

ORDER: The motion for permission to file an interlocutory appeal (ECF No. 274) is DENIED. If this case involved the NSA issue alone, I would certify an interlocutory appeal, because I found that issue to be a close call and the Fifth Circuit has now disagreed with me. *Guardian Flight, LLC v. Health Care Service Corp.*, 140 F.4th 271 (5th Cir. 2025). I note, however, that the Fifth Circuit had a different case before it than I did: Specifically, the Fifth Circuit relied in significant part on 42 U.S.C. Section 300gg-22 in finding statutory evidence that Congress had opted to provide for a "general administrative remedy," *id.* at 277, rather than a private cause of action to enforce payment of IDR awards. As I expressly noted in my opinion, however, "[t]he parties did not address 42 U.S.C. Section 300gg-22 in their briefs," and so "I decline[d] to consider whether this provision provides a method of enforcing [the] substantive rule in the NSAs Timing of Payment provision." 2025 WL 1399145 *8 n.6. It is possible I would have reached a different conclusion had that issue been briefed, but it wasn't -- which diminishes the "conflict" between my opinion and that of the Fifth Circuit. But the NSA issue does not stand alone: my opinion also addressed the plaintiffs' ERISA and CUTPA claims. The presence of the CUTPA claim especially undermines the Defendants' request for an interlocutory appeal, because, frankly, I did not find the preemption issue to be a close call and the same damages (if not more) are available to the plaintiffs through CUTPA that would be available under the NSA and ERISA claims. This means that "an immediate appeal from the order" is not likely to "materially advance the ultimate termination of the litigation." 28 U.S.C. Sec. 1292(b). In other words, if the plaintiffs can secure at least the same damages from a claim that, in my view, is plainly adequately pled and not preempted, then it is largely academic if my interpretation of the NSA is correct. The same point applies to the

ERISA claim, although I do not regard my analysis of that claim, in light of bedrock Article III standing doctrine and Second Circuit precedent, to be a close call either. Finally, as the plaintiffs point out, allowing an interlocutory appeal at this point is only going to postpone the ultimate resolution of this case, because the parties' deadline for completion of fact discovery is only two months away. Furthermore, the plaintiffs' motion to dismiss AETNA's counterclaim (ECF No. 283) is DENIED as moot in light of the AETNA's amended counterclaim (ECF No. 291) and the Plaintiff's motion to dismiss the amended counterclaim (ECF No. 294). Signed by Judge Michael P Shea on 09/30/2025. (Nelson, D) (Entered: 09/30/2025)