UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

ELECTRONICALLY FILED

JOANNE BARROWS, SUSAN HAGOOD, SHARON MERKLEY, LORRAINE KOHL, and DOLLY BALANI, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

HUMANA, INC.,

Defendant.

Civil Action No. 3:23-cv-00654-RGJ

DEFENDANT'S RESPONSE TO PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY

Defendant Humana, Inc. ("Humana") respectfully submits this response to Plaintiffs' Notice of Supplemental Authority, R.67, regarding Humana's Motion to Dismiss Plaintiffs' Amended Complaint, R.40 ("Mot.").

Plaintiffs bring to the Court's attention a non-binding district court decision that dismissed all but two claims in a nearly-identical case, *Estate of Lokken v. UnitedHealth Group, Inc., et al.*, ---F. Supp. 3d---, 2025 WL 491148 (D. Minn. Feb. 13, 2025). In *Lokken*, the court correctly held that all of the plaintiffs' claims were "inextricably intertwined" with claims for Medicare benefits, and that the *Lokken* plaintiffs—like the Plaintiffs here—failed to exhaust the Medicare Act's mandatory administrative appeal process. 2025 WL491148, at *4. The *Lokken* court also correctly held that both plaintiffs' statutory and common law claims were subject to potential preemption by the Medicare Act. *Id.* at *8. However, the *Lokken* court's holdings that the plaintiffs had "presented" their claims to the Secretary of Health and Human Services, *id.* at *4,

and that plaintiffs' obligation to exhaust the Medicare mandatory administrative appeal process should be waived, *id.* at *5, would be reversible error in the Sixth Circuit. And the *Lokken* court's preemption analysis, as applied to plaintiffs' surviving Breach of Contract and Breach of Implied Covenant of Good Faith and Fair Dealing claims, missed important context that the Evidence of Coverage ("EOC") document is an extension of CMS's regulation over Medicare Advantage plans.

Presentment to the Secretary: The *Lokken* court held that merely submitting a claim for consideration to UnitedHealthcare, a Medicare Advantage Organization (MAO), satisfies the Medicare Act's nonwaivable "requirement that a claim for benefits shall have been presented to the ***Secretary***." *Heckler v. Ringer*, 466 U.S. 602, 617 (1984) (emphasis added) (quoting *Matthews v. Eldridge*, 424 U.S. 319, 328 (1976)); *Lokken*, 2025 WL 491148, at *4 (citing *Ringer*, 466 U.S. at 617). But the Sixth Circuit has explained that the Medicare Act's "nonwaivable and nonexcusable presentment requirement . . . mandates that 'virtually all legal attacks' be presented ***to the agency***." *S. Rehab. Grp., P.L.L.C. v. Sec'y of Health and Human Servs.*, 732 F.3d 670, 679 (6th Cir. 2013) (citations omitted) (emphasis added). And the Sixth Circuit has required that plaintiffs attempting to satisfy the presentment requirement must do more than merely submit a claim for reimbursement. *See New Vision Home Health Care, Inc. v. Anthem, Inc.*, 752 F. App'x 228, 238 (6th Cir. 2018) (holding provider did not satisfy presentment requirement for claims tied to overpayments where "there [was] no evidence the ALJ considered Contractor's behavior as a separate or additional ground for relief.").

Waiver of the Medicare Act's Administrative Exhaustion Requirement: The *Lokken* court's conclusion that waiver of the Medicare Act's mandatory administrative review process was appropriate, such that the court could exercise subject matter jurisdiction, *see* 2025 WL 491148, at *4–5, is inconsistent with the Sixth Circuit's controlling precedent over the last twenty-five

years. *See, e.g.*, *Giesse v. Sec'y of Dept. of Health and Human Servs,* 522 F.3d 697, 702–05, 707 (6th Cir. 2008) (holding that "section 405(h) clearly prohibits judicial review of plaintiff's claims absent exhaustion of available administrative remedies", warning that plaintiff's request to do so threatens to "nullify" Congress' direction in § 405(h), and denying request for exception to administrative exhaustion process set by Congress); *see also Cathedral Rock of N. Coll. Hill, Inc. v. Shalala*, 223 F.3d 354, 357 (6th Cir. 2000); *S. Rehab. Grp.,* 732 F.3d 670; *New Vision Home Health Care, Inc.,* 752 F. App'x at 235.

More specifically, the waiver analysis applied by the *Lokken* court is incompatible with the Sixth Circuit's precedent: The Sixth Circuit has explained that the waiver exception identified in *Bowen v. City of New York*, 476 U.S. at 482–86 (1986) is only available where the plaintiffs' claims are "wholly collateral" to claim for Medicare benefits. *See Manakee Pro. Med. Transfer Serv., Inc. v. Shalala*, 71 F.3d 574, 580–81 (6th Cir. 1995). But the *Lokken* court concluded that the plaintiffs' claims were ***not*** "wholly collateral" to a claim for Medicare benefits, 2025 WL 491148, at *4—meaning the Plaintiffs' waiver argument based on the Supreme Court's decision in *Bowen* is unavailable here because of Sixth Circuit precedent.

And the *Lokken* court's finding that waiver was warranted based solely on plaintiffs' allegations of futility and irreparable harm also contravenes the Sixth Circuit's directive that futility is only met "if there is no reasonable prospect that the applicant could obtain ***any*** relief by pursing" the administrative appeals process. *Manakee*, 71 F.3d at 581 (emphasis added) (citation omitted). Here, Plaintiffs' own successful administrative appeals demonstrate that requiring them to exhaust the Medicare administrative appeal process would not be futile. *See* Reply, R.49 ("Reply"), PageID# 582–84.

Further, the *Lokken* court's finding of irreparable harm based on allegations of worsening injuries and out of pocket costs, 2025 WL 491148, at *5, is in tension with both the Supreme Court's explanation of the exhaustion requirement's purpose, *see Ringer*, 466 U.S. at 627 ("Congress must have felt that cases of individual hardship resulting from delays in the administrative process had to be balanced against a potential for overly casual or premature judicial intervention in an administrative system that processes literally millions of claims each year."), and the Sixth Circuit's statements that consequential damages flowing from a denial of a Medicare Part C enrollee's claim do not justify excusal of the exhaustion requirement, *see Giesse,* 522 F.3d at 701, 704–05 (affirming dismissal for failure to exhaust administrative remedies where Part C enrollee brought claims for out-of-pocket expenses and damages for "the distress sale of his personal residence" following denial of continued skilled nursing facility coverage because "[MAO's coverage] determination, from which an aggrieved plaintiff may appeal, is not to be treated as a mere formality or as a method to bootstrap a damages claim . . . in light of Congress' unequivocal prohibition of suits outside of valid appeals").

Preemption Analysis as to Surviving Breach Claims: The *Lokken* court's preemption analysis, which allowed the Breach of Contract and Breach of Implied Covenant of Good Faith and Fair Dealing claims to survive, is flawed. Applying the *Lokken* court's own test, these claims regulate "the same subject matter" as the Medicare Act, 2025 WL 491148, at *7, because the form, content, accuracy, and performance of the "contract" to which Plaintiffs' point—Humana's Medicare Advantage EOC documents—is extensively regulated by CMS. *See* Reply at 590; Mot. at 283. An evaluation of these claims by this Court will necessarily involve asking whether Humana "follow[ed] the law", Am. Compl. R.37 ("Am. Compl."), PageID# 236 (¶ 149), "[]properly delegate[ed] its claims review function", *id.* at 236 (¶ 150), conducted a "thorough,

fair, and objective investigation" *id.* at 235-37 (¶¶ 142, 150, 153), and provided "accurate" communications to members, *id* at 235 (¶ 144)—inquiries governed by the Medicare Act's regulations. *See* Reply at 590.

Dated: March 7, 2025

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2025, I filed the foregoing with the Court, and served it upon counsel for all parties, using the Court's CM/ECF filing system.

s/ Michael P. Abate
Counsel for Humana Inc.