IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED HEALTHCARE SERVICES, INC.; UNITEDHEALTHCARE INSURANCE COMPANY; and UMR, INC., Plaintiffs, v. HOSPITAL PHYSICIAN SERVICES SOUTHEAST, P.C.; INPHYNET PRIMARY CARE PHYSICIANS SOUTHEAST, P.C.; and REDMOND ANESTHESIA & PAIN TREATMENT, P.C., Defendants.	Case No. 1:23-cv-05221-JPB

DEFENDANTS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT FOR LACK OF SUBJECT-MATTER JURISDICTION

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PRELIMINARY STATEMENT

The Georgia Medical Groups[1] showed in their opening brief that there is no actual controversy between themselves and United. United's opposition brief ("Response") does not change that conclusion. In fact, the Response is most notable for what it does *not* include. Nowhere has United offered a single shred of evidence suggesting that the Georgia Medical Groups have ever threatened to sue United over rates of reimbursement. Nor has United asked to take jurisdictional discovery. These omissions are easily explained: United knows that evidence of an actual controversy does not exist. And the reason the evidence does not exist is equally straightforward: the Georgia Medical Groups do not intend to sue United and have never indicated otherwise, as TeamHealth executive Kent Bristow attests in his sworn Declaration. These uncontroverted facts require dismissal.

United's arguments otherwise lack merit. First, as a threshold matter, United has failed to make an evidentiary showing that there is a justiciable controversy. Because the Georgia Medical Groups have raised a factual challenge to the Court's subject-matter jurisdiction, United is obligated to prove jurisdiction through the presentation of evidence. United cannot meet its burden by pointing to the jurisdictional allegations in its Amended Complaint; it must *prove* those allegations.

[1] Unless otherwise specified, capitalized terms shall have the meanings assigned to them in the Motion.

United has not done so. It attached no evidence to its Amended Complaint, and—other than two meaningless letters—it has submitted none with its Response. This alone mandates dismissal. (Part I.A.)

Second, even setting that defect aside, there is still no justiciable controversy. The crux of United's position is that this case resembles a typical insurance coverage dispute where an insured makes a claim and an insurer then brings a declaratory judgment action to establish that it has no duty to pay the claim. But that analogy fails because here the claimants (the Georgia Medical Groups) have *not* demanded additional reimbursement and have never threatened to sue United or explained on what basis they would do so. And because the Georgia Medical Groups are out-of-network providers, there is no written instrument—like an insurance policy—for the Court to construe. In other words, even if the Court were inclined to issue a declaration on the Georgia Medical Groups' entitlement under state law to additional reimbursement from United, there is no practical way to do so because the legal facts—*i.e.*, how much the Georgia Medical Groups are seeking in additional reimbursement, on what underlying claims, under what legal theories etc.—are unknown. In effect, United wants the Court to declare that any claims the Georgia Medical Groups hypothetically might assert—under any hypothetical legal theories and based on any hypothetical set of underlying facts—would be preempted. That is a textbook example of an impermissible advisory opinion. (Part I.B.)

Third, even if the Court *could* grant the relief sought, it should discretionarily decline. As set forth in the Motion, even when other TeamHealth affiliates have sued United for additional reimbursement, they have done so on underlying claims that differ in kind from those at issue here. Thus, there is no reason to think that the Georgia Medical Groups would seek added reimbursement on the claims at issue. And even if they were to do so, United already knows what the resolution of its ERISA preemption defense would be: the same as it has been *every other time* United has asserted an ERISA defense in a lawsuit brought by a TeamHealth affiliate over the last five years. In short, this is not a case where the need for a declaratory judgment is so compelling that the Court should be tempted to stretch the bounds of its jurisdiction. Quite the opposite: given the obvious gamesmanship at play, the Court should err on the side of caution and circumspection. (Part II.)

Which brings us to the bottom line: United's ultimate motivation in seeking declaratory relief is easily discerned, and it has nothing to do with an incipient dispute in Georgia. Rather, United is simply frustrated by the rulings of the *other* courts adjudicating *actual*—not hypothetical—reimbursement disputes between itself and other TeamHealth affiliates in other States. United had always assumed that ERISA preemption would function as an impenetrable aegis, allowing United to victimize emergency medical providers with impunity. But that has not panned out. Numerous state and federal trial courts, faithfully applying recent Supreme

Court precedent, have concluded that the various state law claims asserted by the TeamHealth affiliates are *not* preempted, because ERISA permits state regulation of medical reimbursement rates. The decisions keep piling up, and United is eager to reverse the tide. United hopes that if it can quickly obtain a favorable ERISA decision from this Court (and have that decision affirmed by the Eleventh Circuit), it can use this new authority to convince the other courts adjudicating TeamHealth/United disputes to reconsider their prior rulings.

The Court should not countenance this abuse of the judicial process. If United wants the ERISA decisions in its other cases reversed, it should play by the rules and take its appeals in those cases at the appropriate times. For reasons both jurisdictional and prudential, this Court should not render an advisory opinion on a set of hypothetical facts that is transparently sought to influence the outcomes of other disputes in other fora. The Court must dismiss this action with prejudice.

ARGUMENT

I. THERE IS NO ACTUAL CONTROVERSY BETWEEN UNITED AND THE GEORGIA MEDICAL GROUPS

As set forth in the Motion, a factual attack on subject-matter jurisdiction challenges "the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits are considered." *McElmurray v. Consol. Gov't of Augusta-Richmond Cty.*, 501 F.3d

1244, 1251 (11th Cir. 2007). Here, in presenting the Bristow Declaration, the Georgia Medical Groups have raised a factual attack.

A. United Has Not Satisfied Its Evidentiary Burden

To begin, United—"the party invoking the court's jurisdiction"—has "the burden of proving…facts supporting the existence of federal jurisdiction." *McCormick v. Aderholt*, 293 F.3d 1254, 1257 (11th Cir. 2002); *see also OSI, Inc. v. United States*, 285 F.3d 947, 951 (11th Cir. 2002) ("In the face of a factual challenge to subject matter jurisdiction, the burden is on the plaintiff to prove that jurisdiction exists."). Because the Georgia Medical Groups have raised a factual challenge, United must prove jurisdiction by a preponderance of the evidence. *McCormick*, 293 F.3d at 1257. The Court cannot assume the truth of United's allegations. *Hasan v. Wolf*, 550 F. Supp. 3d 1342, 1344 (N.D. Ga. 2021). Nor is the Court constrained to view the facts in United's favor. *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1336 (11th Cir. 2013).

United has not met its burden for the simple reason that it has not submitted evidence. Rather, it asks the Court to recognize a justiciable controversy on the basis of its jurisdictional allegations. That tactic fails. Under longstanding law, where a plaintiff's "allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof." *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936). The Georgia Medical

Groups first raised their factual challenge in the motion to dismiss the original Complaint. (Dkt. 23.) United could then have attached evidence to its Amended Complaint. It did not do so. After the Georgia Medical Groups raised the same argument in their Motion, United could have attached evidence to its Response. Again, it failed to.[2] These omissions mandate dismissal. Whether a justiciable controversy may exist in theory, United undeniably has failed to prove one in fact.[3]

Next, the *only* evidence that United has submitted is a letter it sent to Mr. Bristow after filing this action ("United Letter") and a response from the undersigned counsel ("GMGs Letter"). (Dkt. 31-1; 31-2.) In the United Letter, United asks Mr. Bristow to declare, in writing, that the Georgia Medical Groups will never sue United for greater reimbursements at any future time under any circumstances. These Letters were offered to impeach the Bristow Declaration. (Response at 10.) But this does not cure the failure of proof. Because United has the burden, it must put forward its own affirmative evidence proving jurisdiction. It is not enough for United simply to impeach the Georgia Medical Groups' witness.

[2] Notably, United should have access to the competent evidence it needs, given that it has received a multitude of TeamHealth documents in discovery in the various TeamHealth/United cases and has deposed TeamHealth executives dozens of times.

[3] United recognizes that jurisdictional discovery is permitted. (Response at 7 n.2.) Yet it declines actually to *request* jurisdictional discovery. This omission speaks volumes as to United's view of the factual strength of its position.

Moreover, United's effort at impeachment falls flat. United labels the GMGs Letter a "refus[al] to renounce pursuit of litigation in Georgia." (Response at 10.) That is a blatant mischaracterization. As the Georgia Medical Groups made clear, decisions about whether to sue:

> are influenced by a variety of external factors, including market conditions in a given geography. Thus, Mr. Bristow's statement [that the Georgia Medical Groups do not intend to sue United] should be understood for what it plainly is: an expression of present intent based on the current status quo. Of course, should conditions change at some point in the future, it is possible that intentions could change in response. But all of this is purely speculative…."

(Dkt. 31-2 at 2.)

In other words, the Georgia Medical Groups were not holding out the possibility of pursuing litigation against United given the current circumstances. They were merely expressing that an unforeseen material *change* in circumstances theoretically could prompt them to change their minds. For instance, if two years from now United suddenly were to announce a 95% reduction to the current reimbursement rates, perhaps the Georgia Medical Groups would then decide to sue. But the speculative possibility of a future lawsuit based on hypothesized conditions that may never materialize does not mean there is a justiciable dispute *now*.[4] *See*

[4] The case United principally relies upon to attack the Bristow Declaration is distinguishable on this basis. In *C.R. Bard, Inc. v. Schwartz*, the defendant patent holder had delivered an affidavit disclaiming any present intent to sue the plaintiff for patent infringement, but the affidavit left open the possibility that the defendant could change his mind for no particular reason. 716 F.2d 874, 881 (Fed. Cir. 1983).

Malowney v. Fed. Collection Deposit Grp., 193 F.3d 1342, 1347 (11th Cir. 1999) (actual controversy must be "real and immediate" rather than "conjectural, hypothetical, or contingent"). Ultimately, United's request for the Georgia Medical Groups to commit to never suing at any future time under any circumstances should be seen for what it is: a bad faith effort to manufacture jurisdiction.[5]

Accordingly, United has not presented evidence sufficient to prove the existence of an actual controversy.

Here, in contrast, the GMGs Letter does not say that the Georgia Medical Groups might change their intention not to sue on a whim. Any change would only come in response to an unforeseen, exogenous change in circumstances. (Dkt. 31-2 at 2.) Moreover, the *C.R. Bard* defendant had already sued the plaintiff for breach of a licensing agreement (for the patented product), thereby showing "a willingness…to enforce his patent rights." 716 F.2d at 881. Here, in contrast, the Georgia Medical Groups have never sued United or threatened to sue United.

[5] This half-baked gambit was obscenely predictable. In the GMGs Letter, the Georgia Medical Groups stated that:

> [W]e suspect [the United Letter] is not a good faith attempt to resolve a dispute between the parties, but rather is an effort to manufacture a record you can use to support United's eventual response to [the Motion]. In other words, we expect that United will argue to the Court that the Georgia Medical Groups' refusal to commit to never suing, irrespective of whatever unforeseen circumstances may materialize in the future, somehow suggests that there is a present, justiciable controversy for the Court to resolve.

(Dkt. 31-2 at 2.)

That supposition clearly has been borne out. Relatedly, the irony of United characterizing the Bristow Declaration as "self-serving" after having pulled its stunt with the United Letter should not be overlooked.

B. United Has Not Adequately Alleged the Existence of an Actual Controversy

Even assuming the truth of United's jurisdictional allegations, there is still no actual controversy. United mainly analogizes this case to declaratory judgment actions in the casualty insurance context. As United notes, it is common for policyholders to submit claims to their carriers, and for the carriers then to deny the claims and file declaratory judgment actions to establish that the claims are not covered. (Response at 8–9.) Such cases lend themselves to declaratory relief because once an insurer refuses payment, there generally is a dispute. And a court in this context has the information needed to declare the parties' rights: there is a written instrument for the court to construe (the insurance policy), the claimant's legal theory is established (breach of the policy), and the facts often are established.

United's analogy fails because here, in contrast, none of those conditions exist. The Georgia Medical Groups have not made specific demands that United pay more than it already has paid, and they have not threatened to sue. Further, because there has been no demand for additional payment, the Court lacks the information needed to render declaratory relief. Here, there is no insurance policy or other contract for the Court to construe. And the Court does not know under what theories the Georgia Medical Groups would claim entitlement to additional reimbursement. As even a cursory review of the complaints from the TeamHealth/United disputes in other States makes clear, the legal theories asserted

generally differ from State to State. For instance, the TeamHealth affiliates in Florida have sought additional reimbursement under Florida statutes regulating the reimbursement rates. (Dkt. 29-2 at 33–35.) Those claims are unique to Florida. The TeamHealth affiliates in Nevada have sought compensation for United's breaches of that State's Unfair Claims Practices Act. (Dkt. 29-8 at 39.) The TeamHealth affiliates in Pennsylvania have sought compensation under a conversion theory, which no affiliates in other States have pursued. (Ex. 1 ¶¶ 158–64[6].)

These differences are significant, because even the authorities that have found ERISA preemption in payer/provider reimbursement disputes generally recognize that preemption is a claim-by-claim analysis based on the underlying facts and legal theories. *See, e.g., Plastic Surgery Ctr., P.A. v. Aetna Life Ins. Co.*, 967 F.3d 218, 242 (3d Cir. 2020) (in pre-*Rutledge* dispute over reimbursement amounts, finding that medical provider's unjust enrichment claim was preempted and claims for breach of oral contract and promissory estoppel were not preempted); *Access Mediquip L.L.C. v. UnitedHealthcare Ins. Co.*, 662 F.3d 376, 387 (5th Cir. 2011) (finding medical provider's unjust enrichment and *quantum meruit* claims preempted but claims for violations of the Texas Insurance Code, promissory estoppel, and negligent misrepresentation not preempted). Yet, here, the Court

[6] The Pennsylvania complaint is an exhibit to this Reply.

cannot know the relevant facts and legal theories, because the Georgia Medical Groups have never sought additional reimbursement on any underlying claims or asserted a legal basis to do so. Thus, to grant the relief United seeks, the Court would not only have to assume the existence of a hypothetical dispute, it would have to assume hypothetical facts and hypothetical legal theories.[7] That is something the Court obviously cannot do, and it is why the Court must dismiss this case. *See, e.g., Atlanta Gas Light Co. v. Aetna Cas. & Sur. Co.*, 68 F.3d 409, 415–16 (11th Cir. 1995) (no justiciable controversy where policyholder sought declaration on coverage for environmental cleanup costs before regulators had ordered cleanup).[8]

[7] Sticking with United's casualty insurance analogy: United's request here would be the equivalent of a home insurer seeking declaratory relief that a claim for hurricane damage is not covered *before the hurricane hits*. In that instance, not only would the parties and court have to speculate about whether, after the hurricane, the homeowner will make a claim, they would have to speculate as to the nature of the hypothetical claim (*i.e.*, roof repairs? damage to the façade? water intrusion? a total loss?). That is something that no court can do.

[8] United attempts to distinguish *Atlanta Gas* by noting that, in that case, the policyholder sought declaratory relief before obtaining the carrier's coverage position. (Response at 12.) While that is true, the reason the *Atlanta Gas* court held that there was no justiciable controversy is that the policyholder had sought declaratory relief before incurring a loss. Because no regulator had ordered cleanup and the policyholder had not been named in third party lawsuits, "no one knew exactly what had to be cleaned up, who was to undertake the cleanup, or how much the cleanup would cost." 68 F.3d at 415. Rather, the policyholder simply assumed that it would be ordered to clean its sites because other, similarly-situated utilities had been so ordered. *Id.* In other words, as here, the parties and court were left to speculate as to the existence of a controversy and the basic facts of that controversy.

United's other arguments in support of jurisdiction uniformly miss the mark. At bottom, United's theory is that because TeamHealth executives have issued years-old, generalized threats to sue over inadequate rates of reimbursement, and because some TeamHealth affiliates in other States have followed through on those threats over the last five years, there necessarily exists a justiciable dispute between United and the Georgia Medical Groups. (Response at 9–10.) But that position fails because United cannot allege that the Georgia Medical Groups or TeamHealth personnel have ever threatened to sue *in Georgia*. As Mr. Bristow attests in his Declaration, TeamHealth affiliates are "selective and deliberate about whether and when to take legal action against Insurers." That decision is made case-by-case and incorporates many local factors. Therefore, "a decision for a TeamHealth-affiliated medical group in a certain geographic market to bring an action against an Insurer is not indicative of an intent for different affiliates in different markets to do the same." (Bristow Decl. ¶ 10.) And the proof is in the pudding: it is now Year Six of the TeamHealth/United national dispute, yet TeamHealth affiliates have sued United in only nine of the forty-seven States where they operate. (Bristow Decl. ¶ 11.)

Relatedly, United notes that "[s]ince United terminated a network agreement encompassing two Defendants (along with other TeamHealth subsidiaries) on October 15, 2019, TeamHealth affiliates have sued United in four of the five other jurisdictions covered by the [agreement]." (Response at 9–10.) But that simply

proves Mr. Bristow's point. TeamHealth and its affiliates evidently concluded that the four other jurisdictions were ripe for litigation, and Georgia was not. Indeed, United does not explain why, if TeamHealth and its affiliates have committed to suing whenever and wherever United terminates a network agreement, the Georgia Medical Groups have not filed suit in the four-and-a-half years since United terminated their agreement (allowing the applicable statutes of limitations to run on many underlying reimbursement claims in the interim).[9]

Accordingly, United has not shown the existence of an actual controversy with the Georgia Medical Groups.[10]

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[9] United maintains that "TeamHealth has commenced case after case against United (its last filing was less than four months ago)," citing the recently filed complaint in *Gulf-to-Bay Anesthesiology Assocs., LLC v. UnitedHealthcare of Fla., Inc. et al.*, Case No. 2023-CA-016780 (Fla. 13th Cir. Ct., Hillsborough Cty.). That is misleading. The action cited is the third dispute between that same Florida-based medical practice and United, each covering claims in successive time periods. The first suit was filed in 2017. *See Gulf-to-Bay Anesthesiology Assocs., LLC v. UnitedHealthcare of Fla., Inc. et al.*, Case No. 2017-CA-011207 (Fla. 13th Cir. Ct., Hillsborough Cty.). In short, this is hardly a new dispute in a new forum.

[10] The authority United cites to supports its position is inapposite. Those cases involve situations where, unlike here, the parties to the declaratory judgment action have already litigated with each other, or where the defendant has specifically threatened litigation. *See, e.g., GTE Directories Publ'g Corp. v. Trimen Am., Inc.*, 67 F.3d 1563, 1568 (11th Cir. 1995) (justiciable controversy where party had threatened litigation in response to specific conduct and opposing party had expressed intent to engage in such conduct nonetheless).

II. THE COURT SHOULD EXERCISE ITS DISCRETION TO DENY DECLARATORY RELIEF

As explained in the Motion, even if the Court were to find that this case falls barely within the outer bounds of its jurisdiction, it should discretionarily decline United's request for declaratory relief. That is because: (1) the underlying claims that TeamHealth affiliates in other States have challenged in the past are distinct from those at issue here, and (2) the ERISA preemption issue has already been resolved numerous times, including in TeamHealth/United lawsuits.[11] For these reasons, the declaratory relief United seeks would not advance its express purpose of allowing United to conform its future behavior to the law. United already knows the law; it simply does not *like* the law.

[11] United suggests that the courts to have found that claims asserted by medical providers challenging rates of reimbursement under state law are not preempted exclusively were state courts "defending their home states' parochial interest in expanding the reach of state law." (Response at 15.) Not true. A number of these decisions—especially the reported decisions—were rendered by federal district courts. *See, e.g., NEMS PLLC v. Harvard Pilgrim Health Care of Conn., Inc.*, 615 F. Supp. 3d 124, 141–42 (D. Conn. 2022); *Emergency Servs. of Okla., PC v. Aetna Health, Inc.*, 556 F. Supp. 3d 1259, 1263–65 (W.D. Okla. 2021). These include federal district courts adjudicating TeamHealth/United disputes. *See, e.g., Fla. Emergency Physicians Kang & Assocs., M.D., Inc. v. United Healthcare of Fla., Inc.*, 526 F. Supp. 3d 1282, 1279–99 (S.D. Fla. 2021); *ACS Primary Care Physicians, Sw., P.A. v. UnitedHealthcare Ins. Co.*, 514 F. Supp. 3d 927, 939–42 (S.D. Tex. 2021), *rev'd on other grounds*, 60 F. 4th 899 (5th Cir. 2023); *Emergency Physician Servs. of N.Y. v. UnitedHealth Grp., Inc.*, 2021 WL 4437166, at *8–9 (S.D.N.Y. Sept. 28, 2021).

United's response on this point is to spend eight full pages—roughly one-third of its brief—arguing the merits of ERISA preemption. (Response at 15–23.) In so doing, it apparently hopes to bait the Court into expounding on the merits, thereby effectively delivering the advisory opinion United seeks. The Georgia Medical Groups will not respond to these arguments—which are improper on this jurisdictional Motion—other than to note that United inadvertently gives the game away. It maintains that "United ***and other similarly-situated health insurers*** need to know they may, as ERISA instructs, continue to administer benefit plans according to their terms." (Response at 23 (emphasis added).) In other words, United wants to create authority that will inure to the benefit of itself and its industry cohorts in helping them begin to reverse an adverse trend in the law. But that is an inappropriate use of this forum. There is no actual controversy between the parties to this case, this is not a class action, and United plainly has no standing to seek relief on behalf of "other similarly-situated health insurers." The Court must dismiss the case accordingly.

CONCLUSION

For all the foregoing reasons, the Court should grant the Motion and dismiss the Amended Complaint with prejudice.

Respectfully submitted, this 7th day of March, 2024.

/s/ James W. Cobb
James W. Cobb

Georgia Bar No. 420133
Cameron B. Roberts
Georgia Bar No. 599839
CAPLAN COBB LLC
75 Fourteenth Street, NE, Suite 2700
Atlanta, Georgia 30309
T: (404) 596-5600/F: (404) 596-5604
jcobb@caplancobb.com
croberts@caplancobb.com

Justin C. Fineberg*
Florida Bar No. 53716
Jonathan E. Siegelaub*
Florida Bar No. 1019121
Jeremy A. Weberman*
Florida Bar No. 1031755
LASHGOLDBERG LLP
2500 Weston Rd., Ste. 220
Fort Lauderdale, Florida 33331
T: (954) 3384-2500/F: (954) 384-2510
jfineberg@lashgoldberg.com
jsiegelaub@lashgoldberg.com
jweberman@lashgoldberg.com
*admitted pro hac vice

Counsel for Defendants

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d), I hereby certify that the foregoing document complies with the font and point selections approved by L.R. 5.1(C). The foregoing document was prepared using Times New Roman font in 14 point.

This 7th day of March, 2024.

/s/ James W. Cobb
James W. Cobb
Georgia Bar No. 420133

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a true and correct copy of the foregoing to be filed with the Clerk of Court using the CM/ECF system, which will send a notification of such filing to all counsel of record.

This 7th day of March, 2024.

/s/ James W. Cobb
James W. Cobb
Georgia Bar No. 420133

Counsel for Defendants