

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS - HOUSTON DIVISION**

REACH AIR MEDICAL SERVICES, LLC, *et al.* §
Plaintiffs, §

vs. §

Civil Action No. 4:23-cv-00805

AETNA HEALTH, INC., *et al.* §
Defendants. §

DEFENDANTS’ REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

A. Plaintiffs Cite No Authority That Venue is Proper Where an IDR Award Is Made

Plaintiffs cite no authority to support their argument that *where* a handful of the IDR awards were issued constitutes a substantial part of the “events or omissions giving rise to the[ir] claim[s] occurred.” 28 U.S.C. § 1391(b)(2). Instead, they cite the unremarkable proposition that venue can be appropriate in more than one district before stringing together cherry-picked language from cases discussing claims that bear no resemblance to the facts of this case. The important point here is that venue is *improper* in the Southern District of Texas because it is *not* where the purported omissions giving rise to the claims occurred.

Plaintiffs’ venue argument rests on the incorrect notion that the IDR awards are what gives rise to their claims. *See* Dkt. 13 at 4–5. But Aetna’s alleged *failure to timely pay* is undeniably the basis of their suit. Logically—and pursuant to ample caselaw—Defendants’ alleged non-payment gives rise to Plaintiffs’ claims, *see* Dkt. 12 at 11, not the IDR awards themselves. Rather than address the cases cited by Defendants, Plaintiffs insist that venue is appropriate in Houston because there would be no lawsuit without the IDR awards. But this argument draws a false equivalence between the events or omissions giving rise to the IDR disputes and those that give rise to Plaintiffs’ claims. By Plaintiffs’ logic, the site of the accident that led to the alleged emergency medical services, which, in turn, led to the payment dispute that resulted in an IDR award, is an appropriate venue. The line must be drawn somewhere. Here, it is where the alleged failure to pay occurred.

The cases Plaintiffs cite are wholly inapposite. For example, *United States v. Murphy* is a criminal case that is not governed by the same venue provisions. *See* 117 F.3d 137, 140 (4th Cir. 1997). Regardless, even in the criminal context, the court of appeals did not hold that the Western District of Virginia was the proper venue to prosecute a claim for unpaid child support because the underlying child-support order was issued in that district. Rather, the court held it was the appropriate venue because the child resided in that district.¹ *See id.* at 141.

Put simply, the alleged “omissions” giving rise to Plaintiffs’ claims are Defendants’ alleged failure to timely pay the IDR awards. Thus, venue is proper in the District of Connecticut—where Defendants reside. *See id.* Plaintiffs have woefully failed to show otherwise.²

B. There Is No Implied Right of Action Under The NSA

Conceding the lack of an express private right of action, Plaintiffs argue an implied right of action under the NSA. As an initial matter, even if there were an implied right of action to “enforce” payment of IDR awards *under the NSA*, Aetna’s payment of all the subject awards now moots any such claim. Regardless, the NSA offers no implied right of action for remedies relating to payment of IDR awards, and such complaints instead fall within the purview of the Departments’ regulatory

¹ Plaintiffs’ reliance on *Mills v. Allied Trust Insurance Co.* is equally misplaced. *Mills* involved alleged misrepresentations (made by persons in Texas and Georgia) as part of the insurance-adjustment process. *See* 2022 WL 352123, at *1–2 (W.D. La. Feb. 4, 2022). In the portion of the opinion quoted by Plaintiffs, the court merely opined that interstate communications can be deemed to occur in the state to which they were directed. Moreover, if you trace the cases cited in *Mills*, it’s clear that the “interstate communications” analysis is reserved for fraud-based claims. *See Trois v. Apple Tree Auction Ctr., Inc.*, 882 F.3d 485, 493 (5th Cir. 2018). In no way does *Mills* support Plaintiffs’ argument that Defendants’ submission of position statements (for *some* of the IDR awards) to MET (in Houston) makes this a proper venue.

² The pendent-venue doctrine requires both a “properly venued” claim and that the pendant claims “arise out of a common nucleus of facts” as the properly venued claim. *See Pacer Glob. Logistics, Inc. v. AMTRAK*, 272 F. Supp. 2d 784, 789 (E.D. Wis. 2003). Because this is not a proper venue for IDR awards issued in Texas, the doctrine cannot be used to extend the Court’s venue to the IDR awards issued elsewhere. And IDR awards issued in other states do not share a “common nucleus of operative facts” with IDR awards issued in Texas; each award stems from separate and distinct events.

oversight.³ See Dkt. 12 at 12–13.

Plaintiffs cite *Cort v. Ash* and the four factors identified therein to determine whether an implied right of action exists under a federal statute. See Dkt. 13 at 8. However, the Supreme Court has since emphasized that congressional intent is the primary determinant. See *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568, 575–76 (1979); see also *Thompson v. Thompson*, 484 U.S. 174, 189 (Scalia, J., concurring) (“[W]e effectively overruled *Cort v. Ash* analysis in *Touche Ross* . . . converting one of its four factors (congressional intent) into *the determinative factor*, with the other three merely indicative of its presence or absence.”). As the Court later explained:

Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, 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) (citations omitted). Plaintiffs have manifestly failed to point to a direct expression by Congress of any intent to provide a private right of action *or* private remedy to providers such as Plaintiffs. Instead, they rely solely on conjecture (coupled with their own speculation) regarding Congressional intent and a case out of the D.C. District Court, *Cheminova A/S v. Griffin LLC*, 182 F. Supp. 2d 68 (D.D.C. 2002), which does not even concern an implied private right or remedy. Instead, *Cheminova* considered whether a federal statute (FIFRA)⁴ conferred federal jurisdiction on the judiciary to enforce arbitration awards. Plaintiffs, however, have expressly avoided suing under the FAA to enforce the IDR awards. See Dkt. 1 at 6–8.

Cheminova never once cites any case concerning an implied right of action. Instead, the

³ Plaintiffs’ indignation and accusations ring hollow, as it is clear Plaintiffs never intended to negotiate in good faith. Indeed, Aetna first received notice of Plaintiffs’ demand—which included IDR awards that *Aetna had not even received*—nine days before Plaintiffs filed suit. Aetna has paid the awards.

⁴ FIFRA created a “binding arbitration proceeding” for resolving compensation disputes, mandating that “determinations of the arbitrator shall be final and conclusive.” 7 U.S.C. § 136a(c)(1)(F)(iii).

court’s decision was premised on its finding that FINRA arbitration awards are enforceable under the FAA. *See id.* at 73. In stark contrast, Plaintiffs—both in this case and other proceedings to vacate IDR awards—have vociferously argued that the NSA’s IDR process is distinguishable from arbitration. Yet, their marquee case—meant to prove that the NSA includes an implied right of action and remedy to enforce IDR awards—was decided *because* the court determined that FINRA’s congressionally created arbitration proceedings are no different than your run-of-the-mill arbitration. *See id.* at 73–74 (“This Court must assume that, absent a plain indication to the contrary, Congress intended the FIFRA arbitration scheme to fit within existing arbitration law. . . . [T]his Court is not free to ignore the plain import of the terms ‘binding arbitration proceedings’ and ‘final and conclusive.’”). Plaintiffs’ reliance on *Cheminova* is rank hypocrisy; they cannot have their cake and eat it too.

C. Plaintiffs Do Not Have Standing Under ERISA

Plaintiffs’ right to payment under the IDR awards is *not a derivative right* of a participant/beneficiary under ERISA but rather a *direct right* under the NSA. *See Haller*, 2022 WL 3228262, at *7 (explaining that the NSA created “*a new public right*”); *see also* Dkt. 12 at 14. As explained by Aetna in its motion, the assignments are of no value, as the assignors have no rights to convey. Due to page-limit concerns, it is impossible to address every misguided standing argument Plaintiffs make, so Defendants refer to their initial briefing. *See* Dkt. 12 at 13–15. But the key takeaway is: Plaintiffs do not have derivative standing under ERISA. And, absent standing, there is no Article III case or controversy and, consequently, no subject-matter jurisdiction.

D. Plaintiffs’ State-Law Claims Are Preempted

As for preemption, Aetna stands on its briefing. *See id.* at 15–19. However, a few ancillary matters necessitate a response. First, to trigger prompt-pay penalties, a “clean claim” must be submitted *by a physician or provider* in a statutorily prescribed format. *See* TEX. INS. CODE §§ 843.336, 1301.131. Obviously, an IDR award does not qualify as a “clean claim” because it is not

submitted by a physician or provider. Incredibly, Plaintiffs argue that this distinction is “immaterial” and, in this one specific context, clean claims need “not [be] submitted by a physician or provider directly.” Dkt. 13 at 16. Such an outcome defies clear, long-standing precedent. Equally fatal, under Plaintiffs’ misguided theory, state-law prompt-pay penalties would begin accruing “only when the IDR award is made.” *Id.* at 15. Such a result finds no support in the text of the prompt-pay statutes themselves, as penalties begin to accrue from the moment an insurer *denies* a claim that is later determined to be payable. In an effort to avoid this statutory roadblock, Plaintiffs draw a false equivalence between Defendants’ acceptance of responsibility to pay the IDR awards and their denial of a claim when it was first submitted—i.e., *before* the IDR process. *See id.* at 16. To adopt Plaintiffs’ theory would require the Court to ignore clear and unambiguous statutory language regarding the accrual of prompt-pay penalties. Finally, Defendants assert two theories why Plaintiffs’ prompt-pay claims are not viable, the first being preemption. In the alternative, prompt-pay claims require contractual privity between the insurer and provider.⁵

For the reasons explained above, Defendants request the Court dismiss Plaintiffs’ claims with prejudice to refiling, unless, of course, the Court dismisses the claims under Rule 12(b)(3).

Respectfully submitted,

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⁵ See Dkt. 12 at 19 n.13 (citing *Christus Health Gulf Coast v. Aetna, Inc.*, 397 S.W.3d 651, 654 (Tex. 2013) (“As there is no contract between Aetna and [Plaintiffs], Aetna could not have violated the [prompt-pay] statute.”)); *see also* Tex. Att’y Gen. Op. KP-0250 (May 22, 2019), at *2 (“the penalty provisions in sections [TEX. INS. CODE §§] 843.342 and 1301.137 cannot apply to claims filed by out-of-network emergency care providers pursuant to sections 843.351 or 1301.069”).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed electronically on June 7, 2023. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

/s/ M. Katherine Strahan
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