

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

**REACH AIR MEDICAL SERVICES
LLC, CALSTAR AIR MEDICAL
SERVICES, LLC, GUARDIAN
FLIGHT LLC, MED-TRANS
CORPORATION, and AIR EVAC
EMS, INC.**

Plaintiffs,

V.

**AETNA HEALTH, INC., AETNA LIFE
INSURANCE COMPANY and AETNA
HEALTH AND LIFE INSURANCE
COMPANY**

Defendants.

Civil Action No. 4:23-cv-00805
Hon. Alfred H. Bennett

JURY TRIAL DEMANDED

**PLAINTIFFS' SUR-REPLY TO DEFENDANTS'
MOTION TO DISMISS PLAINTIFFS' ORIGINAL COMPLAINT**

Plaintiffs file this Sur-Reply to Defendants Aetna Health, Inc.’s, Aetna Health and Life Insurance Company’s and Aetna Life Insurance Company’s (collectively “Aetna”) Motion to Dismiss Plaintiffs’ Original Complaint (“Motion”) and would respectfully show the Court as follows:

ARGUMENT

I. Venue is proper because Aetna is subject to personal jurisdiction in the Southern District of Texas.

As bad as Aetna appears to want to get out of this District (and this Court in particular), venue is proper in the Southern District of Texas because Aetna is a resident of this District and has waived any argument to the contrary. Venue is appropriate in “a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located.” An entity like Aetna “shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the Court’s personal jurisdiction.” 28 U.S.C. § 1391(b)(1). Accordingly,

courts in this District have noted that when conducting a residential venue analysis under §1391(b)(1), that analysis “largely collapses into a personal jurisdiction analysis.” *Graham v. Dyncorp Intern., Inc.*, 973 F. Supp. 2d 698, 701 (S.D. Tex. 2013) (Costa, J.); *Nelson v. PNK (Lake Charles) LLC*, 2020 WL 7706815 (S.D. Tex. Sept. 30, 2020), report and recommendation adopted, 2020 WL 6130877 (S.D. Tex. Oct. 16, 2020). Here, Aetna is subject to personal jurisdiction in the Southern District of Texas, and thus it resides in this District for venue purposes.

Notably, Aetna did not contest personal jurisdiction in its motion to dismiss. Any such defense has now been waived. *See* Fed. R. Civ. P. 12(g)(2) and (h)(1) (explaining that a party waives a challenge to personal jurisdiction by filing a motion under 12(b) that does not include such a challenge). Accordingly, venue is appropriate in this District. *See* 14D C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 3805 at n.26 (4th ed.) (citing *Wiggins v. Darden Restaurants, Inc.*, 2021 WL 2229056, at *3-4 (M.D. Ala. Jun. 2, 2021) (defendant's failure to challenge the personal jurisdiction of the court rendered it subject to personal jurisdiction there and, therefore, established residential venue there)); *Esposito v. Airbnb Action, LLC*, 538 F. Supp. 3d 844, 850 (N.D. Ill. 2020) (holding that defendant was treated as a resident for venue purposes where defendant submitted to personal jurisdiction). Aetna was previously sued in this District by one of the Plaintiffs and likewise did not contest personal jurisdiction. *See Guardian Flight LLC v. Aetna Health, Inc., et al.*, Case No. 4:22-cv-03805 (S.D. Tex. 2022).

Its waiver of residential venue aside, this Court has personal jurisdiction over Aetna because as a regulated insurer, it has consented to be sued in Texas and maintains a registered agent here as a condition to engaging in the business of insurance. *See* TEX. INS. CODE § 804.103(b) (requiring insurers to maintain a registered agent for service of process). It is the sixth largest insurer in Texas, with nearly \$2.5 billion in written premium. Claim disputes with out-of-

network providers of emergency services are determined on a daily basis in Houston by IDR entity MET. Aetna maintains offices in the District. Quite simply, Aetna’s “affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum state.” *Frank v. PNK (Lake Charles) LLC*, 947 F.3d 331, 337 (5th Cir. 2020) (internal quotations omitted). There is no question that the exercise of jurisdiction over Aetna in Texas comports with due process. *See, e.g., Senju Pharmaceutical Co., Ltd v. Metrics, Inc.*, 96 F. Supp. 3d 428, 437-438, n.6 (D. N.J. 2015); *Peyman v. Johns Hopkins Univ.*, 2000 WL 973665, at *4 (E.D. La. Jul. 12, 2000) (finding general jurisdiction where defendant registered to do business in Louisiana, appointed a registered agent in Louisiana, and solicited business and donations from Louisiana students). Because personal jurisdiction exists, venue exists. However, if the Court is not convinced on this record, it should allow discovery so that Plaintiffs may take a 30(b)(6) deposition of Aetna on its contacts with the Southern District of Texas.

II. The *Cort* analysis remains relevant and determines legislative intent.

Aetna suggests in its reply brief that the Supreme Court’s four factor analysis in *Cort v. Ash* on whether a federal statute carries an implied right of action is no longer relevant after the Supreme Court’s decision in *Thompson v. Thompson*, 484 U.S. 174 (1988) and *Alexander v. Sandoval*, 532 U.S. 275 (2001). Aetna further claims that Plaintiffs have “manifestly failed to point to a direct expression by Congress of any intent to provide a private right of action or a private remedy to providers such as Plaintiffs.” *See* Dkt. 16 at 3. Aetna is wrong on both counts.

First, courts across the country, including in this District and Circuit, continue to apply the *Cort* factors post-*Sandoval*, which noted that legislative intent is the determinative factor. For example, in *Glanville v. Dupar Inc.*, Judge Rosenthal applied the *Cort* factors to determine whether the Federal Insurance Contributions Act and the Federal Unemployment Tax Act carried implied

causes of action. 727 F. Supp. 2d 596 (S.D. Tex. 2010) (“Courts use the four-part test in *Cort* to determine if an implied private right of action exists”).¹ In addition, the Fifth Circuit has stated:

To determine whether we should infer a cause of action when one is not explicitly authorized by Congress, **we must answer the four questions** posed by the Supreme Court in *Cort v. Ash* . . . Cases subsequent to *Cort* have recognized that all four factors may be important, but the determinative question is whether Congress intended to create a private right of action in favor of the plaintiff.

Wright v. Allstate Ins. Co., 500 F.3d 390, 395 (5th Cir. 2007) (emphasis added) (applying *Cort* to the National Flood Insurance Act)² Thus, it is apparent that even post-*Sandoval*, where the Supreme Court stated that legislative intent is the determinative factor, courts continue to look to *Cort* in determining whether a federal statute carries a private right of action.

Second, Congress’s intent is clear that the NSA establishes for out-of-network providers of emergency services a direct right to payment from payors like Aetna. In exchange for that statutory right to payment, Congress took away providers’ ability to balance bill patients. The NSA’s text is unambiguous:

(E) Effects of determination

(i) In general

A determination of a certified IDR entity under subparagraph (A)—

¹ See also *Carter v. Transp. Workers Union of Am., Local 556*, 602 F. Supp. 3d 956, 962–64 (N.D. Tex. 2022) (noting that *Cort* is the “seminal opinion . . . for deciding whether a statute lacking an express right of action nevertheless created one impliedly” and finding such a right existed in the Railway Labor Act); *McEwen v. Sourceresources.com*, 2007 WL 508874, at *3–4 (S.D. Tex. Feb. 13, 2007) (applying *Cort* to the Telecommunications Act); *GS Labs, Inc. v. Medica Ins. Co.*, 2022 WL 4357542, at *5–11 (D. Minn. Sept. 20, 2022) (applying *Cort* to the CARES Act).

² *Simmons v. Sabine River Auth. La.*, 732 F.3d 469, 476 n.8 (5th Cir. 2013) (endorsing *Cort*). *Lil’ Man in the Boat, Inc. v. City & Cnty. of San Francisco*, 5 F.4th 952 (9th Cir. 2021) (applying *Cort* to the Rivers and Harbors Act of 1884); *Lindsay v. Assoc. of Pro. Flight Attendants*, 581 F.3d 47, 52–55 (2d Cir. 2009) (applying *Cort* to the Railway Labor Act)

(I) *shall be binding upon the parties involved*, in the absence of a fraudulent claim or evidence of misrepresentation of facts presented to the IDR entity involved regarding such claim

42 U.S.C. § 300gg-111(c) (bold italics added).

(6) Timing of payment

The total plan or coverage payment required pursuant to subsection (a)(3), ***with respect to*** qualified IDR ***air ambulance services for which a determination is made*** under paragraph (5)(A) or with respect to an air ambulance service for which a payment amount is determined under open negotiations under paragraph (1), ***shall be made directly to the nonparticipating provider not later than 30 days after the date on which such determination is made.***

42 U.S.C. § 300gg-112(b)(6) (bold italics added). Applied to this case, Congress was clear and unambiguous that the award ***is binding*** on Plaintiffs and Defendants and ***shall be made directly to*** Plaintiffs within thirty days. How Aetna concludes from this text that nonparticipating providers like Plaintiffs nevertheless cannot sue to enforce these statutorily-required payments is mind-boggling.

Further, as already briefed in *Guardian Flight LLC v. Aetna Health, Inc., et al.*, Case No. 4:22-cv-03805 (S.D. Tex. 2022), there is no administrative process by which Plaintiffs may compel payment of IDR awards. *See* Dkt. 42 at 3-4 (4:22-cv-03805) (explaining that “[t]here is nothing in the NSA that provides medical providers or patients a mechanism to assert a claim against [a payor] . . . for NSA violations). Indeed, the IDR process itself is the only administrative remedy available. Congress left the role of enforcing IDR awards to the parties and thus the judiciary. As the Fifth Circuit explains, in construing a statute, a court must “give effect, if possible, to every word and every provision Congress used.” *Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620, 622 (5th Cir. 2020). Here, if nonparticipating providers cannot sue to enforce IDR awards, the NSA is rendered meaningless. For these reasons, this Court should deny Aetna’s Motion because the NSA carries a right of action to enforce IDR awards.

CONCLUSION

For these reasons, Plaintiffs' respectfully request that Aetna's Motion to Dismiss Original Complaint be denied. Should the Court grant the Motion, Plaintiffs request that the dismissal be without prejudice and that it be granted an opportunity to amend and, if based on venue, an opportunity for venue discovery.

Dated: August 16, 2023
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CERTIFICATE OF SERVICE

I certify that on August 16, 2023, a true and correct copy of the foregoing was served via the Court's ECF system on all counsel of record.

/s/ Adam T. Schramek
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