

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Glenn R. Kantor, California State Bar No. 122643
KANTOR & KANTOR, LLP
19839 Nordhoff Street
Northridge, California 91324
Telephone: (818) 886-2525
gkantor@kantorlaw.net

Appearing *Pro Hac Vice*
Attorneys for Plaintiff
Rebecca Bartee

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

REBECCA BARTEE,

Plaintiff,

v.

BANNER HEALTH AND AETNA
HEALTH INSURANCE COMPANY,

Defendant.

No.

COMPLAINT

For her claims against Banner Health and Aetna Health Insurance Company (“Aetna”), Plaintiff Rebecca Bartee (“Ms. Bartee” or “Plaintiff”) alleges as follows:

Jurisdiction, Venue And Parties

1. This action arises under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* (“ERISA”).
2. Plaintiff Rebecca Bartee is a resident of Surprise, Arizona in Maricopa County in the State of Arizona.
3. Plaintiff was at all relevant times a participant under the Aetna Preferred Provider Organization (PPO) Medical Plan (“Plan”) (Member ID#: 240535857), a welfare benefit plan regulated by ERISA.

KANTOR & KANTOR LLP
19839 Nordhoff Street
Northridge, California 91324
(818) 886 2525

1 4. Aetna administered benefit claims under the Plan.

2 5. Plaintiff is informed and believes that Aetna, the claims administrator, is a
3 plan fiduciary doing business in the State of Arizona, is authorized to transact and
4 transacts business in the State of Arizona, and can be found in the State of Arizona.

5 6. Defendant can be found in this judicial district and the Plan is administered in
6 this judicial district.

7 7. This Court has jurisdiction over the subject matter of this action under ERISA,
8 29 U.S.C. §§ 1132(a), 1132(e)(1), and 28 U.S.C. §§ 2201-02 (declaratory judgments).

9 8. Venue is proper in this Court under ERISA, 29 U.S.C. § 1132(e)(2) and 28
10 U.S.C. § 1391(b).

11 ***Introduction and Background of Proton Beam Radiation Therapy***

12 9. Proton beam radiation therapy (“PBRT” or “proton therapy”) has been
13 recognized for decades by the medical community as an established, medically
14 appropriate treatment for cancer, including head and neck cancers.

15 10. The first hospital-based proton-beam center in the United States was at the
16 Loma Linda University Medical Center, which began operation in 1990.

17 11. Through local coverage determinations or the guidelines adopted by
18 various Medicare Advantage organizations (MAOs), Medicare generally covers PBRT
19 for high-grade (WHO grade III) anaplastic oligodendroglioma (“high-grade brain
20 glioma”).

21 12. PBRT is the most effective form of radiation therapy for many types of
22 cancer.

23 13. PBRT destroys cancer cells by preventing them from dividing and
24 growing, like conventional X-ray radiation.

25 14. The difference between PBRT and conventional X-ray radiation is that
26 protons deposit much of their radiation directly in the tumor and then stop.

27 15. That allows patients to receive higher doses, which can be more effective,
28 while reducing damage to healthy tissues that surround the tumor.

1 16. The physical properties of protons are different from the physical
2 properties of X-rays.

3 17. Protons are large, positively charged sub-atomic particles that penetrate
4 matter to a finite depth.

5 18. X-rays are electromagnetic radiation that penetrate completely through
6 tissue.

7 19. Protons can be conformed to release much of their energy at precise depths
8 so they can target tumors inside the body, depositing much of their radiation exactly at
9 the tumor site.

10 20. X-rays release their maximum dose of radiation quickly after penetrating
11 the skin, damaging healthy tissue and organs on their way to the tumor and again as they
12 pass through the body beyond the tumor.

13 21. The goal of treatment is to deliver the proper dose of radiation to the tumor
14 while limiting the dose received by the surrounding healthy tissue.

15 22. To deposit the proper amount of energy into the tumor, X-rays must
16 irradiate much of the healthy tissue in front of it, known as an “entrance dose,” and then
17 continue to penetrate through the tumor and irradiate much of the healthy tissue behind
18 it, known as an “exit dose.”

19 23. To deliver the proper dose to a tumor, a radiation oncologist must “work
20 around” the tumor by using multiple X-ray beams, delivering the highest dose where the
21 beams intersect, but delivering low to medium “entrance” and “exit” doses to
22 surrounding healthy tissue. In contrast, protons enter the patient at a low dose, then, at a
23 precise depth, they deliver a large burst of energy. Immediately after this burst, they stop
24 completely. To treat the entire tumor, additional protons are sent in at lower doses. In
25 this way, protons completely irradiate the tumor while limiting the dose to the nearby
26 healthy tissue.
27
28

1 24. Proton treatment delivers a dose in a more accurate way, a more efficient
2 way, and spares more of the surrounding healthy tissue.

3 25. Since protons have a low “entrance dose” and essentially no “exit dose,”
4 the volume of normal tissue receiving radiation with PBRT is typically reduced by a
5 factor of 2-3 when compared to even the most modern X-ray treatment plan.

6 26. Proton therapy is the most effective form of treatment for high-grade brain
7 gliomas because it minimizes the radiation dose to vital bodily organs and functions,
8 such as the gastrointestinal system or urinary tract. Many respected cancer facilities and
9 providers, including but not limited to, MD Anderson at the University of Texas,
10 Harvard Medical School/Massachusetts General Hospital, Northwestern University,
11 Baptist Hospital’s Miami Cancer Institute, Loma Linda University, University of
12 Florida, University of Maryland, Mayo Clinic, Emory University, Case Western Reserve
13 University, Washington University in St. Louis, University of Washington, New York
14 Proton Center, and the Texas Center for Proton Therapy recommend and use PBRT on a
15 regular basis.

16 27. The medical community has found proton beam therapy radiation
17 treatment to be a generally accepted standard of medical practice for the treatment of
18 high-grade brain gliomas.

19 28. Other insurers, including Medicare, cover PBRT as a safe and effective
20 treatment that is not “investigational.”

21 29. There is overwhelming evidence that PBRT is safe and effective.

22 30. PBRT is a generally accepted standard of medical practice for the
23 treatment of cancer, including high-grade brain gliomas, within the medical community.

24 31. PBRT has been around and well-accepted for over 30 years.

25 32. The Food and Drug Administration (“FDA”) approved PBRT in 1988 with
26 the following specific statement of indications for intended use: “The [Proton Therapy
27 System] is a medical device designed to produce and deliver proton beam for the
28

1 treatment of patients with localized tumors and other conditions susceptible to treatment
2 by radiation.”

3 33. The American Society for Radiation Oncology (ASTRO), the National
4 Comprehensive Cancer Network (NCCN), and other nationally-recognized medical
5 organizations have validated the safety and effectiveness of PBRT.

6 34. Numerous peer-reviewed studies have validated the safety and
7 effectiveness of PBRT.

8 35. There is randomized Level I dual-institutional trial evidence to support
9 the use of proton therapy for high-grade brain gliomas.

10 36. This also sets proton therapy apart from conventional X-ray radiation,
11 as historically the radiation oncology field has not performed many randomized
12 trials testing whether or not one technology is better than another.

13 37. Because radiation therapy is based on well understood principles of
14 physics, a randomized trial is not necessary to know whether or not more energy
15 will be deposited into healthy tissue with X-rays than with proton therapy.

16 38. That X-rays will irradiate more surrounding healthy tissue than proton
17 therapy is a scientific fact.

18 39. Instead, the field is interested in whether or not more energy can be
19 delivered to the tumor and less to healthy tissue.

20 40. In contrast, there is no randomized data or prospective data to support
21 the use of X-ray radiation to treat high-grade brain gliomas, the default fallback to
22 which Aetna has forced its subscribers to resort by virtue of its systematic denial of
23 PBRT for the treatment of high-grade brain gliomas.

24 41. The medical community has found PBRT treatment to be both medically
25 necessary and a superior form of treatment than established alternative treatments for the
26 treatment of high-grade brain gliomas.

27 42. Most importantly, Plaintiff’s treating provider, Dr. Sujay Vora of Mayo
28 found PBRT to be the best form of treatment for Plaintiff.

KANTOR & KANTOR LLP
19839 Nordhoff Street
Northridge, California 91324
(818) 886 2525

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.