) "whether a state's mandate related to the use of guidelines applied to a benefit decision"; (2) "where the treatment that was being requested would have occurred"; or (3) "whether UBH

[3] The *sole* evidence Plaintiffs presented at trial and in their Post-Trial Brief was a 2015 email stating that "Houston has been using the CDGs." (ECF No. 392, at 65:24–66:2 (citing Tr. Ex. 493-0002); ECF No. 393, at 103 ¶ 618 (same).) As UBH explained in its Post-Trial Brief, Plaintiffs' citation to this isolated email does not prove that UBH had any policy of not applying the TDI guidelines when required by Texas law. To the contrary, the overwhelming weight of the evidence demonstrated that UBH has had a consistent policy of using the TDI guidelines when required by Texas law since at least 2002, and that UBH's clinicians followed that policy. (*See* ECF No. 400:1–12.)

utilized guidelines written by the Texas Department of Insurance." (Trial Tr., 1491:22–1492:7, 1493:2–13 (Bridge).)

Plaintiffs also argue for the first time in their reply brief that "on the LINX spreadsheets, UBH even states that it applied its own Guidelines to these members' claims . . . ." (ECF No. 404, pp. 77:25–78:1.) But there is no classwide proof that UBH failed to apply a TDI guideline when required by Texas law. As Ms. Bridge explained, much of the LINX database is populated using drop-down menus that only allow the user to select a UBH guideline, and information about "whether UBH utilized guidelines written by the Texas Department of Insurance" is simply not "captured in the report." (*Id*. at 1471:3–11, 1493:11–15.) The only adverse benefit decision in evidence that indisputably relates to treatment sought in Texas underscores that the spreadsheets alone cannot be used to prove which guidelines were applied. The adverse benefit determination letter sent to class member 4176 explains that the benefit decision was explicitly based on UBH's review of a UBH CDG *and the Texas* guidelines. (Trial Ex. 1298-0007 to -08.) Thus, even where UBH did refer to an internal UBH guideline in a benefit decision governed by Texas law, the uncontroverted evidence shows that UBH *also* based that decision on the applicable Texas guideline. Plaintiffs have never cited any authority to suggest that Texas law prohibits UBH from consulting other guidelines in addition to the TDI guidelines so long as the decision is "in accordance with" the TDI guidelines cited. 28 TAC § 3.8005(a).

Not only is Plaintiffs' new evidence both improper and insufficient, it underscores why Plaintiffs have failed to satisfy their burden of classwide proof as it relates to Texas law. According to Plaintiffs, "[t]his evidence is more than sufficient to establish that UBH applied its own Guidelines to *at least* some members' substance use treatment in Texas." (ECF No. 404, p. 78:2–3.) Even if the Court could draw that inference from this evidence – for reasons just explained, it should not – evidence that UBH violated Texas law as to "*some members*" is not classwide proof that UBH did so to for *all class members*. It is precisely this sort of unrepresentative, anecdotal evidence on which a classwide judgment cannot stand. *Cruz v. Dollar Tree Stores, Inc.*, Nos. 07-2050 SC, 07-4012 SC, 2011 WL 2682967, at *5 (N.D. Cal. July 8, 2011) (evidence will not support a classwide determination "where plaintiffs have provided no

reliable means of extrapolating that [evidence] to the class as a whole") *accord Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 775 (7th Cir. 2013) ("What can't support an inference about the [circumstances] of thousands of [class members] is evidence of the experience of a small, unrepresentative sample of them").

Nor can Plaintiffs evade their fundamental burden to *prove liability* by shifting the burden to UBH for resolution during the *remedy* phase. (*See* ECF No. 404, p. 77:6 – 11 (arguing that the Court "need not detain long" on the question of whether there is sufficient evidence to prove whether UBH violated Texas law because such evidence will be adduced during "reprocessing"). To the extent a permissible class exists,[4] Plaintiffs were required to prove all the elements of liability "*at trial* through evidence . . . common to the class rather than individual to its members." *Stockwell v. City & Cty. of S.F.*, No. C 08-5180 PJH, 2015 WL 2173852, at *6 (N.D. Cal. May 8, 2015) (emphasis added). Plaintiffs did not satisfy that burden of proof at trial and have failed to prove their claims as to the Texas portion of the State Mandate Class.

II. PLAINTIFFS' NEW SUMMARY EXHIBIT REGARDING PLAN AMENDMENT IS BOTH IMPROPER AND IRRELEVANT

Also for the first time in reply, Plaintiffs attempt to introduce a summary "Exhibit A," which purports to summarize the amendment procedures for the benefit plans in evidence. (ECF Nos. 404-1, 405.) Exhibit A was neither offered nor discussed at trial. It is nothing more than a belated summary exhibit under Federal Rule of Evidence 1006, which Plaintiffs did not disclose before or during trial, did not offer into evidence at trial, and for which they offered no evidence laying a foundation for its admissibility or authenticity. *See Colon-Fontanez v. Municipality of San Juan*, 660 F.3d 17, 31 (1st Cir. 2011) ("for summary evidence to be admitted into court, there must be, like all evidence, a proper foundation laid for its admission"); *United States v. Bray*, 139

[4] As UBH will explain more fully in its motion for decertification at the time permitted by the Court, Plaintiffs' attempt to defer their burden of proving which class members are actually in the Texas portion of State Mandate Class would convert it into an impermissible "fail-safe" class. A "fail-safe" class is a class whose membership "cannot be defined until the case is resolved on its merits." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012) "When the class is so defined, once it is determined that a person, who is a possible class member, cannot prevail against the defendant, that member drops out of the class. That is palpably unfair to the defendant . . . ." *Kamar v. RadioShack Corp.*, 375 F. App'x 734, 736 (9th Cir. 2010).

F.3d 1104, 1110 (6th Cir. 1998) ("In order to lay a proper foundation for a summary, the proponent should present the testimony of the witness who supervised its preparation.").

Even if the Court considers Plaintiffs' untimely Exhibit A, it is irrelevant to the question of whether UBH's guidelines are themselves lawful terms of class members' plans, which are not subject to challenge under ERISA.[5] Plaintiffs again focus on the irrelevant question of whether UBH was itself the plan sponsor, and they rely on Exhibit A to argue that any mid-year revisions to UBH's guidelines could not unilaterally modify the terms of class members' plans.[6] (ECF No. 404, pp. 11:4–19:18.) As UBH explained in its Post-Trial Brief (ECF No. 400, pp. 21:20–22:6), whether UBH had authority to amend the terms of any class members' plan during the plan's effective term is irrelevant to whether the plan incorporated the UBH guidelines in effect on the plan's effective date and "as modified from time to time."

If anything, Exhibit A simply demonstrates that the process for amending the plans varies from plan-to-plan. (*See generally*, ECF No. 405.) To the extent that the amendment procedures set out in Exhibit A are material to determining whether Plaintiffs have satisfied their threshold

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[5] Plaintiffs misconstrue UBH's argument and suggest that UBH's position would immunize UBH from all liability under ERISA. (ECF No. 404, p. 11:5–9.). That is not UBH's position. (*See* ECF No. 400, pp. 21 n. 12 & 22 n.14.) The question is not whether UBH is immune from suit, but whether guidelines that were adopted by the plan sponsor as plan terms are subject to challenge under ERISA. Lawful plan terms are not subject to challenge under ERISA. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). Plaintiffs offered no evidence that UBH's guidelines are unlawful under any other provision of law, and UBH, as a plan administrator, is not liable under ERISA for enforcing or reasonably interpreting those lawful plan terms. *Wright v. Or. Metallurgical Corp*., 360 F.3d 1090, 1100 (9th Cir. 2004).

[6] Plaintiffs wrongly conclude that because UBH amends the guidelines on an annual basis, the guidelines are not incorporated into the plans. (ECF No. 404, pp. 14:18–15:11.) Plaintiffs miss the point. UBH's conduct with respect to the guidelines is not unilateral. The plan sponsors approve the plan terms typically on an annual basis, and each time they do so, they incorporate the guidelines in the plans as written at that time. (*See*, *e.g.*, Trial Tr. 878:21–879:10, 915:11–25 (Dehlin); *see also* Trial Ex. 1647-0063 (excluding coverage for services that are "not consistent with Optum's Level of Care Guidelines").) Even if Plaintiffs were correct that the provisions in Exhibit A render UBH's mid-term decision to update its guidelines from the guidelines adopted by the plan sponsor a discretionary act, Plaintiffs offered no evidence that UBH abused that discretion. Under Plaintiffs' theory, UBH could not be liable under ERISA based on the content of the guidelines absent proof that: (1) UBH used a guideline that was different from the guideline in effect at the time the plan sponsor adopted the plan terms; (2) the modified portions of that guideline were unreasonably more restrictive than the guidelines adopted by the plan sponsor; and (3) such modifications affected the outcome of the class member's request for benefits. Again, Plaintiffs introduced no evidence or argument on any of these points.

burden of demonstrating that UBH's modifications of the guidelines represent a fiduciary act, Exhibit A makes it clear that such an inquiry is an individualized question that is not subject to classwide resolution, and which Plaintiffs failed to prove at trial. *See Brosted v. Unum Life Ins. Co. of Am.*, 421 F.3d 459, 465 (7th Cir. 2005) (plaintiffs bear the burden of proving that an ERISA defendant's conduct constituted a fiduciary act).

III. PLAINTIFFS' NEW DICTIONARY DEFINITIONS WERE NOT INTRODUCED OR DISCUSSED AT TRIAL AND, REGARDLESS, THEY SUPPORT UBH'S POSITION

Plaintiffs also cite new evidence from three dictionaries to argue the meaning of the terms "acute," "presenting," "lead," and "precipitating." (ECF No. 404, pp. 28, 31, 33.) Plaintiffs cite these dictionary definitions for the first time in their reply brief. Plaintiffs did not introduce these dictionary definitions at trial or discuss them with any witness at trial. Nor did Plaintiffs list the dictionaries on the Joint Trial Exhibit List. (ECF No. 359.) This new evidence should not be considered at this stage. If Plaintiffs believed these definitions were relevant to prove the meaning of UBH's guidelines, they could have and should have offered them at trial, and afforded UBH the opportunity to present evidence explaining those definitions in the context of UBH's guidelines. (*See* Oct. 5, 2017 Pretrial Hrg. Tr., pp. 35:13–17, 42:20–24; *see also* ECF No. 351, p. 9.)[7]

In any event, a careful reading of the dictionary definitions Plaintiffs cite shows that they support UBH's position. For example, Plaintiffs' own cited definitions of the term "acute" support UBH's position that, depending on its context, the term "acute" can indicate the severity

[7] Plaintiffs' reliance on dictionary definitions that are not in the trial record is especially puzzling in light of Plaintiffs' objection to legislative history regarding the meaning of the Illinois statute at issue for the State Mandate Class. (*See, e.g.*, ECF No. 404 at 74:14 – 16 (Plaintiffs arguing that "UBH did not offer [an item of legislative history] as evidence at trial, or even include it on its trial exhibit list, and so the report should be disregarded.") Unlike Plaintiffs' new dictionary definitions, there was no reason for UBH to introduce Illinois legislative history at trial because that legislative history only became an issue when Plaintiffs raised statutory construction for the first time in their opening Post-Trial Brief. (*See* ECF No. 392 at 80:26–81:5.) In contrast, Plaintiffs use the new dictionary definitions for the first time in their reply brief to argue the meaning of UBH's guidelines, which was the central issue of fact at trial. (*Id.*) At minimum, if the Court considers Plaintiffs' late-cited dictionary definitions, it should also consider the uncontroverted legislative history cited in UBH's Post-Trial Brief.

of a symptom, the temporal question of when the symptom or condition arose, or both. (*See, e.g.,* ECF No. 404, p. 28:5–14.) This more nuanced definition, which Plaintiffs continue to ignore, is also consistent with Dr. Fishman's testimony that for someone who is "just chronically miserable" and "just sick and tired of being sick and tired," the decision to seek treatment "now and not yesterday" is itself "the acute change" that constitutes the "why now." (Trial Tr. 192:17 – 193:10 (Fishman).) Likewise, Plaintiffs' reliance on the definitions of "lead" or "precipitate" only reaffirms that the guidelines broadly consider everything that "lead to" or "caused" the member to seek treatment. (ECF No. 404, p. 33 n.45.) Finally, Plaintiffs' new definitions of "presenting" or "presenting problems" are entirely consistent with UBH's position that "presenting problems" means the "totality of 'problems' (chronic, recent, severe, co-morbid, etc.) that the member is 'presenting' at the time of treatment." (ECF No. 400, p. 68:13 – 15.) As Plaintiffs admit, "presenting" in the medical context encompasses any "symptom, condition, or sign which is observed or detected upon initial examination of a patient or which the patient discloses to the physician." (ECF No. 404, p. 31:9–10 (quoting *Medical Definition of Presenting*, Merriam-Webster, https://www.merriam-webster.com/medical/presenting).)

IV. CONCLUSION

For these reasons, and for all the reasons stated in UBH's Post-Trial Brief (ECF No. 400), UBH respectfully asks the Court to enter judgment in favor of UBH on all Counts.

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