

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

-----	X
MURPHY MEDICAL ASSOCIATES, LLC; DIAGNOSTIC	:
AND MEDICAL SPECIALISTS OF GREENWICH, LLC;	:
NORTH STAMFORD MEDICAL ASSOCIATES, LLC;	:
COASTAL CONNECTICUT MEDICAL GROUP, LLC; and	:
STEVEN A.R. MURPHY, MD	:
	:
Plaintiffs,	:
v.	:
	:
CIGNA HEALTH AND LIFE INSURANCE COMPANY and	:
CONNECTICUT GENERAL LIFE INSURANCE COMPANY,	:
	:
Defendants.	:
-----	X

3:20-cv-01675-JBA

February 12, 2021

**AMENDED RULE 26(f) REPORT OF PARTIES' PLANNING MEETING**

Date Complaint Filed: November 6, 2020

Date Complaint Served: Service waived on November 18, 2020

Date of Defendant's Appearance: November 18, 2020

Pursuant to Fed. R. Civ. P. 16(b) and 26(f) and D. Conn. L. Civ. R. 16 and 26(f), a conference was held on December 18, 2020. The participants were Michael J. Keane, Jr. on behalf of plaintiffs ("Plaintiffs" or the "Murphy Practice"), and Theodore J. Tucci and Patrick W. Begos on behalf of defendants ("Defendants" or "Cigna"). This Amended Report incorporates agreements reached after the parties filed the original Report on January 4, 2021.

**I. Certification**

Undersigned counsel certify that, after consultation with their clients, they have discussed the nature and basis of the parties' claims and defenses and any possibilities for achieving a prompt settlement or other resolution of the case and, in consultation with their clients, have

developed the following proposed case management plan. Counsel further certify that they have forwarded a copy of this report to their clients.

## **II. Jurisdiction**

### **A. Subject Matter Jurisdiction**

Plaintiffs allege that this Court has jurisdiction under 28 U.S.C. § 1331 because they “assert federal claims against Cigna under the Families First Coronavirus Relief Act (“FFCRA”), the Public Health Services Act and ERISA.” Plaintiffs also allege that this Court has supplemental jurisdiction over their state law claims.

Cigna’s time to respond to the complaint has not yet expired, and it has not fully evaluated issues of subject matter jurisdiction. Cigna reserves the right to contest the existence of subject matter jurisdiction based on the federal statutes alleged.

### **B. Personal Jurisdiction**

Defendants have provided to Plaintiffs executed forms waiving service of the summons, but those waivers have not yet been filed. Defendants do not contest personal jurisdiction.

## **III. Brief Description of the Case**

Plaintiffs assert various claims against Cigna concerning payment for testing and medical services that Plaintiffs allege they provided to individuals covered under Cigna-administered health plans.

### **A. Claims of Plaintiff**

At the start of the COVID-19 pandemic, the Murphy Practice – a cutting edge internal and preventative medical practice based in southwestern Connecticut – was one of the first to answer the call of towns and institutions throughout Fairfield and New Haven Counties, Connecticut, and Westchester County, New York about the desperate need for timely COVID-19 testing. The Murphy Practice invested hundreds of thousands of dollars to transform its tradi-

tional medical practice to set up COVID-19 testing sites throughout southwestern Connecticut and the Hudson Valley. These sites were designed to provide efficient drive and/or walk-through COVID-19 testing to patients with symptoms or suspected exposure.

The Murphy Practice also invested significant hours and resources researching peer-reviewed and other expert literature to determine the most effective and informative way to fulfill its COVID-19 testing mission. This research, combined with Dr. Murphy's more than a decade's worth of primary care and academic experiences, confirmed that merely performing a rapid COVID-19 polymerase chain reaction ("PCR") test is insufficient for treating potentially infected patients. Rather, to comply with the most up-to-date clinical guidance, and to provide complete and thorough patient care, testing for other potential viruses and bacteriological diseases had to simultaneously be performed. The Murphy Practice unquestionably fulfilled its mission. From March 1, 2020 through October 31, 2020, the Murphy Practice engaged in over 65,000 encounters with patients, and collectively tested and provided medical treatment and care to over 28,000 of those patients. To date, the Murphy Practice has provided COVID-19 testing to approximately 3,000 uninsured patients.

Unfortunately, Cigna has not honored its obligation to reimburse the Murphy Practice for this vitally needed public health service. Specifically, through the Families First Coronavirus Response Act and the CARES Act, Congress mandated that health plans and managed care companies, such as Cigna, must cover and reimburse providers for conducting COVID-19-related testing. This coverage must be provided "without cost sharing, when medically appropriate for the individual, as determined by the individual's attending healthcare provider in accordance with acceptable standards of current medical practice."

Thus, health plans and managed care companies must provide this coverage without requiring the patients themselves to pay anything for the testing, even for testing that is performed by out-of-network providers.

Cigna, has not honored its statutory obligation to reimburse the Murphy Practice for the COVID-19-related testing that it provided to Cigna's members and beneficiaries since March 2020. As of now, the amount outstanding owed to the Murphy Practice for this testing totals more than \$4.6 million dollars. Cigna has denied reimbursement for COVID-19 testing-related services for over 4,400 members or beneficiaries.

As stated in the Complaint, Cigna's blatant refusal to reimburse the Murphy Practice not only directly violates the Families First Coronavirus Response Act, the CARES Act, and the Affordable Care Act, it also, to the extent that its plans are covered by ERISA, violates various ERISA provisions. Additionally, due to defamatory statements made by Cigna, the Murphy practice has included a tortious interference claims.

**B. Defenses and Claims (Counterclaims, Third Party Claims, Cross Claims) of Defendant**

Cigna timely requested a pre-filing conference regarding an anticipated motion to dismiss the complaint on various grounds, which the Court has scheduled for February 19, 2021. Cigna reserves its right to assert all defenses to the complaint, and to assert counterclaims against Plaintiffs. With those reservations of rights, Cigna briefly summarizes its present defenses below.

Plaintiffs established drive-up and walk-up sites for the purpose of taking samples and performing tests for the COVID-19 virus in various municipalities in Connecticut and New York (often under contract with those municipalities), as well as with private organizations such as colleges and/or senior living facilities. Instead of simply performing the COVID-19 testing,

Plaintiffs performed multiple additional tests that were not requested and were not medically necessary.

Plaintiffs did not participate in Cigna's provider network (Cigna had terminated Steven Murphy from its provider network in June 2019 following investigation of misrepresentation of services). As non-network providers, Plaintiffs submitted claims for reimbursement to Cigna pursuant to purported assignments from Cigna members (none of whom are identified in the complaint). In addition to billing Cigna for tests that were not requested and/or were not medically necessary, Plaintiffs billed Cigna for "medical consultations" that were nothing more than telephone notifications of test results. Such improper billing led Cigna to "flag" Plaintiffs' reimbursement claims for review, and/or to request medical records documenting the medical services Plaintiffs allegedly provided, as part of such review.

Separately, Plaintiffs' COVID-19 business enterprise generated negative media attention, and triggered decisions by municipalities and organizations to sever relationships with Plaintiffs. Plaintiffs then filed this action. Cigna will defend this action based, at least in part, on the grounds expressed below:

- The First Cause of Action, under the FFCRA, fails to state a claim because FFCRA affords Plaintiffs no express or implied private right of action.
- The Second, Third and Fourth Causes of Action, under the Public Health Services Act and ERISA, fail to state a claim because there is no express or implied private right of action under the Public Health Services Act, and Plaintiffs have not alleged a plausible basis for standing to assert a claim under ERISA for benefits payable under any employee benefit plan covering any of the people they tested.

- The Fifth and Sixth Causes of Action alleging unfair trade practices and tortious interference with contract fail to state a claim because Plaintiffs have failed to allege facts giving rises to a plausible claim, they have failed to allege misconduct (particularly allegedly defamatory statements) with requisite particularity, and the claims are preempted by ERISA to the extent they arise out of an alleged failure to pay benefits under an ERISA-governed plan.

**C. Defenses and Claims of Third-Party Defendants:**

Not applicable.

**IV. Statement of Undisputed Facts**

Counsel certify that they have made a good faith attempt to determine whether there are any material facts that are not in dispute. At this time, the parties have not determined any facts to be undisputed.

**V. Case Management Plan**

The parties request modification of the deadlines in the Standing Order as set forth below.

**A. Initial Disclosures**

The parties will serve initial disclosures pursuant to Fed. R. Civ. P. 26(a) on or before January 30, 2021.

**B. Scheduling Conference with the Court**

The Court will hold a scheduling conference on February 19, 2021.

**C. Early Settlement Conference**

1. The parties certify that they have considered the potential benefits of attempting to settle the case before undertaking significant discovery or motion practice. Settlement is unlikely at this time.

2. The parties do not request an early settlement conference.

3. If a settlement conference is ordered, the parties prefer a conference with the Magistrate Judge.

4. The parties do not request a referral for alternative dispute resolution pursuant to D. Com. L. Civ. R. 16.

**D. Joinder of Parties, Amendment of Pleadings, and Motions Addressed to the Pleadings**

Cigna's requested a pre-motion conference for a motion to dismiss. The parties will file any motions relating to joinder of parties or amendments of pleadings within 45 days of the Court's ruling on the motion to dismiss or, if no motion is filed, within 30 days of the filing of Cigna's answer to the complaint. Nothing in this paragraph constitutes a concession by Cigna that Plaintiffs should be given leave to amend the complaint following the Court's decision on a motion to dismiss.

**E. Discovery**

a. The parties anticipate that discovery will be needed on the following subjects:

- The ownership of, and relationships among, the plaintiff entities.
- Plaintiffs' communications, agreements and/or relationships with municipalities and private organizations regarding COVID-19 testing,
- Plaintiffs' establishment and operation of COVID-19 testing facilities.
- Plaintiffs' business models, revenue projections, and financing arrangements for COVID-19 testing facilities or services.
- Regulatory or governmental evaluations or investigations of Plaintiffs' COVID-19 testing operations.

- The persons tested by Plaintiffs for whom Plaintiffs seek reimbursement in this action, including communications or agreements with them, their health coverage, and medical records pertaining to any tests or health services allegedly performed or provided to them.
- Plaintiffs' relationships with any labs or facilities that analyzed test samples.
- Plaintiffs' alleged damages.
- Communications between the parties regarding COVID-19 testing or claims for reimbursement for such testing.
- Cigna's internal communications concerning the claims submitted by the Murphy Practice.
- Cigna's internal investigations concerning the Murphy Practice.
- Claim files for all disputed claims.

b. All discovery, including depositions of expert witnesses pursuant to Fed.R.Civ.P. 26(b)(4), will be commenced by December 18, 2020 and completed (not propounded) by December 31, 2021.

c. Discovery will not be conducted in phases.

d. The parties presently anticipate that each will require a total of 10 depositions of fact witnesses. Each party reserves the right to notice additional depositions if necessary, and/or to object to deposition notices. The fact witness depositions will commence by February 1, 2021 and be completed by September 30, 2021.

e. The parties do not at this time request permission to serve more than 25 interrogatories, but reserve their rights to seek leave from the Court to do so.



f. Plaintiffs intend to call expert witnesses at trial. Plaintiffs will designate all trial experts and provide opposing counsel with reports from retained experts pursuant to Fed.R.Civ.P. 26(a)(2) by September 30, 2021. Depositions of any such experts will be completed by October 29, 2021.

g. Defendants intend to call expert witnesses at trial. Defendants will designate all trial experts and provide opposing counsel with reports from retained experts pursuant to Fed.R.Civ.P. 26(a)(2) by November 30, 2021. Depositions of such experts will be completed by December 31, 2021.

h. A damages analysis will be provided by Plaintiffs by February 26, 2021. Cigna will provide a damages analysis within 60 days of asserting any counterclaim seeking damages.

i. Undersigned counsel have discussed the disclosure and preservation of electronically stored information, including, but not limited to, the form in which such data shall be produced, search terms and/or other techniques to be used in connection with the retrieval and production of such information, the location and format of electronically stored information, appropriate steps to preserve electronically stored information, and the allocation of costs of assembling and producing such information. The parties are continuing to discuss the preservation, disclosure and management of electronically stored information, and will approach the Court if any issues arise.

Undersigned counsel have also discussed the location(s), volume, organization, and costs of retrieval of information stored in paper or non-electronic forms. The parties are continuing to discuss the preservation, disclosure and management of such information, and will approach the Court if any issues arise.

j. Undersigned counsel have discussed discovery procedures that minimize the risk of waiver of privilege or work-product protection, including procedures for asserting privilege claims after production. The parties will be entering into protective order to supplement the Standing Protective Order (Doc. 4) that will govern the exchange of confidential health information and other proprietary and sensitive information. The parties will also address issues of waiver related to privilege or work product protection.

**F. Dispositive Motions**

Dispositive motions will be filed on or before February 28, 2022.

**G. Joint Trial Memorandum**

The joint trial memorandum required by the Standing Order on Trial Memoranda in Civil Cases will be filed 60 days after the Court's ruling(s) on dispositive motions.

**VI. Trial Readiness**

This case will be ready for trial 30 days after submission of the parties' Joint Trial Memorandum.

As officers of the Court, undersigned counsel agree to cooperate with each other and the Court to promote the just speedy and inexpensive determination of this action.

Respectfully submitted,

ROBINSON & COLE LLP

By: /s/ Patrick W. Begos  
Theodore J. Tucci (ct05249)  
Patrick W. Begos (ct19090)  
280 Trumbull Street  
Hartford, CT 06103  
Tel. (860) 275-8200  
Email: [ttucci@rc.com](mailto:ttucci@rc.com)  
Email: [pbegos@rc.com](mailto:pbegos@rc.com)

*Attorneys for Defendants*

GARFUNKEL WILD, P.C.

By: /s/ Michael J. Keane, Jr.  
Andrew Zwerling  
Barry B. Cepelewicz  
Michael J. Keane, Jr.  
350 Bedford Street  
Stamford, CT 06901  
Tel: 203-316-0483

*Attorneys for Plaintiffs*