

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GUARDIAN FLIGHT LLC, et al.,

Plaintiffs,

v.

**AETNA LIFE INSURANCE
COMPANY et al.,**

Defendants.

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Civil Action No. 3:24-cv-00680-MPS

**PLAINTIFFS'¹ OPPOSITION TO AETNA'S MOTION
FOR PERMISSION TO FILE INTERLOCUTORY APPEAL**

Aetna seeks the extraordinary relief of an interlocutory appeal based on little more than its disagreement with this Court's May 14th ruling on a routine motion to dismiss. Realizing it has a high bar to clear, it creates from whole cloth a list of "exceptional circumstances." First, Aetna argues there is a "clear circuit split" despite Second Circuit precedent clearly saying that is not the case. It then speculates, without any citations or evidence, that there will be a "wave of copycat lawsuits by providers across the country." Finally, it says this Court's ruling is "undermin[ing]" the NSA's "cost-saving objectives." Doc. 274-1 at 1. In reality, there are no exceptional circumstances here, discovery is nearing completion, and trial is within reach.

Rather than materially advance the ultimate termination of this litigation, Aetna's proposed interlocutory appeal would only further delay it. Aetna has now asserted a counterclaim that would not be resolved by its proposed interlocutory appeal. *See* Doc. 278. Aetna's appeal threatens to upend the schedule in this case, with the parties being forced to prepare for trial at the same time

¹ Plaintiffs Guardian Flight, LLC ("Guardian Flight"), REACH Air Medical Services, LLC ("REACH"), CALSTAR Air Medical Services, LLC ("CALSTAR"), Med-Trans Corporation ("Med-Trans"), Air Evac EMS, Inc. ("Air Evac"), and AirMed International LLC ("AirMed") (collectively "Plaintiffs") submit this opposition to Aetna's Motion for Permission to File Interlocutory Appeal Under 28 U.S.C. § 1292(b) (Doc. 274-1), and Cigna's Joinder (Doc. 281).

they are writing appellate briefs. And by the time the Second Circuit decides whether to accept the appeal and the parties submit merits briefing, the trial of this lawsuit likely will be winding up, if not concluded. Importantly, not all of the issues proposed by Aetna may need to be appealed depending on the results at trial. The default rule is no appeal until a final judgment is entered disposing of all parties and issues, and there is no reason to depart from the default here.

Aetna also cannot show—as it must—a substantial ground for difference of opinion on its three proposed issues. This Court ruled correctly on all three issues (NSA private right of action, ERISA standing and CUTPA claim) in a detailed, well-reasoned opinion. Its ruling is perfectly aligned with that of the United States, which—across two Presidential administrations—submitted an *amicus* brief and presented oral argument supporting Plaintiffs in the Fifth Circuit proceedings. There is no “circuit split” since what a court outside the Second Circuit rules does not create a substantial ground for difference of opinion within the Second Circuit, which is Aetna’s burden to establish. And appellate review of the Fifth Circuit recent decision is not yet complete.²

While Aetna claims this Court did not address derivative ERISA standing, Doc. 274-1 at 8, that is not true. This Court expressly addressed it, rejecting Aetna’s argument that “the assignor-participants could not bring suit for payment of the IDR awards under ERISA.” Doc. 264 at 21–24. With respect to CUTPA, Aetna concedes that it is “not aware” of any authority precluding a CUTPA claim based on alleged violations of the NSA’s payment deadlines. In other words, Aetna admits it cannot meet its burden.

² Aetna identifies *Guardian Flight LLC v. Health Care Services Corp.*, 735 F. Supp. 3d 742, 749 (N.D. Tex. 2024) as conflicting authority. On June 12, 2025, after Aetna’s Motion was filed, but before this response was filed, the Fifth Circuit affirmed the district court’s dismissal. *See Guardian Flight, L.L.C. v. Health Care Service Corporation*, 2025 WL 1661358 (5th Cir. 2025); *see also* Doc. 279. The Fifth Circuit’s opinion, however, does not change the analysis under Section 1292(b). In addition, Plaintiff Guardian Flight is filing today a petition for rehearing *en banc*.

Every motion to dismiss involves a losing party. Only rarely do courts grant the extraordinary relief of an interlocutory appeal. Aetna claims that an interlocutory appeal here is “not merely appropriate; it is necessary to promote judicial economy and prevent the injustice of litigating claims that may ultimately fail as a matter of law.” But that is precisely what the law provides: absent extraordinary circumstances, which Aetna has failed to show here, parties can only appeal once, after a final judgment. Aetna’s motion should be denied.

LEGAL STANDARD

As a general matter, a denial of a motion to dismiss is not appealable as a “final decision[]” of the district court. *Balintulo v. Daimler AG*, 727 F.3d 174, 186 (2d Cir. 2013). As the Second Circuit has noted:

It is a ***basic tenet of federal law to delay appellate review until a final judgment*** has been entered. Section 1292(b)’s legislative history reveals that although the law was designed as a means to make an interlocutory appeal available, ***it is a rare exception to the final judgment rule*** that generally prohibits piecemeal appeals. The use of § 1292(b) is reserved for those cases where an intermediate appeal may avoid protracted litigation.

Koehler v. Bank of Bermuda Ltd., 101 F.3d 863, 865–66 (2d Cir. 1996) (citation omitted) (emphasis added). Interlocutory appeals are thus “strongly disfavored in federal practice.” *Ma v. Zhou*, 2025 WL 1384137, at *2 (S.D.N.Y. May 13, 2025).

28 U.S.C. 1292(b) provides for interlocutory appeals only when a district court concludes the order “[1] involves a controlling question of law [2] as to which there is substantial ground for difference of opinion and [3] that an immediate appeal from the order may materially advance the ultimate termination of the litigation.” *Monk v. United States*, 2025 WL 473590, at *1 (D. Conn. Feb. 12, 2025) (quoting 28 U.S.C. 1292(b)).

“A mere claim that a district court’s decision was incorrect does not suffice to establish substantial ground for a difference of opinion.” *Aristocrat Leisure Ltd. v. Deutsche Bank Tr. Co. Americas*, 426 F. Supp. 2d 125, 129 (S.D.N.Y. 2005). Rather, “there must be ***substantial doubt***

that the district court's order was correct.” *N.F.L. Ins. Ltd. v. B & B Holdings, Inc.*, 1993 WL 255101, at *2 (S.D.N.Y. July 1, 1993) (internal quotation marks omitted) (emphasis added). In addition, “certification is appropriate only when a case presents *exceptional circumstances* warranting interlocutory review.” *Hart v. Rick’s Cabaret Intern., Inc.*, 73 F. Supp. 3d 382, 393 (S.D.N.Y. 2014) (internal quotation marks omitted) (emphasis added). The party seeking an interlocutory appeal “bears the *heavy burden of demonstrating* that the case is an exceptional one in which immediate appeal is warranted.” *In re Aggrenox Antitrust Litig.*, 2018 WL 834228, at *1 (D. Conn. Feb. 12, 2018) (quoting *White v. Nix*, 43 F.3d 374, 376 (8th Cir. 1994) (emphasis added). “[O]nly exceptional circumstances will justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.” *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 25 (2d Cir. 1990) (internal quotations and citation omitted).

ARGUMENTS & AUTHORITIES

I. Interlocutory appeal would not materially advance the end of this case.

Rather than materially advancing the end of this litigation, Aetna’s interlocutory appeal request would have the opposite effect, and for that reason should be denied.

“Although advancement of the litigation is the third statutory criteria, ‘[c]ourts place particular weight on...whether immediate appeal will materially advance the ultimate termination of the litigation.” *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 986 F. Supp. 2d 428, 476 (S.D.N.Y. 2013). Aetna claims that “[w]ithout interlocutory review, this case will proceed into burdensome and expensive discovery, require extensive motion practice, and culminate in a full trial on all causes of action.” Doc. 274-1 at 10. Again, Aetna exaggerates. Though the parties can expect a short, efficient trial on the merits on all claims, the close of fact and expert discovery is less than three months away. To date, Plaintiffs have propounded only a handful of discovery requests; the number of deponents per party can similarly be counted on one hand. Aetna’s

complaints of burdensome and expensive discovery are unfounded. Moreover, this Court already rejected that argument when Aetna attempted to stay discovery pending the Court's ruling on its motion to dismiss. That discovery is now almost complete.

Aetna also asserts that its appeal is case-dispositive if it were to prevail. Doc. 274-1 at 10. Not so. Aetna has asserted its own counterclaims, which overlap with Plaintiffs' claims. Aetna claims that Plaintiffs are abusing the NSA and IDR system by submitting disputes the way the government previously compelled them to do so and prefers: one charge code per payment dispute. *See* Doc. 278 at 11–16. Evidence required to support its counterclaims, such as the statute's purpose, rules and guidance by CMS and the Departments, and the workings of the IDR system itself, overlap with the evidence supporting Plaintiffs' claims. Aetna's own action of filing a counterclaim further negates the need for interlocutory appeal. Moreover, Aetna would have to prevail on *all three issues*, including the CUTPA ruling on which no contrary authority exists, in order to avoid further proceedings in district court on Plaintiffs' claims.

The Southern District of New York's decision in *Murray v. UBS Sec.* also squarely refutes Aetna's logic. 2014 WL 1316472 (S.D.N.Y. Apr. 1, 2014). There, the plaintiff argued that "certifying the issues for interlocutory appeal 'will advance the ultimate termination of the litigation *if* the Order is reversed because a reversal will prevent the parties from delaying the litigation by engaging in costly and unnecessary arbitration proceedings.'" *Id.* at *7. The court rejected this argument, observing that the argument carries "only if this Court's decision is reversed; if the Second Circuit affirms the Court's decision, or rather yet, declines to hear Plaintiffs' appeal, the result will be that this action will have been *unnecessarily delayed by the interlocutory appeal.*" *Id.* (emphasis added). The court further noted the likelihood that the appeal process would "take longer than the arbitration, thereby extending the time in which a final decision on the merits

is rendered.” *Id.* In light of “these competing outcomes, the Court’s confidence in its prior decision, and the fact that certifying the issues for interlocutory appeal would only delay adjudication of the merits of this action,” the Court concluded interlocutory appeal was improper. *Id.*; *see also James v. Venture Home Solar, LLC*, 715 F. Supp. 3d 203, 219 (D. Conn. 2024) (third prong not met where “there is no clear indication that reversal of the Ruling would advance the ultimate termination of the litigation.”).

Here too, a trial on the merits would likely be concluded long before the Second Circuit ruled, making Aetna’s attempt at piecemeal appeals particularly ill advised. Indeed, the Second Circuit can take months deciding whether to grant an interlocutory appeal even if this Court were to allow Aetna to attempt one. Aetna’s appeal request, like the request in *Murray*, would only delay the ultimate resolution of this case, and for that reason should be denied.

II. Aetna shows no substantial ground for difference of opinion on its proposed issues.

Aetna cannot carry its burden of showing that there is a substantial ground for difference of opinion on its three proposed issues for interlocutory appeal, and its Motion should be denied for this reason as well. This Court’s ruling, based on a legal interpretation of the NSA that is shared by the United States government, got the issues exactly right. There is no contrary Second Circuit authority.

Aetna claims it can meet its burden by showing either (1) the existence of conflicting authority on the issue or (2) that the issue “is particularly difficult and of first impression within this Circuit.” Doc. 274–1 at 7 (quoting *James v. Venture Home Solar*, 715 F. Supp. 3d 203, 218 (D. Conn. 2024) (citation omitted)). Decisions outside this Circuit, though, hold no weight in the interlocutory appeal analysis. *Cerrato v. Solomon & Solomon*, 2013 WL 12286084, at *2 (D. Conn. Jan. 4, 2013) (“[D]isagreement among courts outside the Second Circuit does not establish a substantial ground for difference of opinion.”) (internal quotation marks omitted). Likewise, “the

mere presence of a disputed issue that is a question of first impression, standing alone, is insufficient to demonstrate a substantial ground for difference of opinion.” *In re Flor*, 79 F.3d 281, 284 (2d Cir. 1996); *see also United States ex rel. Drake*, 736 F. Supp. 2d 489, 503 (D. Conn. 2010) (“simply because a question is particularly difficult does not mean that there is a difference of opinion.”). Given that the Court’s view is shared by the United States government across two administrations and no contrary Second Circuit authority exists, Aetna has not met its burden. And Aetna’s concern over a “wave of copycat lawsuits by providers across the country” is nothing more than rank speculation. Doc. 274-1 at 1. Setting aside the fact that Aetna apparently concedes its dilatory payment practices are prevalent across the country and thus could result in lawsuits against it elsewhere, these theoretical lawsuits have not been filed, and cannot serve as the basis for a substantial difference of opinion to appeal here.

On the first issue, whether the NSA creates a private right of action for enforcement of untimely IDR payment awards, Aetna identifies only one out-of-circuit case suggesting conflicting authority. As explained above, an out-of-circuit split is not enough to create a substantial ground for difference of opinion. And the Fifth Circuit ruling did not provide any new authority or reasoning. It simply repeated the arguments and reasoning that this Court rejected.

On the second proposed issue, Aetna claims that “this Court analyzed standing through the lens of Article III,” Doc. 274-1 at 8, and did not address Aetna’s “derivative standing” argument. Not so. Though the Court chose not to use the parties’ language, it nonetheless addressed the Parties’ arguments on the assignment of claims. *Id.* at 21. The Court expressly addressed the derivative standing issue, rejecting Aetna’s argument that “the assignor-participants could not bring suit for payment of the IDR awards under ERISA.” Doc. 264 at 21–24. Aetna does not explain why, on appeal, the Second Circuit would choose to follow the Northern District of Texas’s

decision in *Guardian Flight* and not this Court’s carefully reasoned approach. *In re NASDAQ Market Makers Antitrust Litig.*, 938 F. Supp. 232, 235 (S.D.N.Y. 1996) (“opinions [in other districts] do not control in this Circuit and do not themselves create ‘substantial grounds’ for difference of opinion.”).

On the third issue, Aetna admits defeat. It concedes that it “is not aware of any federal or state court that has addressed whether a provider may assert a CUTPA claim based on alleged violations of the NSA’s payment deadlines.” Doc. 274-1 at 9. There are no conflicting decisions on this point.³ Aetna does not contend these proposed issues are difficult; it merely claims they are “unresolved” and “unsettled.” *Id.*

In short, Aetna simply disagrees with this Court’s interpretation and application of the law, and it wants permission to seek interlocutory appeal for that reason. That is not enough to depart from this Circuit’s established practice, and if it were, every defendant would appeal denials of Rule 12 motions. This is not the outcome contemplated by Section 1292(b), and Aetna’s Motion should be denied.

III. Even if Aetna could meet the statutory criteria, other compelling reasons support denying certification.

Even if Aetna could satisfy the three statutory criteria, this Court should still exercise its “unfettered discretion to deny certification.” *In re World Trade Ctr. Disaster Site Litig.*, 469 F. Supp. 2d 134, 144 (S.D.N.Y. 2007) (internal quotation marks omitted). This discretion can be exercised “for any reason, including docket congestion” and “the system-wide costs and benefits

³ Aetna argues that “Plaintiffs’ attempt to recast alleged delays in payment as a violation of Connecticut consumer protection law directly implicates federal supremacy and raises the risk of inconsistent obligations across jurisdictions.” Plaintiffs would contend that the payment obligations under the NSA are plain under the statute and consistent across all jurisdictions. As this Court concluded in its order, Plaintiffs’ CUTPA claim supports and does not conflict with the NSA.

of allowing the appeal.” *Klinghoffer*, 921 F.2d at 24. Other factors considered by courts in this Circuit include:

(1) the time an appeal would likely take; (2) the need for a stay pending appeal and the effect on the litigation, including discovery, that would result from a stay; (3) the probability of reversal on appeal; (4) the effect of a reversal on the remaining claims; (5) the benefit of further factual development and a complete record on appeal, particularly in rapidly developing or unsettled areas of the law; and (6) the probability that other issues may moot the need for the interlocutory appeal.

Nat’l Asbestos Workers Medical Fund v. Philip Morris, Inc., 71 F.Supp. 2d 139, 163 (E.D.N.Y. 1999). Plaintiffs filed this case more than two years ago, and trial is rapidly approaching in early 2026. An interlocutory appeal now will only cause delay and increase the burdens on the parties and judiciary. In fact, as of March 31, 2025, the Second Circuit is the second most backlogged circuit in the country with a median length of time of 13 months from filing the notice of appeal to the issuance of a final order or opinion.⁴ At best, Aetna can only speculate as to its chance of success on appeal (or its chance of success that the Second Circuit would even allow the appeal at this time). There is likely to be a final judgement in this lawsuit before any interlocutory appeal would be decided. Thus, additional considerations weigh in favor of this Court exercising its discretion to deny Aetna’s Motion.

CONCLUSION

Plaintiffs respectfully request that the Court deny Aetna’s Motion.

⁴ See U.S. Court of Appeals Summary — 12-Month Period Ending March 31, 2025, available at https://www.uscourts.gov/sites/default/files/document/fcms_na_appsummary0331.2025.pdf.

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PULLMAN & COMLEY LLC

/s/ Timothy G. Ronan

Timothy G. Ronan
850 Main Street
P.O. Box 7006
Bridgeport, CT 06601-7006
T: 203.330.2000
F: 203.576.8888

NORTON ROSE FULBRIGHT US LLP

/s/ Adam T. Schramek

Adam T. Schramek (*pro hac vice*)
Texas Bar No. 24033045
D. Conn No. phv207863
98 San Jacinto Boulevard
Suite 1100
Austin, TX 78701-4255
Telephone: (512) 474-5201
Facsimile: (512) 536-4598
adam.schramek@nortonrosefulbright.com

Abraham Chang (*pro hac vice*)

Texas Bar No. 24102827
D. Conn No. phv208562
Dewey J. Gonsoulin III (*pro hac vice*)
Texas Bar No. 24131337
D. Conn No. phv207862
1550 Lamar Street
Suite 2000
Houston, Texas 77010
Telephone: (713) 651-5151
Facsimile: (713) 651 5246
abraham.chang@nortonrosefulbright.com
dewey.gonsoulin@nortonrosefulbright.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on June 26, 2025, a true and correct copy of the foregoing was served electronically on all counsel of record.

/s/ Adam T. Schramek

Adam T. Schramek