IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

HUMANA INC., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 4:23-cv-909-O
	)	
XAVIER BECERRA, et al.,	)	
	)	
Defendants.	)	
	)	

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO TRANSFER VENUE OR DISMISS

INTRODUCTION

The RADV Rule does not regulate Humana's conduct. It did not establish payment rates. It did not impose the requirement of medical record documentation of diagnoses submitted for payment by Medicare Advantage insurers. And it did not alter insurers' obligation to report and return payments they identify as unsupported by a beneficiary's medical records. There is nothing that the RADV Rule requires of Humana, and nothing it prohibits Humana from doing.

Humana does not dispute the government's authority to audit diagnoses submitted for payment, and to recoup the overpayments identified through such audits. It does not deny that payments based on unsupported diagnoses are in fact overpayments. It does not question the use of statistical sampling and extrapolation to calculate audit recoveries. But Humana suggests that, if the government uses sampling and extrapolation in its RADV audits, then it must either raise the payment rates for audited insurers or else allow them to retain some payments based on diagnoses absent from their beneficiaries' medical records.

At least that is Humana's ultimate position. Before this Court, the insurer merely questions the government's explanation for refusing to raise payment rates or loosen documentation standards when calculating extrapolated recoveries in its RADV audits. But the RADV Rule is not causing Humana any actual or imminent injury. If this case is not transferred to the Dallas Division, it should therefore be dismissed for lack of jurisdiction.

ARGUMENT

A. Venue should be transferred to the Dallas Division.

Humana admits that venue rests exclusively on the residence of its Dallas-based subsidiary, and does not suggest a particular connection between this case and the Fort Worth Division. Yet the insurer maintains that no such connection is required, because plaintiffs residing in Dallas may

have their cases heard in Fort Worth—or anywhere else in the Northern District of Texas—if they prefer. Opp. at 12. This Court has not agreed. When "a resident of Dallas" files suit in Fort Worth but "fails to allege any facts that could establish a connection" with "the Fort Worth Division," then the "case belongs in the Dallas Division." Order, *Air Force Major v. Austin*, No. 4:22-cv-0248-P, 2022 WL 3698302, at *1 (N.D. Tex. Apr. 4, 2022) (Pittman, J.) (quotation omitted).[1]

In its motion, the government cited orders transferring cases out of Divisions to which they had "no apparent connection." Mot. at 15. Humana responds by distinguishing each case on its facts, or quibbling over the decision to make a transfer under 28 U.S.C. § 1406 rather than §1404. Opp. at 13 n.3. It offers two cases in which the convenience of nonparty witnesses, which is irrelevant here, favored plaintiff's choice of forum.[2] And it suggests that plaintiffs should have their choice of Divisions in "facial challenges to a nationwide policy," Opp. at 13 n.3, even if they would not otherwise.[3] But in the case on which Humana relies, venue rested on plaintiff's residence in the forum as well as significant connections between the forum and the challenged

[1] There is good reason for that approach. Nine district judges hear civil cases filed in the Dallas Division. Special Order No. 3-349 (N.D. Tex. June 5, 2023). The civil dockets of the other six Divisions in this District are divided among six district judges—four active, and two senior—most of whom are responsible for more than one Division. *See* 2d Am. Special Order No. 3-345 (N.D. Tex. Dec. 18, 2023); Special Order No. 3-347 (N.D. Tex. Dec. 14, 2022); Special Order Nos. 3-343 & 3-344 (N.D. Tex. Sept. 14, 2022). The entire Amarillo Division is handled by a single district judge, and so is the Wichita Falls Division. On Humana's view, a Dallas resident proceeding under the Freedom of Information Act or Social Security Act—which authorize plaintiffs to file suit where they reside, *see* 5 U.S.C. § 552(a)(4)(B); 42 U.S.C. § 405(g)—could have his case heard in Amarillo or Wichita Falls whenever he wished.

[2] *See Bevill v. City of Quitman*, 2019 WL 6492521, at *7–*8 (E.D. Tex. Dec. 3, 2019); *Superior Shooting Sys., Inc. v. Cole*, 2010 WL 11565996, at *4–*5 (N.D. Tex. Dec. 20, 2010).

[3] The Judicial Conference has recently advised that a plaintiff should not be able to choose the Division in which its challenge to a nationwide policy is heard, even if it would otherwise be able to do so—precisely the opposite of the rule that Humana suggests here. *See* Judicial Conference of the U.S., *Conference Acts to Promote Random Case Assignment* (Mar. 12, 2024), *available at* https://www.uscourts.gov/news/2024/03/12/conference-acts-promote-random-case-assignment.

action. *See* Compl. ¶ 21, *Permian Basin Petro. Ass'n v. Dep't of Int.*, No. 7:14-cv-50 (W.D. Tex. June 9, 2014). Where venue is grounded in a plaintiff's residence in another Division and the case has no apparent connection to the Division in which it is filed, it should be transferred to the Division in which plaintiff resides. This case should be heard in the Dallas Division.

B. Humana and its Texas subsidiary lack standing.

Audits of more than thirty Medicare Advantage contracts from payment year 2007 recovered approximately $13.7 million in overpayments. Since then, the Centers for Medicare & Medicaid Services (CMS) have not made any recoveries through their audits of this $400 billion a year program. Yet Humana insists that it is suffering an injury. Its arguments do not suffice.

i. Possible future audit demands do not provide standing.

To press its claim, a plaintiff must show an injury that is "actual or imminent." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quotation omitted). Humana argues that extrapoled RADV audit recoveries against the insurer are "imminent" because they are "certainly impending." Opp. at 19–22; *see Clapper v. Amnesty Int'l*, 568 U.S. 398, 409 (2013) (the purpose of the "imminence" requirement "is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending" (quotation omitted)). To demonstrate that its injury is "certainly impending," a plaintiff must show that it is sufficiently certain to be injured. Because "[a]llegations of possible future injury" do not suffice, *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990), the alleged injury "cannot be speculative, conjectural, or hypothetical," *Abdullah v. Paxton*, 65 F.4th 204, 208 (5th Cir. 2023) (per curiam). The plaintiff must also establish that the injury will occur sufficiently soon, that it will not be "too remote temporally to satisfy Article III standing." *McConnell v. FEC*, 540 U.S. 93, 226 (2003), *overruled on other grounds*, *Citizens United v. FEC*, 558 U.S. 310 (2010). Humana has not made either showing.

The certainty of injury can be assessed by examining "the causal chain of events necessary to support" a plaintiff's "theory of standing." *Louisiana v. Haaland*, 86 F.4th 663, 666 (5th Cir. 2023). The government did so in its motion (at 17–18). First, Humana must be selected for a RADV audit. Then, it must be found to have received overpayments. And finally, an extrapolated recovery must be demanded from the insurer.

As the government explained, "CMS has not begun—much less completed—any audits under the challenged rule," and so it is entirely speculative whether or when "Humana or its Texas subsidiary will . . . be subject to RADV audits." Mot. at 2, 17. Humana responds that it "has had at least one contract selected" in each year for which the subjects of RADV audits have been identified. Opp. at 20. But that point only applies to the parent corporation, which does not reside in this District. In its complaint, Humana Inc. alleges that it controls "approximately 18 percent" of the Medicare Advantage market. Compl. ¶ 7. Even if it is reasonable to suppose that at least one Humana contract will therefore be selected in most audit years, that is not true for Humana Benefit Plan of Texas, Inc.—the only plaintiff residing in this District—which does not allege that it has ever been subject to a RADV audit, and which controls a much smaller market share.

Humana also points to four Medicare Advantage contracts—again, none held by its Texas subsidiary—that are now being audited by the HHS Office of Inspector General (OIG), which "undertakes audits . . . similar to [CMS's] RADV audits, as part of its oversight functions." RADV Rule, 88 Fed. Reg. at 6645 n.6. OIG operates independently of CMS, *see* 5 U.S.C. § 402, and has no authority to require the return of any overpayments. (It can, and does, recommend that insurers voluntarily return overpayments.) Only CMS, exercising the Secretary's authority, can demand the return of overpayments on the basis of factual findings made by OIG. *See* RADV Rule, 88 Fed. Reg. at 6645 n.6. But even if it were reasonable to suppose that CMS would eventually

demand the return of extrapolated overpayments calculated by the pending OIG audits of the parent corporation, that would not support standing for the Texas subsidiary, which is not being audited.

And so even if the first link in "the causal chain of events necessary to support" Humana's "theory of standing," *Louisiana*, 86 F.4th at 666, will hold for the parent corporation—which is currently subject to OIG audits and likely to be selected for RADV audits when they resume—it does not hold for its Texas subsidiary, which is the only party with any claim to venue in this District.[4] And the parent corporation cannot complete its causal chain.

To establish the second link in Humana's theory of standing, the insurer must be found to have received overpayments. *See* Mot. at 17 ("If and when they are eventually audited, plaintiffs may not be found to have received any overpayments."). Humana ignores this important logical step and does not offer any authority for the proposition that pending or future audits produce cognizable injury because they are certain to identify overpayments. Instead, Humana criticizes the government's citation to *Willamette Family, Inc. v. Allen*, 643 F. Supp. 3d 1180 (D. Or. 2022), in which a district court entertained the argument that pending audits caused an injury justifying preliminary injunctive relief. The *Willamette* court explained that because the "incomplete audits . . . remain in an investigative stage," "it is speculative whether [Defendant] will ever issue audit reports with adverse findings against Plaintiff," and therefore "Plaintiff's . . . claims allege injury

[4] If the Court concludes that the Texas subsidiary lacks standing, then venue does not lie here, and the Court should transfer venue under 28 U.S.C. § 1406(a) to either the U.S. District Court for the Western District of Kentucky, where Humana, Inc. resides, or to the District of Columbia. *See A.J. Taft Coal Co. v. Barnhart*, 291 F. Supp. 2d 1290, 1303–04 (N.D. Ala. 2003) (only plaintiffs with justiciable claims at the time of filing may use their residence for venue purposes). The Court may do so *sua sponte*. *See, e.g.*, *Jones v. Hawk-Sawyer*, 2003 WL 145029 at *7 (N.D. Tex. Jan. 15, 2003). To the extent that the Court deems it necessary, the government requests leave to amend its motion to seek transfer under 28 U.S.C. § 1406(a) if only the parent corporation remains in this case. The government's principal position is that neither plaintiff has standing, but in opposition Humana has made arguments that, even if deemed sufficient by the Court, would only justify standing for one plaintiff.

that is speculative." *Id.* at 1192. Humana is right to note that this was an alternative ground for resolving the preliminary injunction motion, and that the *Willamette* court concluded it was "barred from deciding [the] merits" on grounds of abstention rather than standing. *Id.* But that does not make the injury alleged there, or here, any less speculative. The second link in Humana's causal chain does not hold, because speculative injury cannot support standing.

And even if it did, for Humana to complete the chain CMS would need to calculate and demand an extrapolated audit recovery. Moreover, the demand for an extrapolated recovery would need to be truly imminent, not merely eventual, because an injury that is "too remote temporally" does not "satisfy Article III standing." *McConnell*, 540 U.S. at 226; *see Lujan*, 504 U.S. at 564–65 n.2. Any meaningful analysis of those related issues—*whether* and *when* an extrapolated audit recovery might be demanded of Humana—must look to the history of the RADV audit program. In 2012, CMS first announced that it would calculate extrapolated recoveries through RADV audits. *See* RADV Rule, 88 Fed. Reg. at 6647. But the agency has never done so: not after three years of audits were conducted in accordance with one methodology for sampling and extrapolation, *see* 83 Fed. Reg. at 55,038; not after two more years of audits were performed with a different methodology, *see id.* at 55,039 n.26; and not since the challenged RADV Rule issued in February 2023, disclaiming the collection of extrapolated recoveries for those earlier (and still-pending) audits, *see* RADV Rule, 88 Fed. Reg. at 6644. Indeed, in all that time—and for years before—CMS made sizable RADV audit recoveries just once. *Id.* at 6646. While Medicare Advantage has grown to a more than $400 billion a year program—larger than traditional Medicare—RADV audits have lingered for many years with no recoupments, and the agency has announced its intent to make extrapolated recoveries only to reverse course. Although Humana insists that the collection of extrapolated audit recoveries under the RADV Rule is "certainly

impending," there is every reason to suspect that any extrapolated audit demand against Humana will be too "remote temporally" to support standing now, if such a demand is ever made.

In sum, Humana's Texas subsidiary cannot show that it is sufficiently certain to be audited, and neither the parent corporation nor the subsidiary can demonstrate that they will certainly be found to have received overpayments, nor have extrapolated recoveries demanded from them in the imminent future. For all of those reasons, possible future audit demands do not give the plaintiffs standing to proceed with their claims now.

ii. Present-day responses to possible future audit demands do not provide standing.

Humana's present-day responses to the possibility of future audit demands do not establish standing either. The insurer argues that even if extrapolated audit recoveries are too conjectural or temporally distant to constitute an injury-in-fact, the insurer's actions in anticipation of such recoveries—raising its bids after performing actuarial work—establish injury now. Opp. at 15–19. But when a future injury "is not certainly impending," a plaintiff cannot "repackage[]" its "failed theory of standing" through "a reasonable reaction" to the prospect of future harm. *Clapper*, 568 U.S. at 416. Just as the *Clapper* plaintiffs could not establish that they were "suffering *present* injury" from the "costly and burdensome measures" they undertook in anticipation of surveillance that was not certainly impending, neither can Humana "manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending." *Id.* at 402. If the possibility of increased future audit recoveries does not constitute an imminent injury now—and it does not—then Humana cannot manufacture standing by performing actuarial work to raise its bids in anticipation of those recoveries. As the government explained in its motion, "The second-order effects of hypothetical audit recoveries cannot constitute an imminent, concrete injury when such recoveries themselves do not." Mot. at 18.

None of the cases to which Humana points for the proposition that indirect effects of regulations can confer standing, *see* Opp. at 17, address situations like this one in which the rule's direct effects—here, the collection of extrapolated audit recoveries—are too speculative or temporally distant to impose an imminent injury. Humana argues that its present response to possible future audit recoveries amounts to an injury *even if those possible future audit recoveries themselves do not*. That is wrong, as *Clapper* squarely teaches. *See* 568 U.S. at 416.

And even if Humana could establish standing that way, the insurer has not adequately alleged that it will actually raise its Medicare Advantage bids in response to the RADV Rule. Humana admits that it did not do so last year,[5] and says nothing concrete about the bids it will submit two months from now. *See Lujan*, 504 U.S. at 561 (plaintiff must first make sufficient allegations of injury and later offer factual support). There is good reason to suspect that Humana will not in fact adjust its bids, or incur any competitive harm, because the financial impact of the RADV Rule is expected to be relatively small. Humana makes much of the government's 10-year estimate of recoveries under the Rule, *see* Opp. at 18, but an estimated $479.4 million in recoupments for calendar year 2025, *see* 88 Fed. Reg. at 6663–64, amounts to slightly more than one tenth of one percent of Medicare Advantage payments.[6] To suppose that such a small loss of revenue would cause Humana to reduce benefits enough to make it less competitive against traditional Medicare—which is of course also subject to audit, *see* 88 Fed. Reg. at 6658–59 & n.40—is quite speculative. And there is reason to doubt Humana's claims of increased compliance

[5] *See* Opp., Ex. 5, ECF No. 30-1 at 106 (explaining that "Humana has not altered its bid calculations" in response to the RADV Rule).

[6] *See* BOARDS OF TRUSTEES OF FEDERAL HOSPITAL INS. & FEDERAL SUPPLEMENTARY MEDICAL INS. TRUST FUNDS, 2023 ANNUAL REPORT 13, Table II.B.1, row labeled "Private health plans (Part C)" under Total Expenditures, column labeled "Total" (Mar. 31, 2003), *available at* https://www.cms.gov/data-research/statistics-trends-and-reports/trustees-report-trust-funds.

costs when it has eliminated a significant compliance program "in light of CMS's Final RADV Rule." *See* Opp., Ex. 5, ECF No. 30-1 at 106–07 (explaining that Humana has "discontinued its Self Audit program") (emphasis deleted).

Humana also contends that the RADV Rule "regulates Humana directly." Opp. at 17. But the Rule does not require nor prohibit any action by Humana. It does not establish payment rates, nor alter the terms on which Medicare Advantage insurers may claim payment for the marginal risk associated with a given diagnosis: they may do so if, and only if, that diagnosis is documented in a beneficiary's medical record. *UnitedHealthcare Ins. Co. v. Becerra*, 16 F.4th 867, 869 (D.C. Cir. 2021) ("*United*") ("Neither Congress nor CMS has ever treated an unsupported diagnosis for a beneficiary as valid grounds for payment to a Medicare Advantage insurer."). As the government explained, "before the RADV Rule was promulgated, CMS had an unfettered right to audit the diagnoses submitted for payment and recoup any overpayments that the audit identified." Mot. at 20. The RADV Rule does not impose any greater regulatory burden on Humana, but merely describes audit procedures that the government may use to enforce the pre-existing legal regime.

Because Humana has not established standing, its complaint should be dismissed.

C. Humana's substantive challenge is not ripe.

Even if plaintiffs had standing, their substantive APA challenge should be dismissed as unripe. That claim targets the government's "decision not to apply an FFS Adjuster in RADV audits," Compl. ¶ 75, which it justified in part by explaining, "consistent with the D.C. Circuit's decision in *UnitedHealthcare*, that the actuarial equivalence provision of the [Medicare] statute applies only to how CMS risk adjusts the payments it makes to [Medicare Advantage insurers] and not to the obligation of [such insurers] to return improper payments (for example, payments for

unsupported diagnosis codes)." RADV Rule, 88 Fed. Reg. at 6644 (citation omitted); *see United*, 16 F.4th at 870–71, 885; 42 U.S.C. § 1395w-23(a)(1)(C)(i).

Humana does not argue that the *United* case was wrongly decided, but rather that its reasoning does not apply to extrapolated RADV audits. And Humana points to language in the *United* opinion distinguishing the Overpayment Rule from "[c]ontract-level RADV audits, which would effectively eliminate—and require repayment for—*all unsupported codes* in a Medicare Advantage insurer's data." 16 F.4th at 892 (emphasis added); *see* Compl. ¶¶ 57, 64. But Humana refuses to acknowledge that such "contract-level audits" requiring repayment for "all unsupported codes" may never occur, because CMS may instead use extrapolated RADV audits to focus on subsets of diagnoses at particular risk of overpayment. *See* Mot. at 10 (discussing this "sub-cohort" audit methodology). Recent audits conducted by OIG provide an illustrative example. In those audits, OIG has focused on diagnosis patterns of particular concern—such as an acute heart attack with no corresponding hospitalization, or lung cancer with no corresponding treatment—and then calculated an extrapolated audit finding for only those subsets of diagnoses.[7] Such protocols are not audits of "all unsupported codes in a Medicare Advantage insurer's data." *United*, 16 F.4th at 892. Unless and until CMS decides to estimate all unsupported codes in a Medicare Advantage insurer's data, Humana's argument that the RADV Rule would not justify such recoveries is merely an "abstract disagreement[] over administrative polic[y]." *Nat'l Park Hosp. Ass'n v. Dep't of the Interior*, 538 U.S. 803, 807 (2003). Its first claim is therefore unripe.

CONCLUSION

This case should be transferred to the Dallas Division or dismissed for lack of jurisdiction.

[7] *See, e.g.*, HHS OIG, Medicare Advantage Compliance Audit of Specific Diagnosis Codes That Presbyterian Health Plan, Inc. (Contract H3204) Submitted to CMS at 4–5 (Aug. 2023), *available at* https://oig.hhs.gov/oas/reports/region7/72001197.pdf.

Respectfully submitted,

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