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August 22, 2017

VIA E-FILE

Honorable Donovan W. Frank
Judge of United States District Court
United States District Court
Warren E. Burger Federal Building
316 N. Robert Street
St. Paul, MN 55101

Re: *Brittany R. Tovar v. Essentia Health, et al.*
Case No.: 16-cv-00100-DWF/LIB

Dear Judge Frank:

I represent defendants HealthPartners, Inc. (“HealthPartners”) and HealthPartners Administrators, Inc. (“HPAI”) and write in response to the Court’s Order dated August 16, 2017. Below, I address the current status of the case and how HealthPartners and HPAI suggest the case proceed going forward.

Plaintiff Brittany Tovar alleges that HealthPartners and/or HPAI discriminated against her in violation of 42 U.S.C. 18116(a), or Section 1557 of the Affordable Care Act (“ACA”), because her former employer’s health plan contained an exclusion for gender reassignment services or surgery. Tovar never sought such services or surgery, but Tovar’s complaint alleges that her son Reid Olson sought gender reassignment services. HPAI was the third-party administrator under that health plan.

By Memorandum Opinion and Order dated May 11, 2016, the Court granted HealthPartners’ Rule 12 motion and dismissed Tovar’s Complaint without prejudice. The Court found that, among other things, Tovar lacked Article III standing to pursue a claim under Section 1557. Through an Order dated June 23, 2016, the Court vacated an earlier Judgment, amended Tovar’s Complaint to include HPAI as a defendant and dismissed the amended Complaint with prejudice.

By decision dated May 24, 2017, the Eighth Circuit affirmed in part and reversed in part. As to defendants HealthPartners and HPAI, the Eighth Circuit remanded the case for further proceedings.

The Eighth Circuit found that Tovar “alleged an injury cognizable under Article III because she contends that [HealthPartners’ and HPAI’s] discriminatory conduct denied her the benefits of her insurance policy and forced her to pay out of pocket for some of her son’s prescribed

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medication.” *Tovar v. Essentia Health et al.*, 857 F.3d 771, 778-79 (8th Cir. 2017). Because the record on appeal was silent as to “whether Tovar has been fully reimbursed for these out-of-pocket payments,” Tovar’s allegations were “sufficient to establish an injury in fact for purposes of Article III standing” and to show that Tovar’s claim was not moot. *Id.* at 779 & n.3.

Having found allegations of an Article III injury, the Eighth Circuit declined to address whether Tovar was among the class of plaintiffs whom Congress has authorized to sue under the ACA and whether HealthPartners and HPAI could be held liable under the ACA for administering a plan under the sole control of another organization. *Id.* at 779. (Judge Benton, dissenting in part, concluded that HealthPartners and HPAI could not be liable under the ACA based upon Office of Civil Rights’ regulations. (*Id.* at 779-81).)

Immediately after receiving the Eighth Circuit’s decision, HealthPartners and HPAI asked Tovar whether, in fact, she had incurred out-of-pocket expenses for which she has not received reimbursement. Tovar’s counsel has since confirmed that Tovar has no such unreimbursed expenses.

On August 18, 2017, Tovar provided a draft First Amended Complaint in which her son, Reid Olson, is also listed as a plaintiff. In that draft pleading, Tovar and Reid assert a single claim against HealthPartners and HPAI under Section 1557. The draft pleading again confirms that Tovar has no unreimbursed out-of-pocket expenses. Tovar and Reid have requested that HealthPartners and HPAI stipulate to the filing of the First Amended Complaint.

HealthPartners and HPAI do not object to the First Amended Complaint and plan to file a motion to dismiss. The motion to will address, among other things, the issues identified in the Eighth Circuit’s decision, namely whether Tovar has standing, whether Tovar is among the plaintiffs permitted to bring a claim under the ACA and whether Tovar or Reid may sue HealthPartners or HPAI under the relevant health plans. These defendants suggest that the Court permit the amended pleading (at least with respect to HealthPartners and HPAI) and allow them to file the opening memorandum in support of their motion to dismiss within 21 days after the First Amended Complaint is filed.

Very truly yours,



David M. Wilk

DMW/jh