UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GUARDIAN FLIGHT, LLC, et al. Plaintiffs, v. AETNA HEALTH, INC. et al, Defendants.	§ § § § § § § § § § §	CIVIL ACTION NO. 4:22-cv-03805 Hon. Alfred H. Bennett

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO PARTIALLY RECONSIDER DISMISSAL AGAINST INSURER DEFENDANTS AND TO CERTIFY DISMISSAL ORDER FOR APPEAL

Plaintiffs Guardian Flight, LLC ("Guardian"), CALSTAR Air Medical Services, LLC ("CALSTAR"), and REACH Air Medical Services, LLC ("REACH," collectively "Plaintiffs") file this Reply in Support of their Motion to Partially Reconsider Dismissal Against Insurer Defendants and to Certify Dismissal Order for Appeal ("Motion") and would respectfully show the Court as follows:

INTRODUCTION

Plaintiffs moved for reconsideration because they wanted to give this Court the opportunity to correct what they viewed as manifest error on an issue that none of the parties had previously briefed. Namely, that prevailing parties are proper defendants in any federal court challenge of an IDR award in their favor regardless of the grounds for such challenge. There of course is no case law on this issue as this Court is one of the first in the nation to even consider a challenge to an IDR award. However, every challenge to an IDR award to date has included the prevailing party as a defendant. And Defendants were unable to point to a single case where an arbitration award was vacated in the absence of the underlying prevailing party. Indeed, Plaintiffs thought that Aetna

and Kaiser (the "Insurer Defendants"), not wanting an award in their favor to be vacated in their absence, would agree. But just as litigation can make strange bedfellows, so too can it make parties take strange legal positions.

Here, across fifteen pages of legal briefing, the Insurer Defendants each implore this Court to determine, without their participation or presence, whether to vacate and take away their winning IDR awards. And they make judicial admissions that they must participate in a subsequent IDR proceeding if the Court vacates the underlying award at issue herein, a proceeding where they may end up having to pay much more for the transports at issue. If Defendants Kaiser and Aetna want to leave the validity of their awards in the hands of MET and its counsel, and in light of the judicial admissions and future collateral estoppel their briefs and a final judgment will create, Plaintiffs will not stand in their way.

Where Kaiser and Aetna part ways is in Plaintiffs' request for issuance of final judgments. While Kaiser take "no position," meaning it does not really oppose the relief requested, Aetna continues its "fight every fight" mentality and asks the Court not to enter a final judgment against it. This Court should see through the gamesmanship and issue final judgments against both.

ARGUMENT AND ANALYSIS

A. The Court No Longer Needs to Reconsider its Dismissal Order as Plaintiffs Now Only Seek Final Judgments

The Insurer Defendants argue their participation is not necessary in the remaining challenge to the favorable IDR awards they secured. Doc. 86 at 5–7; Doc. 87 at 8–9. They contend that the validity of their awards can be adjudicated without their participation and that, if the awards are vacated by this Court, they will participate in another IDR proceeding. Doc. 86 at 6.

While the Insurer Defendants focus on Plaintiffs' briefing regarding Rule 19 necessary parties, that rule was only cited by analogy. Plaintiffs asserted in their motion that their "surviving

claim under the NSA to vacate the IDR award runs against both the Insurer Defendants and MET." Motion at p. 7. The issue is not whether the Insurer Defendants are a necessary party to Plaintiffs' claim against MET. It is that Plaintiffs have stated a claim *directly against the Insurer Defendants* that this Court ruled is viable. A claim to vacate an IDR award under the NSA always exists against the prevailing party. That is because if the losing party prevails in litigation, the award is vacated and the winning party must participate in another IDR proceeding at which it could be ordered to pay more money for the out-of-network medical services at issue. *C.f., e.g., Houston Lighting & Power Co. v. Int'l Broth. of Elec. Workers, Local Union No. 66*, 71 F.3d 179, 184 (5th Cir. 1995) (party who lost arbitration sued prevailing party claiming arbitrator exceeded his powers under the applicable collective bargaining agreement). However, if the Insurer Defendants *voluntarily choose* not to participate in such litigation and *agree* that this Court can vacate their awards in their absence, Plaintiffs will not stand in their way. That decision is not much different than a defendant deciding not to answer a lawsuit and defaulting.

In light of the Insurer Defendants' judicial admissions and arguments, Plaintiffs hereby withdraw their request for the Court to reconsider its Dismissal Order and the request to certify that order for interlocutory appeal. Instead, Plaintiffs only seek entry of final judgments.

B. Final Judgments Should Be Entered Against Both Insurer Defendants

As mentioned above, Kaiser takes "no position" on whether the Court should enter a final judgment against it. Doc. 86 at 12. That is tantamount to an unopposed motion. Accordingly, the Court should enter a final judgment against Kaiser.

Revealing a divide in what was otherwise a uniform strategy and nearly identical briefs, Aetna refuses to take "no position" on the issue. Instead, it opposes the entry of a final judgment against it. Doc. 87 at 13–14. Aetna argues that judicial economy will be served by denying Plaintiffs' request for entry of a final judgment because it will prevent piecemeal litigation *Id.* at

13. Not true. A Fifth Circuit appeal exists and the only question is the scope of review the appellate court will undertake of the Dismissal Order. Avoiding piecemeal litigation was the basis on which the Fifth Circuit stayed its proceedings to allow this Court time to act on the Motion. Entering final judgments is fully supported by FED. R. CIV. P. 54(b) and serves judicial economy.

The Insurer Defendants' position that there is no claim against them to vacate the IDR awards due to MET exceeding its powers provides further reason for this Court to enter final judgments that will allow the same Fifth Circuit panel to review interrelated issues in one proceeding. Whether MET has immunity or not clearly implicates who the proper parties are to a challenge to an IDR award. If the Fifth Circuit rules that MET is immune from suit, that means that lawsuits challenging an IDR award due to an IDR entity exceeding its powers *must* be brought against the prevailing parties (here the Insurer Defendants). It is clearly more efficient for the Fifth Circuit to decide both of these related issues at the same time. And regardless of how the Fifth Circuit rules on immunity, Plaintiffs would still seek an appeal of its dismissed misrepresentation claims against the Insurer Defendants, thus creating the exact piecemeal litigation for the Fifth Circuit that Aetna claims it is trying to "avoid". *See, e.g., Burge v. St. Tammany Par. Sheriff's Off.*, 2000 WL 815879, at *4 (E.D. La. June 22, 2000), *aff'd sub nom. Burge v. St. Tammany Par.*, 336 F.3d 363 (5th Cir. 2003) (citing the interest of judicial efficiency and entering a final judgment under Rule 54(b) to allow for a single consolidated appeal).

Moreover, the fact Kaiser and Aetna disagreed on the entry of final judgments speaks volumes. The reason is obvious. Defendants who are successful on a motion to dismiss typically do not want to continue to participate in litigation. Here, absent final judgments, Defendants would remain subject to discovery as parties to the ligation on the remaining claim. It is for this reason that the case law recognizes the "injustice of a delay" in a party becoming a non-party. *See Stewart*

v. Gates, 277 F.R.D. 33, 35 (D.D.C. 2011) (explaining that the basic purpose of Rule 54(b) is to avoid the possible injustice of a delay in entering judgment) (internal citations and quotations omitted). Similarly, there is injustice to Plaintiffs of a delay in entering judgment against the Insurer Defendants. It is clearly more efficient and less expensive to have a single appeal on the Dismissal Order and a single trial on all of the possible grounds for vacating an IDR award rather than piecemeal trials, appeals, and subsequent retrials.

Furthermore, the fact this case raises so many issues of first impression further weighs in support of entry of final judgments. The Fifth Circuit should be permitted to address whether misrepresentations made to IDR entities are grounds for vacating arbitration awards at the same time it considers who the proper parties are to such proceedings and whether IDR entities are immune from them. It is because these issues are interrelated and arise from the same facts that the Fifth Circuit stayed MET's pending appeal and provided this Court the time needed to rule on Plaintiffs' Motion. A single consolidated appeal is warranted, and Plaintiffs Motion should be granted.

CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request that the Court grant their Motion in part and enter final judgments against the Insurer Defendants.

Dated: March 28, 2024

Abraham Chang
Texas Bar No. 24102827
Federal ID: 3831625
Dewey J. Gonsoulin III
Texas Bar No. 24131337
Federal ID: 3805035
1301 McKinney, Suite 5100
Houston, TX 77010-3095
Telephone: (713) 651-5151
Facsimile: (713) 651-5246
abraham.chang@nortonrosefulbright.com
dewey.gonsoulin@nortonrosefulbright.com

NORTON ROSE FULBRIGHT US LLP

/s/ Adam T. Schramek
Adam T. Schramek, Lead Counsel
Texas Bar No. 24033045
Federal ID: 431403
98 San Jacinto Boulevard
Suite 1100
Austin, TX 78701-4255
Telephone: (512) 474-5201
Facsimile: (512) 536-4598
adam.schramek@nortonrosefulbright.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on March 28, 2024, a true and correct copy of the foregoing was served via the Court's ECF system on all counsel of record.

/s/ Adam T. Schramek
Adam T. Schramek