NO. 20-16823

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RACHEL CONDRY; JANCE HOY; FELICITY BARBER; RACHEL CARROLL; CHRISTINE ENDICOTT; LAURA BISHOP, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

UNITEDHEALTH GROUP, INC.; UNITEDHEALTHCARE, INC.; UNITED HEALTHCARE INSURANCE COMPANY; UNITED HEALTHCARE SERVICES, INC.; UMR, INC.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of California, No. 3:17-cv-00183-VC (Hon. Vince Chhabria)

SUPPLEMENTAL BRIEF FOR DEFENDANTS-APPELLANTS

Martin J. Bishop
Rebecca R. Hanson
REED SMITH LLP
10 S. Wacker Dr., 40th Fl.
Chicago, IL 60606
Tel: (312) 207-1000
Fax: (312) 207-6400
mbishop@reedsmith.com
rhanson@reedsmith.com

Raymond A. Cardozo
REED SMITH LLP
101 Second Street
Suite 1800
San Francisco, CA 94105
Tel: (415) 543-8700
Fax: (415) 391-8269
rcardozo@reedsmith.com

Counsel for Defendants-Appellants UnitedHealth Group, Inc.; UnitedHealthcare, Inc.; United Healthcare Insurance Company; United Healthcare Services, Inc.; and UMR, Inc.

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INTRODUCTION

A federal court must, of course, "assure itself of its own jurisdiction to entertain a claim" at all stages of the litigation, including appeal. *Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1137 (9th Cir. 2012). Accordingly, this Court has asked the parties to address whether (1) the district court's Stipulated Final Judgment and Order is a "final decision" for purposes of 28 U.S.C. § 1291, particularly in light of *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017); and (2) the appeals from the Stipulated Final Judgment and Order present a genuine "case" or "controversy" under Article III of the U.S. Constitution.

This Court has jurisdiction over the appeal filed by Defendants-Appellants UnitedHealth Group, Inc., UnitedHealthcare, Inc., United Healthcare Insurance Company, United Healthcare Services, Inc., and UMR, Inc. (collectively, "United").[1] United has appealed the district court's rulings on Plaintiffs' claims relating to United's "remark codes." Because (1) these claims have been litigated to a full and final resolution in the district court and (2) United contests that resolution and retains an indisputably genuine stake in this appeal, appellate jurisdiction over United's appeal is proper. Furthermore, because the Stipulated Final Judgment and Order granted injunctive relief, appellate jurisdiction independently exists under 28 U.S.C. § 1292(a).

[1] This Supplemental Brief will address the existence of appellate jurisdiction over United's appeal of the district court's Stipulated Final Judgment and Order. United takes no position regarding the existence of jurisdiction over Plaintiffs' cross-appeal.

BACKGROUND

The factual background of this case is discussed at length in United's earlier briefing and will not be repeated here. There are, however, a few points central to this jurisdictional briefing that warrant discussion.

A key issue before the district court was the effect and propriety of United's "remark codes." Regulations promulgated under Section 503 of ERISA, 29 U.S.C. § 1133, require denials of benefits claims to include "[t]he specific reason or reasons for the adverse determination" and "[a] description of the plan's review procedures." 29 C.F.R. § 2560.503-1(g)(1). Denial notices must be "written in a manner calculated to be understood by the participant." 29 U.S.C. § 1133(1). Given the large volume of processed claims, United—like others in the industry—provides standardized remark codes that briefly state the reasons for a claim's denial and which are used to initiate a dialogue with plan members about a claims decision. United Opening Br. at 9. Each of the Plaintiffs received communications containing such remark codes. *Id.* at 11-17.

In this case, the ERISA Plaintiffs asserted that United violated Section 503 of ERISA by utilizing "a system … that fails to provide timely and substantive responses to requests for out-of-network benefits and/or appeals to denials of [such] requests." 6-ER-1280 at ¶ 207. Despite United's submission of the full course of Plaintiffs' interactions with United, the district court—focusing solely on the remark codes alone—granted summary judgment to Plaintiffs on this issue, ruling that the codes "were written in a way that made them virtually impossible to understand." 1-ER-28.

The district court's erroneous summary-judgment decision was compounded at the class-certification stage. The court—again over United's argument and submission of evidence—issued an order certifying a Remark Code Class, based on its summary-judgment conclusion that United's remark codes violated ERISA. 1-ER-12-22.

The district court did not change its mind before final judgment. In entering final judgment in favor of the Remark Code Class, the district court granted injunctive relief to Plaintiffs, ordering United to send a follow-up letter to each member of the class "that explain[s] the basis for denial of the lactation claim in a comprehensible fashion (which would, in turn, allow participants to meaningfully assess whether to contest the denial)," and that is "worded so as to emphasize that if a participant believes her dispute with the company was mooted by activity or communications subsequent to the initial denial letter, she need not take further action in response to the new letter." 1-ER-6-7. The parties conferred on the content of this letter, but agreed to stay execution of the order directing United to send the letter until after the parties' appeals are fully resolved. 1-ER-7. The letter has accordingly not yet been sent.

Notably, although several of the issues and claims of two individual plaintiffs in this case were subject to stipulated judgment and partial settlement, no such settlement occurred for the remark-code issues that are the subject of United's appeal. The remark code summary judgment ruling, the remark code class certification, and the remark code injunctive relief were each contested and litigated to a final decision.

ARGUMENT

I. The Stipulated Final Judgment And Order Is A "Final Decision" For United's Appeal

Under 28 U.S.C. § 1291, federal appellate jurisdiction exists over "appeals from all final decisions of the district courts." This finality requirement is to be given "a practical rather than a technical construction," and applies to a decision "which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *United States v. Ray*, 375 F.3d 980, 985 (9th Cir. 2004) (internal quotation marks omitted); *Parsons v. Ryan*, 949 F.3d 443, 472 (9th Cir. 2020).

The district court's Stipulated Final Judgment and Order fits the bill. The court entered final judgment in favor of the Remark Code Class on Count I, finding United violated ERISA. 1-ER-6. As part of the final judgment, the court ordered United to send a letter to each class member containing content that the court deemed required. 1-ER-6-7. The district court's decision accordingly ended the litigation on the merits and left the court with nothing to do but execute the judgment.

Microsoft Corp. v. Baker poses no bar to appellate jurisdiction here. 137 S. Ct. 1702 (2017). In *Baker*, the Supreme Court held that an interlocutory order could not be transformed into a reviewable final judgment by manipulative litigation tactics designed to create appellate jurisdiction where none would otherwise exist. In particular, the *Baker* parties attempted to turn an interlocutory denial of class certification into a final judgment by stipulating to a voluntary dismissal of the claims—subject to the "right to

revive their claims" depending on the outcome of the appeal. *Id.* at 1706-07. The Court held that this voluntary-dismissal tactic did not qualify as a "final decision" under § 1291 because permitting such tactics would "undermine § 1291's firm finality principle, designed to guard against piecemeal appeals, and subvert the balanced solution Rule 23(f) put in place for immediate review of class-action orders." *Id.* at 1707; *see also Torrent v. Yakult U.S.A., Inc.*, 739 F. App'x 437, 438 (9th Cir. 2018) (unpublished) (concluding, based on *Baker*, that no appellate jurisdiction existed in similar circumstances).

These concerns are inapplicable to United's appeal. There has been no voluntary dismissal or other manipulation of the claims subject to this appeal. *See Brown v. Cinemark USA, Inc.*, 876 F.3d 1199, 1201 (9th Cir. 2017) (rejecting application of *Baker* and upholding appellate jurisdiction because "[n]o facts suggest that [the parties] engaged in sham tactics to achieve an appealable final judgment"). Nor is United attempting to appeal an interlocutory class-certification order. *See Rodriguez v. Taco Bell Corp.*, 896 F.3d 952, 955 (9th Cir. 2018) (holding *Baker* does not preclude appellate jurisdiction even in the case of voluntary dismissals, "so long as the discretionary regime of Rule 23(f) is not undermined"). Rather, following the interlocutory class certification, the district court granted final injunctive relief *on the merits* to *the certified remark code class.* Thus, the issues raised in United's appeal were fully and zealously litigated to completion, culminating in the district court's final judgment on the merits. Appellate review is therefore appropriate under section 1291's "final" judgment provision.

II. United's Appeal Presents A Genuine "Case" Or "Controversy"

"Article III's case-or-controversy limitation on federal court jurisdiction requires a live controversy between two adversaries." *Alatorre v. Stackley*, 698 F. App'x 512, 512 (9th Cir. 2017) (unpublished) (internal quotation marks omitted); *see In re Gollan*, 728 F.3d 1033, 1037 (9th Cir. 2013) ("These two constitutional words … 'confine the business of federal courts to questions presented in an *adversary context* and in a form historically viewed as capable of resolution through the *judicial process*.'" (quoting *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007)) (emphasis in original)). The controvery requirement is failed where, for instance, an appeal is moot because "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Pub. Util. Com'n v. F.E.R.C.*, 100 F.3d 1451, 1458 (9th Cir. 1996) (internal quotation marks omitted).

United's appeal does not implicate such concerns. There has been no stipulated relief or settlement with regard to the claims United has raised in its appeal. These claims have been fully contested through the entire course of litigation culminating in the district court's final judgment and order. In its order granting injunctive relief, the district court mandated that United engage in an act that has not yet been performed—namely, sending the letter to the remark code class members—and which United continues to vigorously assert it should not be required to perform. Accordingly, United indisputably continues to have a stake in the "live controversy" presented by its appeal.

III. 28 U.S.C. § 1292(a) Provides Separate And Independent Appellate Jurisdiction Over United's Appeal

There is a separate, independent basis for this Court's appellate jurisdiction over United's appeal. 28 U.S.C. § 1292 grants jurisdiction over appeals from "[i]nterlocutory orders of the district courts … granting, continuing, modifying, refusing or dissolving injunctions." 28 U.S.C. § 1292(a)(1); *United States v. McIntosh*, 833 F.3d 1163, 1170 (9th Cir. 2016). "An order need not be termed an injunction by the district court to fall within § 1292's ambit; an order that 'has the "practical effect" of granting or denying an injunction … should be treated as such for purposes of appellate jurisdiction.'" *Roman v. Wolf*, 825 F. App'x 495, 496 (9th Cir. 2020) (unpublished) (quoting *Abbott v. Perez*, 138 S. Ct. 2305, 2319 (2018)).

Thus, were this Court to conclude that the order appealed by United is interlocutory rather than final, appellate jurisdiction would be proper under Section 1292(a)(1). Therefore, in all events, this Court has jurisdiction over United's appeal.

The district court's final-judgment order granted injunctive relief to Plaintiffs, ordering United to send a letter to all class members with information regarding the denial of their lactation claims. If this Court were to construe that order as non-final in light of the stipulated settlement of two named plaintiffs' individual claims, then the district court's "order[] … granting … [an] injunction[]" is squarely within § 1292(a)(1)'s grant of appellate jurisdiction. Again, in all events, this Court has jurisdiction over United's appeal.

CONCLUSION

For the foregoing reasons, this Court should conclude that it has jurisdiction to hear United's appeal from the district court's Stipulated Final Judgment and Order.

Dated: July 14, 2021

Respectfully submitted,

/s/ Raymond A. Cardozo
Raymond A. Cardozo
REED SMITH LLP
101 Second Street
Suite 1800
San Francisco, CA 94105
Tel: (415) 543-8700
Fax: (415) 391-8269
rcardozo@reedsmith.com

Martin J. Bishop
Rebecca R. Hanson
REED SMITH LLP
10 S. Wacker Drive, 40th Fl.
Chicago, IL 60606
Tel: (312) 207-1000
Fax: (312) 207-6400
mbishop@reedsmith.com
rhanson@reedsmith.com

Counsel for Defendants-Appellants UnitedHealth Group, Inc.; UnitedHealthcare, Inc.; United Healthcare Insurance Company; United Healthcare Services, Inc.; and UMR, Inc.

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