

Multiple Documents

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**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

LIFENET, INC.

Plaintiff,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN
SERVICES,

U.S. DEPARTMENT OF LABOR,

U.S. DEPARTMENT OF THE TREASURY,

OFFICE OF PERSONNEL MANAGEMENT,

and the

CURRENT HEADS OF THOSE
AGENCIES IN THEIR OFFICIAL
CAPACITIES,

Defendants.

Case No. 6: 22-cv-00162-JDK

PLAINTIFF’S MOTION FOR EXPEDITED SUMMARY JUDGMENT BRIEFING

Plaintiff LifeNet, Inc. (“LifeNet”) respectfully submits this motion for an expedited summary judgment schedule on Plaintiff’s challenge, under the Administrative Procedure Act (APA), to the QPA Presumption contained in the regulations implementing the “No Surprises Act” of 2020, Pub. L. 116-260, div. BB, tit. I (Dec. 27, 2020).

This case presents just one question: Is the QPA Presumption unlawful? This Court has already answered, “yes.” *Texas Medical Association, et al. v. U.S. Dep’t Health & Hum. Serv’cs, et al.*, 21-cv-00425, Dkt. 113, 2022 WL 542879 (Feb. 23, 2022) (the “*TMA Decision*”). Despite *TMA*, the Defendant agencies announced last month—much to Plaintiff’s surprise—that

Defendants will continue to require IDR entities to apply the unlawful QPA Presumption in *air ambulance* IDRs. Complaint ¶ 43 (quoting the “guidance” that Defendants issued on April 12). Defendants have never offered *any* reason why the reasoning of this Court’s *TMA* Decision should not apply in full to air ambulance IDRs. Defendants’ sole textual basis for their position is a regulatory provision that is *word-for-word identical* to one of the five provisions struck down by the *TMA* Decision. *See infra*, at 4 (quoting the relevant provisions).

Plaintiff—an air ambulance provider headquartered in Texarkana, Texas—seeks an order simply and expressly extending the holding of *TMA* to air ambulance IDRs. By this motion, Plaintiff seeks expedited summary judgment briefing.

This Court has broad inherent authority to manage its own docket. *Dietz v. Bouldin*, 579 U.S. 40, 45 (2016); Fed. R. Civ. P. 1. Moreover, a federal statute—28 U.S.C. § 1657(a)—guides District Courts to use this authority to “expedite the consideration” of cases involving a “right under . . . a Federal Statute” such as the APA, for “good cause shown.” “[G]ood cause” for expedited consideration “is shown if a right under a Federal Statute . . . would be maintained in a factual context that indicates that a request for expedited consideration has merit.” *Id.*; *see also* *Zukowski v. Howard, Needles, Tammen, & Bergendoff*, 115 F.R.D. 53, 55 (D. Colo. 1987) (“It is abundantly clear that Congress [in enacting Section 1657(a)] intended to give preference on crowded court dockets to federal questions.”); H.R. REP. 98-985, 4, 1984 U.S.C.C.A.N. 5779, 5782 (House Report on Section 1657(a), quoting with approval the testimony of DOJ representative, who stated that “[l]itigants who can persuasively assert that there is a special public or private interest in expeditious treatment of their case will be able to use the general expedition provision [of Section 1657(a)]”).

An expedited briefing schedule is appropriate for three reasons. *First*, the public interest strongly favors prompt resolution of the single question presented here. *Tens of thousands* of air ambulance transports, in this year alone, are and will be affected by the QPA Presumption.¹ As the three attached declarations from other air ambulance providers attest, among these three providers *alone*, 76 air ambulance IDRs have already begun; another 493 disputes are in the mandatory 30-day “open negotiation” period immediately prior to the initiation of an IDR; and another 4,469 claims are right behind them in the queue. *See* Exs. 1-3.

Absent prompt guidance from this Court, the IDR entities presiding over these arbitrations will be required by Defendants’ recent guidance to apply the unlawful QPA Presumption in these ongoing and forthcoming IDRs. *See* Compl. ¶ 43. That erroneous requirement will (at best) lead to numerous “do overs” of these IDRs, with much confusion in the meantime. At worst, the result could be flawed IDR determinations that cannot be undone.² For similar reasons of public interest, this Court agreed to expedited briefing in the *TMA* case, which Defendants did not oppose. *See TMA*, Dkt. 21 (Plaintiff’s Unopposed Motion for Expedited Summary Judgment Briefing) (“Plaintiffs . . . respectfully move the Court to set an expedited schedule for summary judgment briefing so as to permit a decision by March 1, 2022, when the challenged agency action will begin affecting the results of statutorily required arbitration proceedings . . .”).

Second, prompt resolution of this issue will promote judicial economy. Defendants have noticed an appeal of this Court’s *TMA* Decision to the Fifth Circuit. A prompt decision by this

¹ The Defendants’ own rulemaking indicates that in 2017, there were 33,800 emergency air ambulance transports of patients with commercial health insurance, of which 69% (i.e., 23,322) were flown by “out of network” providers. *Requirements Related to Surprise Billing; Part I*, 86 Fed. Reg. 36,872, at 36,923 (July 13, 2021) (“*IFR Part I*”).

² The No Surprises Act states that “[a] determination of a certified IDR entity . . . shall not be subject to judicial review, except in a case described in [the Federal Arbitration Act, 9 U.S.C. § 10(a)].” 42 U.S.C. § 300gg-111(c)(5)(E)(i)(II).

Court in this action would enable the Fifth Circuit to determine, in the same appeal, whether the QPA Presumption is lawful in *all* IDRs—including air ambulance IDRs—rather than considering this issue in piecemeal separate appeals.

Third, prompt resolution is appropriate because this Court already answered the sole question presented here in the Court’s *TMA* Decision. The regulatory history is exactly the same, and the certified record is already on the Court’s *TMA* docket at ECF No. 66. The sole basis for Defendants’ continued application of the QPA Presumption, in air ambulance IDRs, is the regulation set forth below. That regulatory text should not detain the Court long, since the *TMA* Decision struck down *identical regulatory text* in the neighboring provision of the regulations:

<p>45 C.F.R. § 149.510(c)(4)(iii)(C) (bold language, vacated by the <i>TMA</i> Decision, applies to <i>non-air</i> ambulance IDRs)</p>	<p>45 C.F.R. § 149.520(b)(2) (bold language is <i>still being applied by the Defendants to require the QPA Presumption in air-ambulance IDRs</i>)</p>
<p>Additional information submitted by a party, provided the information is credible and relates to the circumstances described in paragraphs (c)(4)(iii)(C)(1) through (5) of this section, with respect to a qualified IDR item or service of a nonparticipating provider, facility, group health plan, or health insurance issuer of group or individual health insurance coverage that is the subject of a payment determination. This information must also clearly demonstrate that the qualifying payment amount is materially different from the appropriate out-of-network rate.</p>	<p>Additional information. Additional information submitted by a party, provided the information is credible, relates to the circumstances described in paragraphs (b)(2)(i) through (vi) of this section, with respect to a qualified IDR service of a nonparticipating provider of air ambulance services or health insurance issuer of group or individual health insurance coverage that is the subject of a payment determination. This information must also clearly demonstrate that the qualifying payment amount is materially different from the appropriate out-of-network rate.</p>

Counsel for Defendants have indicated to Plaintiff’s counsel that Defendants oppose expedited summary judgment briefing, and intend to move to transfer this case to Judge Leon, on the District Court for the District of Columbia, because Judge Leon is presiding over an APA challenge brought by the trade association of air ambulances, the Association of Air Medical Services (AAMS).

Defendants’ proposal is not an efficient use of judicial resources. Unlike this Court, Judge Leon has not yet issued a decision. Moreover, Judge Leon has indicated at oral argument that he may wait to decide until new versions of the regulations are issued by Defendants at some as-yet-unknown point in the future.³ Transfer is also disfavored because venue is appropriate in this District, since Plaintiff LifeNet has its headquarters in (and thus “resides” in) Texarkana, Texas. *See* 28 U.S.C. § 1391(e). Plaintiff’s “initial choice of forum is entitled to deference,” and the “degree of deference is higher when he has chosen his home forum.” *Rimkus Consulting Grp., Inc. v. Balentine*, 693 F. Supp. 2d 681, 690 (S.D. Tex. 2010) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255–56 (1981)).

For the foregoing reasons, Plaintiff respectfully requests that the Court enter the expedited briefing schedule set forth in the Proposed Order enclosed herewith:

Plaintiff’s motion for summary judgment:	May 16
Defendants’ opposition:	May 23
Plaintiff’s reply:	May 26

Dated: May 11, 2022

BY:

/s/ Stephen Shackelford, Jr.
Stephen Shackelford, Jr. (EDTX Bar No. 24062998)
Steven M. Shepard (*pro hac vice*)
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1301 Ave. of the Americas, Fl. 32
New York, NY 10019
sshackelford@susmangodfrey.com
212-336-8340
Counsel to Plaintiff LifeNet, Inc.

³ *Association of Air Medical Services, et al. v. U.S. Dep’t Health & Hum. Services*, 21-cv-3031 (D.D.C.), ECF 57, Tr. Oral Argument (Mar. 21, 2022), at 36:20-23 (THE COURT: “[W]e’re talking probably, in a case of this complexity and magnitude, somewhere between 40 and 60 pages or 40 and 75 pages. That’s a lot of work, especially if it’s going to all be thrown up in the air . . .”).

CERTIFICATE OF SERVICE

I certify that I caused the foregoing document to be filed on the CM/ECF system on May 11, 2022, which will effect service on call counsel of record.

/s/ Stephen Shackelford, Jr.
Stephen Shackelford, Jr.

EXHIBIT 1

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

LIFENET, INC.

Plaintiff,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN
SERVICES,

U.S. DEPARTMENT OF LABOR,

U.S. DEPARTMENT OF THE TREASURY,

OFFICE OF PERSONNEL MANAGEMENT,

and the

CURRENT HEADS OF THOSE
AGENCIES IN THEIR OFFICIAL
CAPACITIES,

Defendants.

Case No. 6:22-cv-00162-JDK

DECLARATION OF KOREEN MUTHIAH

1. My name is Koreen Muthiah. I am over the age of eighteen. I am employed by Air Methods Corporation. My job title is Vice President of Reimbursement. I have personal knowledge of the matters contained herein.

2. Air Methods Corporation, together with its affiliates and subsidiaries (collectively Air Methods Corporation) provides air ambulance services across the United States.

3. As of the date of this Declaration, Air Methods Corporation has performed approximately 469 emergency air transports for which the right to reimbursement is governed by the No Surprises Act and its implementing regulations. These are services that were provided to

patients with commercial health plans or health insurance policies, for plan or policy years beginning on or after January 1, 2022, for which our company is an out-of-network provider.

4. As of the date of this Declaration, approximately 172 of these emergency air transports have become the subject of an “open negotiation notice” initiating the “open negotiation” period described in the No Surprises Act and its implementing regulations.

5. As of the date of this Declaration, approximately 47 of these emergency air transports have become the subject of an Independent Dispute Resolution (“IDR”) notice, initiating an IDR proceeding.

6. As of the date of this Declaration, none of these emergency air transports have received a final determination from the IDR entity.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on May 11, 2022.

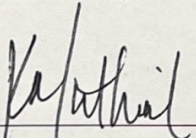
Signature: 
Printed Name: Koreen Muthiah

EXHIBIT 2

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

LIFENET, INC.

Plaintiff,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN
SERVICES,

U.S. DEPARTMENT OF LABOR,

U.S. DEPARTMENT OF THE TREASURY,

OFFICE OF PERSONNEL MANAGEMENT,

and the

CURRENT HEADS OF THOSE
AGENCIES IN THEIR OFFICIAL
CAPACITIES,

Defendants.

Case No. 6:22-cv-00162-JDK

DECLARATION OF PHI Health, LLC

1. My name is David Motzkin. I am over the age of eighteen. I am employed by PHI Health, LLC. My job title is President. I have personal knowledge of the matters contained herein.
2. PHI Health, LLC provides air ambulance services across the United States.
3. As of the date of this Declaration, PHI Health, LLC has performed approximately 800 emergency air transports for which the right to reimbursement is governed by the No Surprises Act and its implementing regulations. These are services that were provided to patients with commercial health plans or health insurance policies, for plan or policy years beginning on or after January 1, 2022, for which our company is an out-of-network provider.

4. As of the date of this Declaration, approximately 81 of these emergency air transports have become the subject of an “open negotiation notice” initiating the “open negotiation” period described in the No Surprises Act and its implementing regulations.

5. As of the date of this Declaration, approximately two of these emergency air transports have become the subject of an Independent Dispute Resolution (“IDR”) notice, initiating an IDR proceeding.

6. As of the date of this Declaration, approximately zero of these emergency air transports have received a final determination from the IDR entity.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on May 09, 2022.

Signature:



Printed Name:

DAVID MOTZKIN

EXHIBIT 3

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

LIFENET, INC.

Plaintiff,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN
SERVICES,

U.S. DEPARTMENT OF LABOR,

U.S. DEPARTMENT OF THE TREASURY,

OFFICE OF PERSONNEL MANAGEMENT,

and the

CURRENT HEADS OF THOSE
AGENCIES IN THEIR OFFICIAL
CAPACITIES,

Defendants.

Case No. 6:22-cv-00162-JDK

DECLARATION OF GLOBAL MEDICAL RESPONSE, INC.

1. My name is Sarah Netherton. I am over the age of eighteen. I am employed by Global Medical Response, Inc. ("GMR"). My job title is Director, Revenue Cycle Strategic Initiatives. I have personal knowledge of the matters contained herein.

2. GMR provides air ambulance services across the United States.

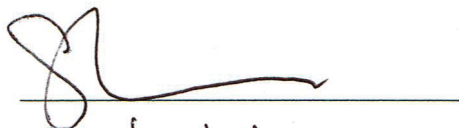
3. As of the date of this Declaration, GMR has performed approximately 3,200 emergency air transports for which the right to reimbursement is governed by the No Surprises Act and its implementing regulations. These are services that were provided to patients with commercial health plans or health insurance policies, for plan or policy years beginning on or after January 1, 2022, for which our company is an out-of-network provider.

4. As of the date of this Declaration, approximately 240 of these emergency air transports have become the subject of an “open negotiation notice” initiating the “open negotiation” period described in the No Surprises Act and its implementing regulations.

5. As of the date of this Declaration, approximately 27 of these emergency air transports have become the subject of an Independent Dispute Resolution (“IDR”) notice, initiating an IDR proceeding.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on 5/10/22. (date).

Signature:

A handwritten signature in black ink, appearing to read 'SN', written over a horizontal line.

Printed Name:

Sarah Netherton

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

LIFENET, INC.

Plaintiff,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN
SERVICES,

U.S. DEPARTMENT OF LABOR,

U.S. DEPARTMENT OF THE TREASURY,

OFFICE OF PERSONNEL MANAGEMENT,

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CURRENT HEADS OF THOSE
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CAPACITIES,

Defendants.

Case No. 6: 22-cv-00162-JDK

**[PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION FOR EXPEDITED
SUMMARY JUDGMENT BRIEFING**

The Court, for good cause shown upon the motion of Plaintiff for expedited summary judgment briefing and the arguments contained therein, GRANTS the motion. Summary judgment briefs shall be due on the following schedule:

Plaintiff's motion for summary judgment: May 16

Defendants' opposition: May 23

Plaintiff's reply: May 26

IT IS SO ORDERED.

U.S. District Judge

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

LIFENET, INC.

Plaintiff,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN
SERVICES,

U.S. DEPARTMENT OF LABOR,

U.S. DEPARTMENT OF THE TREASURY,

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Case No. 6: 22-cv-00162-JDK

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