

**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' OMNIBUS RESPONSE TO PLAINTIFFS' CONDITIONAL
MOTION FOR JURISDICTIONAL DISCOVERY AND
MOTION FOR LEAVE TO FILE SURREPLY**

Defendants (“Georgia Medical Groups”) file this Omnibus Response in Opposition to Plaintiffs’ (“United”) Motion for Leave to File Surreply to Defendants’ Motion to Dismiss (Dkt. 38) and Conditional Motion for Jurisdictional Discovery (Dkt. 39).

BACKGROUND

United filed its Complaint in this case on November 13, 2023. (Dkt. 1.) It sought declaratory relief directing that state law claims for additional reimbursement which the Georgia Medical Groups have not yet asserted—but which United believes they will assert—are preempted by ERISA. (Dkt. 1 at 38.) The Georgia Medical Groups responded by filing a Motion to Dismiss for Lack of Subject-Matter Jurisdiction. (Dkt. 23.) They contended that the Court must dismiss this declaratory judgment action because there is no actual controversy between the parties. In other words, the Georgia Medical Groups have never threatened to sue United or otherwise contemplated doing so. The Georgia Medical Groups attached to their motion a sworn declaration from TeamHealth executive Kent Bristow, attesting that the Georgia Medical Groups do not intend to sue United. (Dkt. 23-1.)

Rather than respond to the Motion to Dismiss, United filed an Amended Complaint, ostensibly to shore up its jurisdictional allegations. (Dkt. 27.) The substance of United’s position—both on jurisdiction and the merits—remained materially unchanged. As such, the Georgia Medical Groups submitted a materially

identical Motion to Dismiss Amended Complaint for Lack of Subject-Matter Jurisdiction, reattaching the Bristow Declaration. (Dkt. 29.) United responded to the Motion to Dismiss Amended Complaint on February 22, 2024. (Dkt. 30.) Notably, neither in the Amended Complaint nor in its Response did United request jurisdictional discovery, despite the Georgia Medical Groups' having twice raised a factual challenge to the Court's subject-matter jurisdiction. The Georgia Medical Groups submitted their Reply on March 7, 2024, wherein they noted that United had not met its burden of proving jurisdiction by a preponderance of the evidence because it had not presented any evidence. (Dkt. 33.)

On March 11, 2024, the parties submitted a Joint Preliminary Report and Discovery Plan. (Dkt. 34.) In United's portion of that filing, it stated that "Plaintiffs believe that the Court should deny the motion to dismiss on the basis of the allegations in the Amended Complaint and there is no need for Plaintiffs to submit evidence on allegations that have not been disputed. (Dkt. 34 at 7.) In the alternative, it requested jurisdictional discovery. (*Id.*) The following day, the Court issued its Scheduling Order. (Dkt. 35.) Relevant here, it noted that "[a] request for jurisdictional discovery should be made via a separate motion." (*Id.* at 1 n.1.)

On March 27, 2024, United filed a Motion for Leave to File a Surreply to Defendants' Motion to Dismiss (Dkt. 38) and a Conditional Motion for Jurisdictional Discovery (Dkt. 39). The Georgia Medical Groups herein respond to those Motions.

ARGUMENT

I. THE COURT SHOULD NOT ALLOW UNITED TO SUBMIT A SUR-REPLY

United argues that it should be permitted to file a sur-reply responsive to a “new argument” in the Georgia Medical Groups’ reply brief. (Dkt. 38 at 2.) Specifically, United contends that the Georgia Medical Groups argued for the first time in Reply “that declaratory relief is inappropriate due to uncertainty about ‘what theories’ Defendants would invoke if they proceeded with litigation ... against United in Georgia.” (Dkt. at 2). But the timing of that statement is neither improper nor surprising. The Georgia Medical Groups noted in their Reply that the Court cannot possibly know what theories of liability the Georgia Medical Groups would raise in a hypothetical lawsuit against United because that point is directly responsive to an argument that United first raised in its Response brief. In the Response, United attempted to analogize its request for declaratory relief to those often raised in the casualty insurance context. (Dkt. 30 at 8–10.) In response, the Georgia Medical Groups noted that, in the casualty insurance context “there is a written instrument for the court to construe (the insurance policy), the legal theory is established (breach of the policy), and the facts are established.” (Dkt. 33 at 13.) The Georgia Medical Groups further explained that here, in contrast, there is no insurance policy or written instrument for the Court to construe, and therefore no

certainty as to “what theories” the Georgia Medical Groups would use to anchor a hypothetical request for additional reimbursement. (Dkt. 33 at 13.)

The Georgia Medical Groups’ approach was perfectly appropriate, because the entire purpose of a reply brief is to *reply* to arguments raised in the non-moving party’s response brief. As such, nothing has transpired that would warrant the Court’s taking the unusual step of granting United leave to file a sur-reply. *See, e.g., Ngando v. Butler*, 2023 WL 6370896, at *2 n.3 (N.D. Ga. Mar. 1, 2023) (noting that “[g]enerally, sur-replies are disfavored because to allow such sur-replies as a regular practice would put the court in the position of referring an endless of volley of briefs”).

II. UNITED’S CONDITIONAL REQUEST FOR JURISDICTIONAL DISCOVERY IS IMPROPER

United did not bother to confer with the Georgia Medical Groups prior to seeking relief from the Court in its Conditional Motion for Jurisdictional Discovery. (Dkt. 39.) Had it done so, the Georgia Medical Groups would have informed United that their position is as follows:

First, United’s “conditional” request for jurisdictional discovery is entirely inappropriate and should be rejected. On the one hand, United insists that “the Court can and should determine it has subject matter jurisdiction over this action based on United’s unchallenged factual allegations.” (Dkt. 39-1 at 2.) Yet, United also seeks jurisdictional discovery “in the event that the Court determines that one or more facts

material to determining subject matter jurisdiction is substantially in dispute.” (*Id.*) United cannot have its cake and eat it too. If United’s position is that the Court can and should resolve the MTD in its favor based exclusively on the allegations in its pleading, then United should be made to stand on its pleading. The Georgia Medical Groups should not be compelled to incur the time and expense of jurisdictional discovery when United itself insists that the discovery is unnecessary. Moreover, United should not get two bites at the apple. It must either concede that it is required to prove jurisdiction through the presentation of evidence—as the Georgia Medical Groups have argued—and then take discovery, or else continue to insist that jurisdiction can be established based on the pleadings and thereby forgo discovery.

Second, if United concedes that it must prove jurisdiction through the presentation of evidence, then the Georgia Medical Groups agree that some jurisdictional discovery would be appropriate. Yet, United’s proposed discovery requests (Dkt. 39-1 at 10; Dkt. 39-2) are overbroad. For instance, United has requested four depositions: Kent Bristow, Leif Murphy, Robert Galvin, and a 30(b)(6) designee. (Dkt. 39-1 at 10.) The Georgia Medical Groups agree that United should be permitted to depose Mr. Bristow—who has submitted a sworn declaration in conjunction with the MTD, attesting that he is the key decisionmaker on questions of whether, where, and when TeamHealth-affiliated medical practices will file lawsuits against health insurers (Dkt. 29-1 at ¶¶ 7, 10.)—and a 30(b)(6) designee.

Those two depositions would be more than enough for United to obtain any jurisdictional evidence it may need. On the other hand, the Georgia Medical Groups object to overbroad and unnecessary discovery at this stage, including United's requests to depose Mr. Murphy (the TeamHealth CEO) and Mr. Galvin (a TeamHealth board member). Neither of those individuals would have any relevant testimony to offer that would not be duplicative of information obtained through depositions of Mr. Bristow and a corporate designee.

In any event, the Georgia Medical Groups recognize that questions regarding whether to allow jurisdictional discovery, what form any jurisdictional discovery would take, and how the jurisdictional discovery would be used (given that the MTD already has been fully briefed and is ripe for resolution) are procedurally complex. The Georgia Medical Groups respectfully suggest that these matters could be resolved most efficiently if the Court were to hold a status conference with the parties, and they respectfully request that the Court do so.

CONCLUSION

For all the foregoing reasons, the Georgia Medical Groups respectfully request that the Court deny United's Motion for Leave to File a Surreply (Dkt. 38) and Conditional Motion for Jurisdictional Discovery (Dkt. 39).

Respectfully submitted, this 10th day of April, 2024.

/s/ James W. Cobb

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(D), the undersigned counsel hereby certifies that the above and foregoing has been prepared in Times New Roman, 14-point font, one of the font and point selections approved by this Court in Local Rule 5.1(C).

This 10th day of April, 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 10th day of April, 2024.

/s/ James W. Cobb
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