IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GUARDIAN FLIGHT LLC AND MED-TRANS CORPORATION, Plaintiffs, v. HEALTH CARE SERVICE CORPORATION Defendant.	Civil Action No. 3:23-cv-01861-B Judge Jane J. Boyle

HEALTH CARE SERVICE CORPORATION'S
REPLY IN SUPPORT OF ITS MOTION TO DISMISS

I. INTRODUCTION[1]

Plaintiffs lack standing and fail to state a claim for relief in their Complaint, and their Opposition to HCSC's Motion ("Opposition" or "Opp'n," at ECF No. 12) cannot save any of their claims. The Court should grant HCSC's Motion and dismiss Plaintiff's Complaint because:

***First*, Plaintiffs fail to state a claim for relief under the NSA because the Act is not privately enforceable (Count One).** Specifically, Plaintiffs fail to show that Congress intended for the NSA's "Timing of Payment" provision to create a private right and private remedy for Plaintiffs "through clear and unambiguous terms," precluding Plaintiffs' cause of action under the NSA in Count One. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002). Contrary to Plaintiffs' unsupported assertions, a statutory provision that requires a health plan to pay a provider does not demonstrate Congress's intent to create a private remedy for the provider. *See* Motion, pp. 14–15 (collecting cases). Plaintiffs complain that refusing to grant them a private cause of action under the NSA "would render the statute meaningless," *see* Opp'n, pp. 4, 7–8, but unless Congress intends to create a new private right and remedy for Plaintiffs through clear and unambiguous terms, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001). Finally, Plaintiffs' out-of-circuit cases regarding motions to confirm arbitration awards are also inapposite because Plaintiffs are not asking this Court to confirm (or enforce) arbitration awards; they are bringing a private cause of action directly under the NSA. *See* Compl., ¶¶ 16–17; Opp'n, p. 4 ("IDR proceedings are not arbitrations"). Count One should be dismissed.

[1] Unless stated otherwise, all defined terms in HCSC's Motion to Dismiss Plaintiffs' Claims and Supporting Brief ("Motion," at ECF No. 11) shall carry the same meaning in this reply brief.

***Second,* Plaintiffs Lack Standing and Fail to State a Claim under ERISA (Count Two).** Plaintiffs have no standing under ERISA, and they have no derivative standing because HCSC's member-beneficiaries, who supposedly assigned their benefits to Plaintiffs, "have no concrete stake in this dispute" over the alleged nonpayment of IDR awards "and therefore lack Article III standing." *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1622 (2020); Motion, pp. 15–17. Plaintiffs cannot rely on conjectural or hypothetical injuries, such as endangering members' balance billing protections, the risk of higher premiums, or more limited access to certain air ambulance providers, to satisfy Article III standing. Plaintiffs also fail to identify any ERISA plan terms requiring the payment of IDR awards, and they do not challenge their obligation to do so.

***Third*, Plaintiffs fail to state a claim for unjust enrichment because Plaintiffs did not provide services for HCSC's benefit (Count Three).** Nothing about the NSA changes the fact that — as Plaintiffs allege in their Complaint — Plaintiffs' services were provided "for [HCSC's] beneficiaries," not for HCSC. Compl., ¶ 25. As the Texas Supreme Court held earlier this year, Plaintiffs cannot state a claim for unjust enrichment against HCSC. *Texas Med. Res., LLP v. Molina Healthcare of Tex., Inc.*, 659 S.W.3d 424, 437-38 (Tex. 2023) (emphasis in original).

Accordingly, the Court should dismiss Plaintiffs' Complaint.

II. ARGUMENT

A. Plaintiffs Fail to State a Claim for Relief under the NSA Because the Act Is Not Privately Enforceable (Count One).

Plaintiffs fail to show that Congress intended for the NSA's "Timing of Payment" provision, 42 U.S.C. § 300gg-112(b)(6), to create both a private right and private remedy for Plaintiffs "through clear and unambiguous terms," precluding relief in Count One. *Gonzaga Univ.*, 536 U.S. at 290; *Sandoval*, 532 U.S. at 286–87; Motion, pp. 1-7, 11-15. Indeed, the NSA's plain language, and Congress's stated purpose for enacting the NSA, unambiguously demonstrate that

Congress passed the NSA to protect patients from surprise medical bills ***from*** Plaintiffs, not create a new private right and remedy ***for*** Plaintiffs. *See* 42 U.S.C. §§ 300gg-135, 300gg-139; H.R. Rep. No. 116-615, at 47; Motion, pp. 3–5, 11–15. The NSA provides for judicial review solely for the ***vacatur*** of IDR awards, requires ***providers*** to pay ***patients*** interest if the provider overbills the patient, and grants executive agencies extensive rulemaking authority and oversight to field and act on complaints from providers like Plaintiffs that health plans are not timely paying IDR awards. *See* Motion, pp. 6, 13–14. Nothing in the NSA's text or structure displays Congress's intent to grant Plaintiffs a new private right and remedy under 42 U.S.C. § 112(b)(6) to "have the IDR determinations converted into a federal judgment," seek this Court's assistance with "post-judgment collection efforts," or recover pre- and post-judgment interest, *see* Compl., ¶¶ 16–17, much less "through clear and unambiguous terms." *Gonzaga Univ.*, 536, U.S. at 290. "This silence on the remedy question serves to confirm that in enacting the Act, Congress was concerned not with private rights" for Plaintiffs, but with protecting patients from surprise bills from Plaintiffs. *California v. Sierra Club*, 451 U.S. 287, 296 (1981).

Plaintiffs' Opposition does not identify any display of Congressional intent to grant Plaintiffs a new private right and remedy under the NSA. That "Congress created a direct payment obligation from the health plan or insurer" has no bearing on whether 42 U.S.C. § 300gg-112(b)(6) grants them a private cause of action to pursue a private remedy. *See* Opp'n, pp. 3–5. The direct payment obligation in 42 U.S.C. § 300gg-112(b)(6) simply furthers Congress's statutory purpose of protecting patients by "'tak[ing] the consumer out of the middle' of surprise billing disputes." H.R. Rep. No. 116-615, at 57. And the CARES Act similarly created a "direct payment obligation from the health plan or insurer," yet federal courts almost uniformly held that the Act did not create a private cause of action for the testing providers to whom payment was directed. *See* Motion, pp.

14–15 (collecting cases).[2] "[E]ven if Congress intended to create a personal right of reimbursement for providers, like Plaintiff[s], through" 42 U.S.C. § 300gg-112(b)(6), "nothing in the text or structure of [the NSA] suggests that Congress intended to afford a privately enforceable remedy to Plaintiff[s]." *Genesis Lab. Mgmt. LLC v. United Health Grp., Inc.*, No. 21-cv-12057, 2023 U.S. Dist. LEXIS 38156, at *9 (D.N.J. Mar. 6, 2023) (cited by Plaintiffs).

Plaintiffs' assertion that the Court's refusal to grant them a private cause of action under the NSA "would render the statute meaningless" is similarly misguided. *See* Opp'n, p. 4; *see also* Opp'n, pp. 7–8 (arguing that "complain[ing] to the Departments" about untimely IDR award payments is not a sufficient "administrative process for compelling payment of IDR awards"). The Supreme Court made clear that unless Congress intends to create a new private right and remedy for Plaintiffs through clear and unambiguous terms, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Sandoval*, 532 U.S. at 286–87; *see Gonzaga Univ.*, 536, U.S. at 290.[3] Plaintiffs' argument that it will be "left remediless without a private cause of action" "may provide a good policy reason to create a private cause of action, [but] it does not provide an indication that Congress intended to create such a right." *Murphy Med. Assocs., LLC v. Cigna Health & Life Ins.*

[2] Plaintiffs claim that the CARES Act is distinct from the NSA because when Congress enacted the CARES Act, "it was the ***patients*** and not the providers whose benefit the statute was created." Opp'n, p. 6 (emphasis in original). But Congress similarly passed the NSA "***to protect consumers from surprise medical bills***." H.R. Rep. No. 116-615, at 47 (emphasis added); *see also* Motion, pp. 3–5; *supra*, pp. 3–4.

[3] To distract from the Court's focus on whether Congress intended to grant Plaintiffs a private right and remedy through clear and unambiguous terms, Plaintiffs' Opposition analyzes the four factors in *Cort v. Ash*, 422 U.S. 66, 78 (1975). *See* Opp'n, pp. 5–6. But more than 25 years after *Cort*, the Supreme Court made clear that no private cause of action may exist without Congressional intent to create both a private right and private remedy. *Sandoval*, 532 U.S. at 286–87; *see Stokes v. Southwest Airlines*, 887 F.3d 199, 202 (5th Cir. 2018) (holding that *Sandoval* "today defines the method for identifying private rights of action").

Co., No. 3:20-cv-1675 (JBA), 2022 U.S. Dist. LEXIS 43351, at *13–14 (D. Conn. Mar. 11, 2022) (citing *Sandoval*, 532 U.S. at 286–87).

Plaintiffs also cite two out-of-circuit cases granting motions to confirm arbitration awards and separately ask "the Court to enforce the award that was made." *See* Opp'n, pp. 4–5 (citing *GPS of New Jersey, M.D. v. Horizon Blue Cross & Blue Shield*, Civ. No. 22-6614 (KM) (JBC), 2023 U.S. Dist. LEXIS 159460, at *23–25 (D.N.J. 2023); *Cheminova A/S v. Griffin L.L.C.*, 182 F. Supp. 2d 68, 72–73, 79–80 (D.D.C. 2002)); Opp'n, pp. 8–9. As Plaintiffs know, *Cheminova* interpreted a different statute with distinguishable language,[4] and in *GPS*, "the parties assumed that 9 U.S.C. § 9 applied to IDR awards," even though "the NSA does not invoke or discuss §§ 6, 9, 12, or any other sections of the FAA." *Med-Trans Corp. v. Cap. Health Plan, Inc.*, Nos. 3:22-cv-1153, 3:22-cv-1077, 2023 U.S. Dist. LEXIS 195736, at *13–15 (M.D. Fla. Nov. 1, 2023). Moreover, unlike *Cheminova* and *GPS*, Plaintiffs are not asking this Court to confirm (or enforce) arbitration awards; they bring a private cause of action under the NSA's "Timing of Payment" provision and seek damages, attorney's fees, pre- and post-judgment interest, and costs. *Compare* Opp'n, pp. 8–9 *with* Compl., ¶¶ 16–17, 30. Indeed, Plaintiffs even argue that "***IDR proceedings are not arbitrations***." Opp'n, p. 4 (emphasis added). Accordingly, *GPS* and *Cheminova* are inapposite.

Plaintiffs cannot meet their "heavy burden" of showing that Congress intended to create a new private right and remedy for Plaintiffs under the NSA, 42 U.S.C. § 300gg-112(b)(6), through

[4] Under the Federal Insecticide, Fungicide, and Rodenticide Act at issue in *Cheminova*, arbitrations proceed under the rules of the Federal Mediation and Conciliation Services, which "states that the parties 'shall be deemed to have consented that judgment upon the arbitration award may be entered' in federal or state court." 182 F. Supp. 2d at 72–73 (citations omitted).

clear and unambiguous terms. *Gonzaga Univ.*, 536, U.S. at 290; *Sandoval*, 532 U.S. at 286–87; *Casas v. Am. Airlines, Inc.*, 304 F.3d 517, 521-22 (5th Cir. 2002). Count One should be dismissed.

B. Plaintiffs Lack Standing and Fail to State an ERISA Claim (Count Two).

1. Plaintiffs Lack Standing to Bring ERISA Claims on Behalf of Patients, Who Have Not Sustained any Injury.

Neither Plaintiffs nor the HCSC member-beneficiaries who allegedly assigned their benefits to Plaintiffs have standing to bring an ERISA claim against HCSC for the alleged nonpayment of IDR awards. *See* Motion, pp. 15–17. Plaintiffs have no standing to sue for benefits under ERISA. *See* 29 U.S.C. § 1132(a)(1)(B). Plaintiffs also have no derivative standing because HCSC's member-beneficiaries "have no concrete stake in this dispute" over the alleged nonpayment of IDR awards "and therefore lack Article III standing." *Thole*, 140 S. Ct. at 1622. Specifically, HCSC's member-beneficiaries (1) do not participate in open negotiations or the IDR process, (2) are entitled to receive any payments from awards issued through the IDR process, and (3) are not liable for any amounts owed by the plan. *See* 42 U.S.C. §§ 300gg-112(b)(1)(A), (b)(5)(B), (b)(6), 300gg-135, 300gg-139(b).

Plaintiffs argue that they have valid assignments from HCSC's member-beneficiaries, conferring on them derivative standing. *See* Opp'n, p. 11. However, by proceeding under an assignment, Plaintiffs must "stand[] in the same position as [their] assignor stood." *Quality Infusion Care, Inc. v. Health Care Serv. Corp.*, 628 F.3d 725, 729 (5th Cir. 2010) (citation and internal quotations omitted); *accord Foley v. Southwest Tex. HMO, Inc.*, 193 F. Supp. 2d 903, 906–07 (E.D. Tex. 2001) ("[A]n assignee is limited to the same remedies under ERISA as the plan participants or beneficiaries who originally assigned her rights under the plan to the assignee."). This is not a typical ERISA dispute where Plaintiffs allege "that Defendants have failed to pay benefits allegedly due to [the patient] and [the patient] is personally liable to [the providers] for

the medical expenses incurred." *Professional Orthopedic Assocs., PA v. CareFirst BlueCross BlueShield*, No. 14-4486, 2015 U.S. Dist. LEXIS 84996, at *11–12 (D.N.J. June 30, 2015). Here, Plaintiffs bring an ERISA claim on behalf of HCSC's member-beneficiaries to "compel[ ] HCSC to use plan funds to pay Plaintiffs the IDR awards." Compl., ¶ 23. And HCSC's member-beneficiaries have no concrete injury or stake in Plaintiffs' attempt to recover IDR awards. *See supra*.

Plaintiffs' Opposition also speculates that HCSC's alleged nonpayment of IDR awards could "endanger[ ] members' balance billing protections under numerous [unidentified] legal theories," "risk higher premiums," and eventually limit access to certain air ambulance providers, *see* Opp'n, p. 10, but such "hypothetical" and "conjectural" injuries cannot confer Article III standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (rejecting speculative theories of injury). Plaintiffs must plausibly allege that the HCSC member-beneficiaries who supposedly assigned their benefits to Plaintiffs sustained an actual, imminent, concrete, and particularized injury in fact to support Article III standing. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339–40 (2016). A particularized injury "must affect the plaintiff in a personal and individual way," while a concrete injury "must actually exist" and be "real, not abstract." *Id.* (citations and internal quotations omitted). Plaintiffs' unsupported theories do not come close to meeting this standard. As such, Plaintiffs do not have derivative standing to bring Count Two, and it must be dismissed.

2. Plaintiffs Also Fail to State a Claim for ERISA Benefits Because Plan Terms Are Not the Basis for any Requirement to Pay IDR Awards.

Plaintiffs also fail to state a claim for ERISA benefits because they fail to identify any plan terms that compel HCSC to pay Plaintiffs IDR awards issued under the NSA. *See* Motion, pp. 17-18. Rather than identify a specific ERISA plan term that confers the "benefit" of HCSC's payment of IDR awards to Plaintiffs, as they must to state a claim for relief, Plaintiffs broadly allege that

"NSA administration is itself a plan benefit for HCSC's insureds, and with that comes HCSC's responsibility to comply with the statute for the plan it administers." Opp'n, p. 11 (citing Compl., ¶ 19). Plaintiffs have no authority to support their position, and they fail to challenge or distinguish their obligation to "identify a specific plan term that confers the benefit in question" to support their ERISA claim. *Paragon Office Servs., LLC v. UnitedHealthcare Ins. Co.*, No. 3:11-cv-02205-D, 2012 U.S. Dist. LEXIS 165791, at *6–7 (N.D. Tex. Nov. 20, 2012); *accord Mission Toxicology, L.L.C. v. UnitedHealthcare Ins. Co.*, No. 5:17-cv-1016-DAE, 2018 U.S. Dist. LEXIS 151338, at *14–17 (W.D. Tex. Apr. 20, 2018).

The one case Plaintiffs do cite is wholly inapplicable. In *Spring E.R., LLC v. Aetna Life Ins.*, a case from more than a decade prior to the NSA involving a health plan's alleged refusal to pay any benefits for the provider's emergency services, the plaintiffs sought remand of their state law claims after the defendant insurer removed on the grounds that the complaint implicated ERISA. No. H-09-2001, 2010 U.S. Dist. LEXIS 13565, at *1–2 (S.D. Tex. Feb. 17, 2010). The Court held that plaintiffs' implied contract claim was preempted by ERISA because the claim relied on the patients' health insurance card, which expressly referenced and limited the providers' recovery to the benefits available under the patient's ERISA plan terms. *Id*. at *16–19. Effectively, the Court held that the only benefits recoverable in the provider's implied contract claim were those recoverable under the patient's ERISA plan terms. *Id*. at *17 ("[I]n determining the facts, circumstances, and actions of the parties that may give rise to an implied contract, this Court would necessarily refer to the ERISA plans at issue, because the presented health cards explicitly limit the offer to healthcare providers to the plan terms."). Nothing in *Spring E.R.* affects Plaintiffs' obligation to "identify a specific plan term that confers the benefit in question" to support their ERISA claim. *Paragon Office Servs.*, 2012 U.S. Dist. LEXIS 165791, at *6–7.

Confusingly, Plaintiffs also argue that HCSC must cover out-of-network emergency services, s*ee* Opp'n, pp. 12-13, even though this dispute has nothing to do with coverage. The IDR process provides a method for determining the "out-of-network rate" when the plan covers the claim, but the provider is dissatisfied with the payment rate. *See* 42 U.S.C. § 300gg-112(b). Conversely, when the plan denies coverage (as happens in a typical ERISA case), the plan's benefit denial must be disputed through the plan's claims and appeals process, not the federal IDR process. 86 Fed. Reg. 36872, 36901–02; *e.g.*, *United Healthcare Ins. Co. v. Levy*, 114 F. Supp. 2d 559, 564–65 (N.D. Tex. 2000) ("ERISA and federal regulations govern the review of plan benefit denials," and "these internal appeal procedures are mandatory . . ."). More fundamentally, Plaintiffs' argument has nothing to do with their pleading obligations under ERISA.

Because Plaintiffs cannot "identify a specific plan term that confers" on HCSC member-beneficiaries the right to "compel[ ] HCSC to use plan funds to pay Plaintiffs the IDR awards" at issue in the Complaint, Count Two should be dismissed. *Paragon Office Servs.*, 2012 U.S. Dist. LEXIS 165791, at *6–7; Compl., ¶ 23.

C. Plaintiffs Fail to State a Claim for Relief for Unjust Enrichment Because Plaintiffs Did Not Provide Services for HCSC's Benefit (Count Three).

Plaintiffs have not and cannot state a claim for unjust enrichment because they cannot show that they provided services "for the defendant," HCSC. *Tex. Med. Res.*, 659 S.W.3d at 437–38. Plaintiffs cannot meet this requirement because the services they rendered—air ambulance transports for HCSC's beneficiaries—were not for HCSC's benefit. *Id.*; *see* Motion, pp. 18–20.

Plaintiffs' assertion that the federal NSA would somehow change the Texas Supreme Court's analysis of a state law claim is wrong. *See* Opp'n, p. 13 (arguing that "under the NSA providers have a direct right to payment from health plans and insurers," and "HCSC's citations to pre-NSA courts holding to the contrary are inapplicable and inapposite"). The Texas Supreme

Court decided *Tex. Med. Res.* more than a year after the NSA became effective. Moreover, HCSC's alleged "payment obligation" under the NSA does not change the fact that – as Plaintiffs allege in their Complaint – Plaintiffs' services were provided "for [HCSC's] beneficiaries," not for HCSC. Compl., ¶ 25; *see Tex. Med. Res.*, 659 S.W.3d at 437 ("Serving a defendant's *customers* is hardly the same as serving the defendant *itself* . . . Recovery in quantum meruit cannot be had from an insurer based on services rendered to an insured, because those services aren't directed to *or* for the benefit of the insurer.") (emphasis in original) (citations omitted).

Similarly, Plaintiffs' allegations that the NSA requires payment within 30 days of the IDR award, or that HCSC became "further unjustly enriched by receiving interest or investment income as a result of the unlawful retention of the funds," does not change that Plaintiffs provided the underlying services "for [HCSC's] beneficiaries" and therefore cannot state a claim against HCSC for unjust enrichment. *Compare* Opp'n, p. 14 (citing Compl., ¶¶ 27–28) *with* Compl., ¶ 25; *Tex. Med. Res.*, 659 S.W.3d at 437.

Because Plaintiffs cannot show that they provided valuable services ***for HCSC***, Count Three should be dismissed with prejudice. *Tex. Med. Res.*, 659 S.W.3d at 437.

III. CONCLUSION

For these reasons and those stated in its Motion, HCSC requests that the Court enter an order dismissing this action with prejudice and awarding other relief that the Court deems proper.

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Respectfully Submitted,

/s/ Martin J. Bishop

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CERTIFICATE OF SERVICE

The undersigned certifies that on November 7, 2023, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all counsel of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Martin J. Bishop