UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

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.	Civil Action No. 1:23-cv-05221-JPB

PLAINTIFFS' MOTION FOR LEAVE TO FILE SURREPLY TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs (collectively, "United") respectfully move this Court for an order granting United leave to file a brief surreply in response to Defendants' Reply in Support of their Motion to Dismiss ("Reply") (Dkt. 33). A copy of United's proposed surreply is attached to this motion as Exhibit A. A brief surreply is warranted here to respond to Defendants' new argument—raised for the first time in their Reply—that declaratory relief is inappropriate due to uncertainty about "what theories" Defendants would invoke if they proceeded with the litigation they have threatened against United in Georgia. Reply at 9.

Courts in this district and others routinely allow surreplies when a proponent of a motion raises new arguments in a reply brief. *See, e.g., Carter v. Howard*, 2020 WL 10050792, at *2 (N.D. Ga. Oct. 22, 2020) (granting plaintiff leave to file surreply to defendant's reply in support of motion to dismiss where defendant raised new argument for the first time in reply); *United States ex rel. Olsen v. Lockheed Martin Corp*., 2010 WL 11512336, at *2 (N.D. Ga. Sept. 17, 2010), *aff'd sub nom. U.S. ex rel. Seal 1 v. Lockheed Martin Corp*., 429 F. App'x 818 (11th Cir. 2011) (same); *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. EPT Mgmt. Co*., 2006 WL 8433523, at *3 (N.D. Ga. Dec. 11, 2006) (granting leave to file surreply to motion to dismiss); *Int'l Telecomms. Exchange Corp. v. MCI Telecomms. Corp*., 892 F. Supp. 1520, 1531 (N.D. Ga. 1995) (Hull, J.) ("Normally, a party may not raise new grounds for granting its motion in a reply. Where a party does raise new grounds in

its reply, the Court may either strike the new grounds or permit the non-moving party additional time to respond to the new argument.").

Those persuasive precedents warrant a surreply here. Defendants' Motion to Dismiss argued primarily that this Court "lacks subject-matter"—or, alternatively, "should dismiss this case" as an exercise of discretion—because Defendants purportedly "do not presently intend to sue [United] for additional reimbursement." Motion to Dismiss 3-5 (Dkt. 29). Because Defendants insisted (contrary to the evidence) that they do not intend to bring suit, they made no argument whatsoever addressing the state law theories they would invoke were they to sue.

In their Reply, by contrast, Defendants change course, arguing for the first time that declaratory relief is inappropriate because "the Court does not know under what theories the Georgia Medical Groups would claim entitlement to additional reimbursement." Reply at 9. Because Defendants never raised that argument in their Motion to Dismiss, it is waived. *See, e.g., Herring v. Sec'y, Dep't of Corr.*, 397 F.3d 1338, 1342 (11th Cir. 2005) ("As we repeatedly have admonished, '[a]rguments raised for the first time in a reply brief are not properly before a reviewing court.'" (*citing United States v. Coy*, 19 F.3d 629, 632 n. 7 (11th Cir.1994))); *United States v. Martinez*, 83 F.3d 371, 377 n. 6 (11th Cir. 1996) (declining to consider arguments raised for the first time in a reply brief); *Boring v. Pattillo Indus. Real Estate*, 426 F. Supp. 3d 1341, 1349 (N.D. Ga. 2019) ("[T]he

Court will not consider new arguments made for the first time in the reply brief."). But to the extent the Court is at all inclined to consider Defendants' new argument, United should be permitted to respond, correct the record, clarify the declaratory relief United seeks, and explain why it does not require the Court to predict what legal theories Defendants may invoke in a future lawsuit.

United therefore respectfully requests that this Court grant United leave to file a surreply addressing Defendants' new arguments.

Respectfully submitted,

Dated: March 27, 2024

/s/ Greg Jacob

Greg Jacob (*pro hac vice*)
Brian Boyle (*pro hac vice*)
Meredith Garagiola (*pro hac vice*)
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
Tel.: (202) 383-5300
Fax: (202) 383-5414
gjacob@omm.com
bboyle@omm.com
mgaragiola@omm.com

William D. Pollak (*pro hac vice)*
O'MELVENY & MYERS LLP
7 Times Square
New York, NY 10036
Tel.: (212) 326-2000
Fax: (212) 326-2061
wpollak@omm.com

William H. Jordan
R. Blake Crohan
ALSTON & BIRD LLP
One Atlantic Center
1201 West Peachtree Street
Suite 4900
Atlanta, GA 30309-3424
Tel.: (404) 881-7000
Fax: (404) 881-7777
bill.jordan@alston.com
blake.crohan@alston.com

Emily Seymour Costin (pro hac vice)
ALSTON & BIRD LLP
The Atlantic Building
950 F Street, NW
Washington, DC 20004-1404
Tel.: (202) 239-3300
Fax: (202) 239-3333
emily.costin@alston.com

Attorneys for Plaintiffs United HealthCare Services, Inc., UnitedHealthcare Insurance Company, and UMR, Inc.

CERTIFICATE OF SERVICE AND TYPE-SIZE COMPLIANCE

Pursuant to LR 5.1C, N.D. Ga., the foregoing pleading is prepared in Times New Roman font, 14 point, and 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 27th day of March, 2024.

/s/ Greg Jacob
Greg Jacob (*pro hac vice*)
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
Tel.: (202) 383-5300
Fax: (202) 383-5414
gjacob@omm.com

Attorney for Plaintiffs United HealthCare Services, Inc., UnitedHealthcare Insurance Company, and UMR, Inc.

Exhibit A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

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.	Civil Action No. 1:23-cv-05221-JPB

PLAINTIFFS' SURREPLY TO DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

Plaintiffs ("United") file this surreply in response to Defendants' Reply in Support of their Motion to Dismiss ("Reply") (Dkt. 33) to address a new argument raised by Defendants for the first time in their Reply that misstates the nature of declaratory relief that United seeks. Through this action, United "seeks to clarify its legal obligation to reimburse Defendants' claims according to the terms of the Plans and without regard to Georgia common law—which is expressly preempted by Section 514 of ERISA, 29 U.S.C. § 1114." Response in Opposition to Motion to Dismiss ("Response") (Dkt. 30), at 2. Declaratory relief to clarify that obligation is warranted, United has explained, because Defendants have threatened legal action challenging United's reimbursement rates under Georgia common law. *Id.* at 8-10. Defendants argue in their Reply, however, that such relief is improper because "the Court does not know under what theories [Defendants] would claim entitlement to additional reimbursement" if they brought suit against United. (Reply at 9.)

At the threshold, Defendants' argument comes too late because it does not appear anywhere in their Motion to Dismiss. Instead, that motion argued primarily that this Court "lacks subject-matter"—or, alternatively, "should dismiss this case" as an exercise of discretion—because Defendants purportedly "do not presently intend to sue [United] for additional reimbursement." Mot. to Dismiss (Dkt. 29), at 3–5. Because "a party may not raise new grounds for granting its motion in a reply," *Int'l Telecommunications Exch. Corp. v. MCI Telecommunications Corp.,* 892 F.

Supp. 1520, 1531 (N.D. Ga. 1995), "the Court is not required to consider [Defendants'] new arguments" that were "raised for the first time in a reply." *Tindall v. H&S Homes, LLC*, 2011 WL 5007827, at *2 (M.D. Ga. Oct. 20, 2011).

Even if considered, Defendants' new argument lacks merit. The legal principle that United is asking this Court to declare is that in the absence of a contract or representation by United promising a different payment, United is obligated under ERISA to pay out-of-network claims according to the requirements and payment processes specified in the ERISA plan documents notwithstanding ***any*** state-law claims that Defendants might deploy to argue otherwise. Am. Compl. (Dkt. 27), ¶ 83. That obligation cannot depend on whatever common law theories Defendants might attempt to devise in an artfully pleaded complaint because United must know how much to pay Defendants ***before*** it pays them.

Indeed, avoiding the uncertainty that a patchwork of conflicting, as-yet-unidentified state law duties would create is a central purpose of ERISA preemption. *See Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004) ("The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans. To this end, ERISA includes expansive pre-emption provisions. . . ."); *Pharm. Care Mgmt. Ass'n v. Mulready*, 78 F.4th 1183, 1193, 1198 (10th Cir. 2023) ("ERISA's promise of uniformity is vitally important for employers, who 'have large leeway to design . . . plans as they see fit.'") (quoting *Black & Decker Disability Plan v. Nord*,

538 U.S. 822, 833 (2003)). That is why ERISA's preemption provision is categorical: As the case law well establishes, ERISA preempts *all* common law claims against ERISA-governed plans that are not promissory in nature—i.e., that do not depend on independent purported contracts or representations as to the payment amount. *See* Response at 16–23. The Court thus need not parse in any detail the common law causes available to Defendants under Georgia law. As long as those causes do not depend upon a promise or representation to pay a specific amount regardless of what the plans provide, United submits that they must yield under ERISA § 514.

Defendants' discussion of United's cases only proves the point. Defendants assert that two of United's cases—*Plastic Surgery Center, P.A. v. Aetna Life Insurance Co.*, 967 F.3d 218 (3d Cir. 2020), and *Access Mediquip L.L.C. v. UnitedHealthcare Ins. Co.*, 662 F.3d 376 (5th Cir. 2011)—analyzed preemption on a "claim-by-claim" basis, and found some claims preempted but not others. Reply at 10. But as Defendants' case summaries explain, the claims found "not preempted" in those cases—"breach of oral contract," "promissory estoppel," and "negligent misrepresentation," *id.*—each involve the types of promises or representations that would fall outside the scope of United's requested injunction. By contrast, each of the claims in *Plastic Surgery Center* and *Access Mediquip* that did ***not*** depend on a promise of representation were found preempted. *Id*.

The simple declaration United seeks concerning its obligations is not novel. Courts have issued similar declarations regarding the obligation of a party to follow federal law notwithstanding the purported requirements of state law. *See, e.g.*, *Garcia v. Vanguard Car Rental USA, Inc.*, 2007 WL 9723491, at *1 (M.D. Fla. Apr. 26, 2007) (reaffirming court's "clear" declaratory judgment that claims of vicarious liability under Florida state law were preempted by federal law); *Blue Cross & Blue Shield of Alabama v. Peacock's Apothecary, Inc*., 567 F. Supp. 1258, 1277 (N.D. Ala. 1983) (granting declaratory judgment that Alabama state law was preempted by federal law with respect to employee benefit plans governed by ERISA). The same relief is available and appropriate here.

Of course, if Defendants believe that the case law leaves some exception from preemption for some other, still unnamed cause of action under Georgia law, nothing prevents them from raising that as a defense to the declaratory relief that United is seeking. If this Court agrees with Defendants, it can decide at that time whether to modify the declaratory relief sought or deny it entirely. But empty speculation that Defendants might belatedly discover a heretofore unknown exception to ERISA preemption is not a reason to cut this action short at the starting gate.

CONCLUSION

Defendants' Motion to Dismiss the Amended Complaint should be denied.

Respectfully submitted,

Dated: March 27, 2024

/s/ Greg Jacob

William H. Jordan
R. Blake Crohan
ALSTON & BIRD LLP
One Atlantic Center
1201 West Peachtree Street
Suite 4900
Atlanta, GA 30309-3424
Tel.: (404) 881-7000
Fax: (404) 881-7777
bill.jordan@alston.com
blake.crohan@alston.com

Emily Seymour Costin (*pro hac vice*)
ALSTON & BIRD LLP
The Atlantic Building
950 F Street, NW
Washington, DC 20004-1404
Tel.: (202) 239-3300
Fax: (202) 239-3333
emily.costin@alston.com

Greg Jacob (*pro hac vice*)
Brian Boyle (*pro hac vice*)
Meredith Garagiola (*pro hac vice*)
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
Tel.: (202) 383-5300
Fax: (202) 383-5414
gjacob@omm.com
bboyle@omm.com
mgaragiola@omm.com

William D. Pollak (*pro hac vice)*
O'MELVENY & MYERS LLP
7 Times Square
New York, NY 10036
Tel.: (212) 326-2000
Fax: (212) 326-2061
wpollak@omm.com

Attorneys for Plaintiffs United HealthCare Services, Inc., UnitedHealthcare Insurance Company, and UMR, Inc.

CERTIFICATE OF SERVICE AND TYPE-SIZE COMPLIANCE

Pursuant to LR 5.1C, N.D. Ga., the foregoing pleading is prepared in Times New Roman font, 14 point, and 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 27th day of March, 2024.

/s/ Greg Jacob
Greg Jacob (*pro hac vice*)
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
Tel.: (202) 383-5300
Fax: (202) 383-5414
gjacob@omm.com

Attorney for Plaintiffs United HealthCare Services, Inc., UnitedHealthcare Insurance Company, and UMR, Inc.