UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 03-21296-CIV-MORENO

IN RE: MANAGED CARE LITIGATION

RICK LOVE, M.D., *et al.*,

Plaintiffs,

vs.

BLUE CROSS AND BLUE SHIELD ASSOCIATION, *et al.*,

Defendants.
_____/

ORDER GRANTING DEFENDANTS' MOTION TO ENFORCE INJUNCTION

THIS CAUSE came before the Court upon the Motion of Settling Defendants Independence Blue Cross, Keystone Health Plan East, Inc., and AmeriHealth HMO, Inc. to Enforce Injunction (D.E. No. 2119). The defendants (collectively, "IBC") move for an injunction barring claims filed in the Superior Court of New Jersey. *See Advocare, LLC, et al. v. Independence Blue Cross, et al.*, No. BUR-L-2266-10 (N.J. Super. Ct. Law. Div July 8, 2010). IBC alleges the *Advocare* plaintiffs' claims are barred by this Court's final order approving the settlement agreement in the *In re Managed Care* litigation.

I. BACKGROUND

A. The *In re Managed Care* Litigation

On April 17, 2000, the Judicial Panel on Multidistrict Litigation ("MDL") ordered the creation of *In re Managed Care Litigation*, Case No. 1:00-MDL-1334. This MDL case concerned, among other things, reimbursement for health care services by managed care companies and was

divided into two tracks: one involving broad claims by health care providers and the other involving broad claims by subscribers to health care plans. The provider track was a class action brought on behalf of all providers who submitted claims to health care companies, including the IBC defendants, for the provision of medical services. *See Thomas v. Blue Cross and Blue Shield Ass'n*, Case No. 03-CIV-21296 (S.D. Fla. 2003) (hereinafter, "*Love*").

In *Love*, the providers alleged that health insurance companies engaged in a conspiracy to inflate profits by systematically denying, delaying, and diminishing payments due to them. The *Love* defendants allegedly effected this scheme through the manipulation of computerized billing programs. Throughout the pendency of this complex class-action litigation, settlements have been reached between numerous providers and several of the insurers. On April 27, 2007, a group of *Love* defendants entered into a Settlement Agreement. D.E. No. 928-1 ("Settlement Agreement"). IBC filed a Joinder to the Settlement Agreement on July 6, 2007. D.E. No. 970. The Court approved IBC's Joinder on July 16, 2007. D.E. No. 971. On April 20, 2008, the Court entered its Final Order and Judgment approving the *Love* Settlement. D.E. No. 1286 ("Final Order").

The Final Order enjoined settling class members[1], the "Releasing Parties," from filing new lawsuits in which "Released Claims" are asserted against the settling defendants (the "Released Parties"). According to the *Love* Settlement Agreement, the term "Released Claims" encompassed

> any and all causes of action, judgments, liens, indebtedness, costs, damages, obligations, attorneys' fees, losses, claims, liabilities and demands of whatever kind, source or character whether arising under any federal or state law, ... and other statutory and common law claims, intentional or non-intentional .. arising on or before the Effective Date, that are, were

[1]The Settlement agreement defines the *Love* class as: "Any and all Physicians, Physician Groups and Physician Organizations who provided Covered Services to any Plan Member or services to any individual enrolled in or covered by a Plan offered or administered by any Person named as a defendant in the Complaint or by any other primary licensee of the BCBSA or by any of their respective current or former subsidiaries or Affiliates, in each case from May 22, 1999 through the Preliminary Approval Date." D.E. No. 928-2 at § 1.23.

> or could have been asserted against any of the Released Parties by reason of, arising out of, or in any way related to any of the facts, acts, events, transactions, occurrences, courses of conduct, business practices, representations, omissions, circumstances or other matters referenced in the Action, or addressed in this Agreement, whether any such Claim was or could have been asserted by any Releasing Party on its own behalf or on behalf of other Persons, or to the business practices that are the subject of §7. This includes, without limitation and as to Released Parties only, any aspect of any fee for service claim submitted by any Class Member to a Blue Plan, and any claims of any Class Member related to or based upon any Capitation agreement between a Blue Plan and any Class Member or other Person or entity, or the delay, nonpayment or amount of any Capitation payments by a Blue Plan....

D.E. No. 928-2 at § 13.1(a). The Final Order expressly enjoined *Love* class members from

> (i) filing, commencing, prosecuting, intervening in, participating in (as class members or otherwise) or receiving any benefits from any lawsuit, arbitration, administrative or regulatory proceeding, or order in any jurisdiction based on any or all Released Claims against one or more Released Parties; (ii) instituting, organizing class members in, joining with class members in, amending a pleading in, or soliciting the participation of class members in, any action or arbitration, including but not limited to a purported class action, in any jurisdiction against one or more Released Parties based on, involving, or incorporating, directly or indirectly, any or all Released Claims; and (iii) filing, commencing, prosecuting, intervening in, participating in (as class members or otherwise), or receiving any benefits from any lawsuit, arbitration, administrative or regulatory proceeding, or order in any jurisdiction based on an allegation that an action of the Blue Parties, which is in compliance with the provisions of the Settlement Agreement, violates any legal right of any Class Member.

D.E. No. 1286 at ¶ 9. In paragraph 28 of the Final Order, the Court expressly retained jurisdiction as to all matters relating to the interpretation, administration and consummation of the Settlement Agreement, and the enforcement of injunctions. *See id.* at ¶ 28.[2]

B. The *Advocare* Action

In July 2010, Advocare, LLC, Manyan Ng, M.D., Pamela Mehalick, D.O., Burton Langer, M.D., Edward Rosof, M.D., and Janet Crino, M.D., filed the *Advocare* Action against Independence

[2] The United States Court of Appeals for the Eleventh Circuit has affirmed this Court's prior orders enjoining Releasing Parties from pursuing Released Claims in federal and state courts. *See, e.g., Thomas v. Blue Cross and Blue Shield Ass'n*, No. 08-15395, 2009 WL 1483522 (11th Cir. May 28, 2009); *Klay v. All Defendants*, No. 08-12906, 2009 WL 179617 (11th Cir. Jan. 27, 2009).

Blue Cross, QCC Insurance Company, Keystone Health Plan, and AmeriHealth HMO, Inc., in the Superior Court of New Jersey, Law Division, Burlington County, Docket No. BUR-L-2266-10. The claims asserted by the *Advocare* plaintiffs "arise out of a Professional Group Provider Agreement between IBC and Advocare's corporate predecessor, Children's Health Associates LLC, entered into on January 1, 2007, and an Addendum to the contract, entered into on March 1, 2007." D.E. No. 2119 at 3 (citing *Advocare* Complaint at ¶¶ 16, 17). According to that complaint, "the Addendum contained specific terms which applied to Advocare's Pennsylvania locations including, but not limited to, 'Current Procedural Terminology' ('CPT') Codes for which IBC agreed to pay specific amounts, and the manner in which the amounts to be paid for such CPT Codes would be calculated." *Advocare* Complaint at ¶ 17. The *Advocare* plaintiffs further allege that "Independence has failed to pay Advocare at the contract rate for medically necessary services rendered to the members of Independence's various plans and networks who have been treated at Advocare's five (5) Pennsylvania care centers and has, in fact, substantially underpaid for said services." *Id.* at ¶ 18.

In August of 2011, IBC's counsel requested that counsel for the *Advocare* plaintiffs execute a consent order permitting the filing of an amended answer and counterclaim to add an affirmative defense to the case based upon the *Love* settlement. *See* D.E. No. 2120 at 9. The amended answer was filed on September 16, 2011 and included an Affirmative Defense asserting that the *Advocare* plaintiffs' claims are precluded by the *Love* Settlement Agreement and Final Order. *See* D.E. No. 2119 at 5-6. On May 31, 2012, a motion was filed with this Court to enjoin the plaintiffs from prosecuting the New Jersey lawsuit on that same basis. *Id.* at 1. On July 2, 2012, the Superior Court of New Jersey dismissed the *Advocare* Action without prejudice, with leave to re-file the complaint pending the final resolution of the action currently before this Court, including all appeals

therefrom.[3] D.E. No. 2123-1 at 2.

II. ARGUMENT

The only dispute before this Court turns on whether the claims asserted in the *Advocare* Action are Released Claims as defined by the *Love* Settlement Agreement and are therefore barred by the Court's Final Order. IBC argues that the theories advanced in the New Jersey litigation are Released claims because they arise from the same allegations asserted in *Love*: that IBC improperly diminished or delayed payments to the *Advocare* plaintiffs. D.E. No. 2119 at 9.

The *Advocare* plaintiffs contend that despite the breadth of the language in the *Love* Settlement Agreement, the claims at issue in *Advocare* were not, and could not have been, raised in the *Love* case. The plaintiffs argue that the New Jersey Lawsuit involves issues of contractual interpretation of "a very narrow nature, which are specific to individually negotiated agreements between IBC and Advocare." D.E. No. 2120 at 12. According to the *Advocare* plaintiffs, the New Jersey Lawsuit "does not involve general issues such as up- and down-coding of claims, or bundling or un-bundling, or notifications to the provider community in general of changes in policies by the *Love* defendants." *Id.* at 12-13. The plaintiffs conclude that the claims which form the basis of the *Advocare* complaint could not have been addressed by the Court in *Love*, and therefore cannot be barred.

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[3]The *Advocare* plaintiffs dispute this Court's authority to enjoin the New Jersey litigation. *See* D.E. No. 2120 at 10-11 (citing 28 U.S.C. § 2283 (the "Anti-Injunction Act"); *Smith v. Bayer Corp.*, 131 S.Ct. 2368, 2382 (2011)). This argument all but ignores the Eleventh Circuit's recognition of a "complex multi-state litigation" exception to the Anti-Injunction Act, which enables a district court to enjoin a state court action where it has expressly retained jurisdiction over complex lawsuits. *See Estate of Brennan ex rel. Britton v. Church of Scientology Flag Service Organization, Inc.*, 645 F.3d 1267, 1274 (11th Cir. July 7, 2011); *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877 (11th Cir. 1989). *See also Klay*, No. 08-12906, 2009 WL 179617 at *1 (affirming this Court's order enjoining claims brought by members of the *Love* class in a California state court case).

In addition, the plaintiffs raise three additional arguments as to why the Final Order does not bar the *Advocare* claims. First, the plaintiffs contend that there is a specific "carve-out" in the *Love* Settlement Agreement that applies to individually-negotiated contracts such as those at issue in *Advocare*. Second, the plaintiffs claim that IBC has either waived its right to seek an injunction under the language of the *Love* settlement, or that they should be equitably estopped from doing so. Third, and finally, the plaintiffs argue that even if the Courts's Final Order applies to the *Advocare* claims, it cannot bar those claims for services rendered after the Settlement Agreement's effective date: June 19, 2009.

III. ANALYSIS

A. Released Claims under the *Love* Settlement Agreement

A litigation release of claims is a contract. It is construed according to the normal rules of contract interpretation. *See, e.g., V & M Erectors, Inc. v. Middlesex Corp.*, 867 So. 2d 1252, 1253-54 (Fla. 4th DCA 2004). When interpreting a contract under Florida law, the Court is guided first by the language of the document itself. *See Dows v. Nike, Inc.*, 846 So. 2d 595, 601 (Fla. 4th DCA 2003). Where that language is clear and unambiguous, the parties' intent must be discerned from the four corners of the document. *Id.* The language of the Court's Final Order clearly prohibits class members from initiating lawsuits against Released Parties for any claims released by the Settlement Agreement. D.E. No. 1286 at ¶ 9. This Court must therefore enjoin the *Advocare* plaintiffs claims if (i) the plaintiffs are *Love* class members; (ii) IBC is a Released Party under the Settlement; and (iii) the claims at issue in the New Jersey litigation are Released Claims.

There is no dispute that the *Advocare* plaintiffs are also *Love* class members, or that the IBC defendants are Released Parties under the terms of the *Love* Settlement Agreement. *See* D.E. No.

2120 at 2. Thus, the Court need only decide the third issue: whether the claims contained in the *Advocare* complaint are Released Claims.

In determining whether the *Advocare* claims are Released Claims under the *Love* Settlement Agreement, the Court must determine whether the New Jersey complaint shares the "same operative nucleus of fact" as the *Love* complaint, that is, whether the "primary rights and duties" are the same. *Thomas v. Blue Cross and Blue Shield Ass'n*, 333 Fed. Appx. 414, 418 (11th Cir. 2009). In *Love*, those rights and duties involved "Blue Cross' contractual duty to pay its doctors for medically necessary care given to its clients, and the doctors' contractual right to receive the money." *Id.* According to the language of the Settlement Agreement, claims that "in any way relate[ ] to any of the facts, acts, events, transactions, occurrences, courses of conduct, business practices, representations, omissions, circumstances or other matters referenced in [*Love*]" are Released Claims. D.E. No. 928-2 at § 13.1(a).

B. The Claims Asserted in *Advocare*

On its face, the *Advocare* complaint concerns IBC's contractual duty to pay the plaintiffs for medically necessary services rendered to members of IBC's various plans and the plaintiffs' right to receive payment for those services. Advocare Complaint at ¶¶ 16-18. The plaintiffs allege that IBC breached its agreement to make certain "fee-for-service payments" as well as "capitation payments" to Advocare.[4] *See* D.E. No. 2120 at 6. According to the *Advocare* plaintiffs, the "crux" of the complaint is IBC's breach of its contractual duty to reimburse them for certain services, which the complaint refers to as "billaboves," at the "fee-for-service" rate rather than at the "capitation" rate. *Id.*

[4]Capitation payments are monthly payments made on the basis of the number of IBC's customers who are treated at Advocare facilities. Fee-for-service payments, on the other hand, are payments made for each "evaluation and management" service provided. According to the plaintiffs, under the agreement, such payments were to be made for individual "evaluation and management" medical procedures as well as other office services known as "billaboves."

at 7.

These claims appear to fall squarely into the category of Released Claims as defined by the *Love* settlement. The *Advocare* action asserts the same rights and duties alleged in the MDL litigation, namely, IBC's "contractual duty to pay its doctors for medically necessary care given to its clients, and the doctors' contractual right to receive the money." *Thomas*, 333 Fed. Appx. at 418. The *Love* Settlement Agreement sets out the claims asserted in that action, including those claims that the Released Parties "improperly manipulated claim procedures or capitation payments or any other payments;" "paid at incorrect rates or improperly applied reimbursement policies;" or "fraudulently misrepresented the criteria for insurance coverage determination, treatment decisions, claims payments and adequacy of capitation payments[.]" D.E. No. 928-1 at 3. These are the same claims contained in the *Advocare* complaint and, as such, are Released Claims per the terms of the *Love* Settlement Agreement. D.E. No. 928-2 § 13.1(a).

The plaintiffs argue that the allegations in the *Advocare* complaint differ from the allegations in *Love* because they deal primarily with issues of contract interpretation: issues which are specific to individually negotiated agreements between IBC and Advocare. D.E. No. 2120 at 11-12. However, the fact that the *Advocare* complaint contains allegations of a breach of an exclusive agreement between IBC and the plaintiff providers does not remove the latter's claims from the *Love* Settlement Agreement's broad definitions. Courts have held that the determination of whether a claim is a Released Claim under the language of the Settlement Agreement depends not on the cause of action alleged but on the nucleus of operative fact underlying the claim. *See Thomas*, 594 F. 3d 814 at 822 (11th Cir. 2010) (finding plaintiff's claims of tortious interference and defamation released under the *Love* Settlement Agreement regardless of the fact that these claims might "depend on a different

legal theory than the claims asserted in the class action or require [plaintiff] to prove matters in addition to or different from the claims asserted in the class action").

The *Advocare* plaintiffs' contention, that their individualized breach-of-contract claims could not have been adjudicated in the class action and thus cannot be enjoined, has been rejected by this Court in the past. *See* D.E. No. 1973 at 13, adopted by D.E. No. 2006 (enjoining breach of "quasi-contract" claim that concerned defendant's treatment and payment of fee-for-service claim and thus could have been asserted in the class action). Where, as here, the cause of action alleged so clearly relates to matters of underpayment and non-payment of fee-for-service claims, the Court has no choice but to enjoin those claims. *See Thomas*, 594 F.3d at 822 (instructing that the *Love* release "extends to any and all causes of action of whatever kind, source, or character that are related to matters addressed in the class action."). Allowing the *Advocare* claims to go forward would require re-litigating the merits of the alleged improper claims-handling practices, the very issue addressed and settled by the Court's Final Order in *Love*. Having found that the *Advocare* claims are Released Claims, the Court turns briefly to the plaintiffs' additional arguments for why the *Love* Final Order should not bar the New Jersey action.

C. Individually Negotiated Contracts and the *Love* Settlement Agreement

First, the plaintiffs argue that the *Love* Settlement Agreement's definition of Released Claims explicitly exempts claims arising out of individually negotiated contracts. D.E. No. 2120 at 12. The plaintiffs assert that section 7.29(d) of the settlement agreement "provides that 'Individually Negotiated Contracts,' to the extent they establish higher or customized rates, length or term of contract and/or other customized payment methodologies, shall be unaffected by the settlement." *Id.* Section 7, which contains the provision cited by the plaintiffs, establishes several affirmative steps

the *Love* defendants were to take in consideration of the settlement and release. *See* D.E. No. 921-1 at 24-24 ("Settlement Consideration: Business Practice Initiatives"). Mandatory changes to the standard form agreement and other business practices, meant to benefit members of the *Love* class, are outlined throughout section 7.

The provision cited by the plaintiffs does little more than clarify that non-standard form agreements, namely, individually negotiated contracts, were not necessarily nullified or modified by the terms of the Settlement Agreement. *See* D.E. No. 921-2 at § 7.29(d)(ii) ("Except for those terms relating to higher or customized rates, length of term of the contract, and/or other customized payment methodologies or as otherwise permitted under §§ 7.13(b), 7. 13(c), 7.14(a) and 7.29(r), this Agreement shall be deemed to modify or nullify any inconsistent terms of an Individually Negotiated Contract."). It seems that section 7.29(d) simply permits the parties to the Settlement Agreement to continue operating under previously negotiated payment agreements if those agreements differed from the Released Parties' standard form payment structure, which was the subject of the *Love* class action. Presumably, this provision permits Releasing Parties who were operating under more favorable terms to continue to enjoy the benefit of their individually negotiated bargains. However, nowhere in section 7 is it stated that claims arising under these individually negotiated agreements are automatically exempt from the definition of Released Claims, as the *Advocare* plaintiffs suggest.

D. Waiver and Estoppel

The plaintiffs next argue that IBC should be estopped from seeking to enjoin the *Advocare* claims on the basis of the *Love* settlement. The plaintiffs contend that IBC's delay in raising the *Love* litigation release as a defense prejudiced their *Advocare* claims. They accuse IBC of "gamesmanship" and suggest that the delay was intended to prevent the *Advocare* plaintiffs from pursuing a claim

under the dispute resolution procedure set out in the *Love* Settlement Agreement. D.E. No. 2120 at 13. For these reasons, the plaintiffs assert that IBC's affirmative defense based on the *Love* settlement was waived. *Id.*

The pleading of an affirmative defense is mandated by Federal Rule Civil Procedure 8(c) to be presented in a responsive pleading, and a party waives its right to advance an affirmative defense by failing to assert it in such. *American Nat'l Bank of Jacksonville v. FDIC*, 710 F. 2d 1528, 1537 (11th Cir. 1983). However, a party may amend its pleading with the opposing party's written consent or the court's leave. Fed. R. Civ. P. 15(a)(1)(B). In *Advocare*, it is undisputed that the plaintiffs agreed to allow IBC to amend its affirmative defenses to include the *Love* Settlement Agreement's bar. D.E. No. 2120 at 9. Although the parties apparently dispute the precise time at which the defense was first raised, the plaintiffs' suggestion that it was waived is defeated by their own acquiescence.

As for the contention that IBC should be equitably estopped from asserting the defense, the Court finds that the *Advocare* plaintiffs' conduct in the early stages of the New Jersey litigation precludes them from seeking such equitable relief. The *Advocare* plaintiffs admit that, at the time they filed the New Jersey lawsuit, they were under the impression that they had opted out of the *Love* Settlement Agreement and thus were not bound by the litigation release. D.E. No. 2122-1 at 2. It follows then, that at the time it filed its initial answer, IBC had no way of knowing the *Advocare* plaintiffs were a party to the *Love* settlement agreement. Once it came to light that the *Advocare* plaintiffs had not opted out of the class action, IBC raised its affirmative defense in an amended answer, which was filed with the plaintiffs' consent and the New Jersey court's permission. *See* D.E. No. 2119 at 5-6. It is unclear whether the *Advocare* plaintiffs acted in bad faith in representing to IBC that they had opted out of the *Love* settlement, however the Court will not now afford those

plaintiffs equitable relief on the basis of a delay that they themselves caused.

E. Services Rendered after *Love* Settlement's Effective Date

Finally, the plaintiffs argue that the claims raised in *Advocare* stem from services rendered both before and after the *Love* settlement's Effective Date of June 19, 2009. D.E. No. 2120 at 14. They argue that any claims concerning services rendered after the Effective Date cannot be barred by the Court's Final Order. *Id.* This argument is foreclosed by prior rulings on this very issue. Both this Court and the Eleventh Circuit Court of Appeals have consistently rejected the argument that claims involving post-settlement conduct cannot be enjoined by the settlement agreements. *See Klay v. All Defs.*, 309 Fed. Appx. 294, 294-295 (11th Cir. 2009); *Thomas v. Blue Cross and Blue Shield Ass'n*, 594 F.3d 914, 922 (11th Cir. 2010); *see also Thomas v. Blue Cross and Blue Shield Ass'n*, 333 Fed. Appx. 4 l4, 420 (11th Cir. 2009). Here, the plaintiffs do not address IBC's argument that the *Advocare* claims arose from a course of conduct that began prior to the settlement's effective date. Whether or not the services provided by the plaintiffs occurred post-settlement, the claims alleged in *Advocare* all arise from an agreement that the parties agree was executed on January 1, 2007 and amended on March 1, 2007. D.E. No. 2120 at 2. Accordingly, it is

ADJUDGED that IBC's Motion to Enforce Injunction is hereby GRANTED.

DONE AND ORDERED in Chambers at Miami, Florida, this 20 day of June; 2013.

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies provided to:

Counsel of Record

Clerk for the Superior Court of New Jersey, Burlington County, Law Division