IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

LIFENET, INC., Plaintiff, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*, Defendants.	Civil Action No. 6:22-cv-00162-JDK

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR JURISDICTIONAL DISCOVERY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

INTRODUCTION

The Departments are completing a final rule under the No Surprises Act that will address this Court's decision in *Texas Medical Association*. This final rule will describe the standards for the arbitration of payment disputes under the Act involving out-of-network services performed by each of the categories of health service providers that are subject to the Act, including air ambulance service providers. The Departments anticipate that this rule will be completed in the coming weeks.

In the meantime, Plaintiff has offered no good reason for this Court to rush to address the current version of the arbitration rule for air ambulance service providers. Indeed, it has offered no reason to believe that it is injured by that rule at all. It has shifted its theory of its injury several times already, and now apparently rests on a supposition that it might face difficulty gaining financing in the future as a result of the rule. It has offered no evidence in support of this new theory, which in any event is highly speculative. It therefore has failed to meet its burden to prove its standing. At the very least, the Departments should be permitted to conduct jurisdictional discovery to test this new theory. Plaintiff's claims also fail on the merits: the arbitration rule for out-of-network air ambulance service providers is fully consistent with the No Surprises Act; that rule did not require notice-and-comment rulemaking; and, as a matter of law, later-arising events could not render the rule to be arbitrary and capricious. Finally, at all events, the Fifth Circuit's recent decision in *Louisiana v. Becerra* requires that any relief awarded in this action must run in favor of Plaintiff alone, not in favor of parties that are absent here; Plaintiff has forfeited any argument to the contrary.

ARGUMENT

I. PLAINTIFF HAS NOT SHOWN THAT IT HAS STANDING TO CHALLENGE THE RULE'S ARBITRATION PROCEDURES.

A. Plaintiff Has Not Met Its Burden to Prove Its Standing.

Plaintiff's theory of its standing has shifted several times over the short life of this litigation. In its Complaint, Plaintiff alleged that the arbitration rule caused it "economic injury," in that its "right to compensation from the plan or insurer" would be "governed" by arbitrations under the No Surprises Act, and that compensation would be reduced under the rule. Compl. ¶ 46, ECF No. 1.

Publicly available information casts doubt on that allegation, however. As the Departments explained in their initial filings in this case, the information that was available to them indicated that Plaintiff is paid a flat fee for its air ambulance services by Air Methods Corporation, and that therefore Plaintiff does not have an economic stake in the outcome of No Surprises Act arbitrations. *See* Defs.' Mot to Transfer at 7-8, ECF No. 22; Defs.' Opp'n to Mot. for Expedited S.J. Briefing at 3-4, ECF No. 23.[1]

Plaintiff then acknowledged that Air Methods contractually "owes the agreed amount to LifeNet, for a given transport, even if Air Methods is unsuccessful at collecting reimbursement for that transport from other payors." Pl.'s Mot. for S.J. at 11, ECF No. 27. In other words, Plaintiff's right to compensation for its air ambulance services is *not* governed by arbitrations under the Act. It accordingly did not defend the theory of standing it had advanced in its Complaint. It asserted instead that "there is a significant risk that [the Air Methods-LifeNet] contract will be terminated (and the payments to LifeNet reduced or ceased entirely) if" the rule caused "the agreed-upon contractual amounts to be financially unviable." *Id.* at 20 (internal quotations omitted). The Departments explained that this allegation is implausible for several reasons. In particular, the contract requires 180 days' notice before a party may terminate it on the basis of a "financially unviable situation" that is beyond the parties' "reasonable expectations," and it is unlikely that Air Methods would exercise this option in response to a rule that will be superseded in the coming weeks. *See* Defs.' Cross-Mot. for S.J. or, in the Alternative, for Jurisdictional Discovery at 16, ECF No. 31. Defendants also explained that, as a matter of law, Plaintiff could not meet its burden of proof by relying on speculation as to the "significant risk" that a third party might act in a given way in response to the current rule. *See id.* (citing, *e.g.*, *Inclusive Communities Project, Inc. v. Dep't of Treasury*, 946 F.3d 649, 655-56 (5th Cir. 2019)).

Plaintiff now shifts gears yet again. It apparently no longer claims standing on the basis of the contractual termination provision. *See* Pl.'s Reply in Supp. of Its Mot. for S.J. ("Pl.'s Reply") at 7, ECF

[1] In contrast, Air Methods does have an economic interest in the outcome of these arbitrations. It accordingly is participating in litigation brought by its trade association, the Association of Air Medical Services, to challenge the arbitration rule in the District of Columbia. Given the overlap between this case and the association's action, and the potential for inconsistent judgments in the two actions, the Departments have moved to transfer this case to the District of Columbia under the "first-to-file" rule. Defs.' Mot. to Transfer, ECF No. 22. That motion is ripe for this Court's decision.

No. 32 ("that contract is not necessary to show that LifeNet has suffered the injury described above"); Pl.'s Mot. to Seal at 3, ECF No. 33 ("LifeNet's motion for summary judgment does *not* depend on the Contract") (emphasis in original).[2] Instead, it asserts a new theory of injury: if arbitrations conducted under the current version of the rule result in lower valuations for Plaintiff's services, it reasons, those valuations will make it more difficult for it to obtain financing in the future. Pl.'s Reply at 4.

Plaintiff fares no better in its third bite at the apple than it did in its first two. As an initial matter, Plaintiff has waived this argument by raising it for the first time in its reply brief. *See Dugger v. Stephen F. Austin State Univ.*, 232 F. Supp. 3d 938, 957 (E.D. Tex. 2017); *see also Abraugh v. Altimus*, 26 F.4th 298, 305 (5th Cir. 2022) ("arguments in favor of Article III standing, like all arguments in favor of jurisdiction, can be forfeited or waived"). In any event, Plaintiff has provided no evidence whatsoever in support of this new theory. It relies solely on its counsel's statements in its reply brief, and even those statements are phrased conditionally. *See* Pl.'s Reply at 4 ("This question [of LifeNet's valuation] will be asked *if* LifeNet seeks to borrow money or makes capital investments.") (emphasis added). On summary judgment, however, Plaintiff "must have adduced evidence to support controverted factual allegations" in support of its standing. *El Paso Cnty. v. Trump*, 982 F.3d 332, 338 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 2885 (2021). It has failed to do so.

Moreover, this recast allegation is just as implausible as its prior theory was. The price for Plaintiff's services is set now by its fixed-fee contract with Air Methods. And the version of the arbitration regulation that Plaintiff challenges here will soon be replaced by a new rule. If Plaintiff seeks to borrow money or make investments in the future, its counterparties will presumably be interested in the valuation of Plaintiff's services going forward; but the current rule would play no role in that determination. And it is doubtful that even the current version of the rule would have the effect that Plaintiff claims. The market for air ambulance services operates somewhat differently than the market for other medical services does. The vast majority of air ambulance services are performed

[2] Plaintiff does make a passing reference to the possibility that its contract would be terminated. Pl.'s Reply at 3. To the extent Plaintiff intends to continue to rely on this theory of standing, it has still failed to meet its burden of proof. Plaintiff has entirely failed to respond to any of the Departments' arguments rebutting the factual and legal basis for this theory.

out of network, and this has caused plans and issuers to bid their offers up during negotiations with air ambulance service operators over in-network rates. *See* Erin C. Fuse Brown et al., *The Unfinished Business of Air Ambulance Bills*, HEALTH AFFAIRS FOREFRONT (Mar. 26, 2021) (AR 2844-2845). As a result, these in-network prices—and, therefore, qualifying payment amounts—are inflated far above what the fair price would be in a functional market. *See id.* Plaintiff therefore can only offer speculation that arbitrations under the No Surprises Act will depress the value of its services.

Plaintiff cites *Clinton v. City of New York*, 524 U.S. 417 (1998), for the proposition that it may show its standing by asserting that it might incur a financial loss in the future. That case did not so hold. In that case, Congress had enacted a provision to forgive a debt held by a public hospital, and the President exercised a line-item veto to reinstate the debt. The hospital had standing to challenge the veto, despite the possibility that the debt might later be forgiven through a waiver from HHS. *See id.* at 431. As the Fifth Circuit later explained, the hospital's injury "occurred when the President canceled the provision, depriving it of immediate relief from liability. The fact that [the hospital's] liability might later have been relieved by this waiver did not affect the Court's conclusion that the cancellation caused [the hospital] to lose a benefit which it already had in hand." *Comcast Corp. v. FCC*, 250 F.3d 931, 936 (5th Cir. 2001). The hospital, in other words, had already suffered a concrete loss from the line-item veto; the Court did not hold that litigants are excused from the ordinary burden of proof when they instead allege a threat of a future injury. *See id.* In cases where plaintiffs rely on such an allegation, "[a] threatened injury must be certainly impending to constitute an injury in fact." *Id.* (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). "Allegations of possible future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Plaintiff here relies solely on its speculative allegations of a possible future injury, and thus has failed to prove its standing.

B. At a Minimum, the Court Should Grant the Departments Leave to Pursue Targeted Jurisdictional Discovery.

At the very least, given that Plaintiff has already revised its theory of standing twice, the Departments should be afforded a period of targeted jurisdictional discovery before this Court rules on the cross-motions for summary judgment. *See Bailey v. KS Mgmt. Servs., L.L.C.*, No. 21-20335, ---

F.4th ---, 2022 WL 1672850, at *2 (5th Cir. May 26, 2022). Further evidence would need to be developed before Plaintiff could be held to have met its burden to prove its standing, either under any of its original theories or under the new theory that it has advanced in its reply brief. Plaintiff opposes jurisdictional discovery on three grounds, none of which has merit.

First, Plaintiff contends that leave should be denied because the Departments did not submit a declaration in support of their request. This is flatly incorrect. The Departments *did* submit a declaration which detailed the topics of discovery that they intended to pursue and the relevance of those topics to the question of Plaintiff's standing. *See* McElvain Decl., ECF No. 31-1.

Second, Plaintiff disputes whether discovery would adduce facts that could be relevant to its standing. It is evident, however, that further evidence would be of assistance in evaluating Plaintiff's claimed injuries. Evidence of the course of dealings between Plaintiff and Air Methods would assist in determining the likelihood that the latter entity would exercise an option to terminate the contract (to the extent that Plaintiff still intends to rely on this theory of standing). As to Plaintiff's new theory of standing, additional discovery would likely uncover evidence as to the existence (or absence) of any efforts by Plaintiff to obtain financing or to make capital investments, and whether the current version of the arbitration rule has affected those efforts in any way. In the meantime, however, Plaintiff has offered only its own unadorned speculation that the rule has such an effect; this is plainly insufficient on summary judgment absent further factual development. *See Bailey*, 2022 WL 1672850, at *2.

Third, Plaintiff argues that the Departments have not diligently pursued discovery. But the Complaint in this action was filed only seven weeks ago. Moreover, this is an Administrative Procedure Act action on the administrative record. The Departments thus could not pursue discovery without first obtaining leave of court. *See* Fed. R. Civ. P. 26(a)(1)(B)(i); *see Camp v. Pitts*, 411 U.S. 138, 142 (1973) (APA review is limited to the administrative record); *see also Bailey*, 2022 WL 1672850, at *5 ("In other cases where we've found a lack of diligence, it was because the movant failed to conduct discovery during a period in which it was permitted to do so."). The Departments promptly sought leave to pursue jurisdictional discovery in response to the Plaintiff's summary judgment motion. They hardly could be faulted for not seeking leave earlier, given that they did not know Plaintiff's theory of

standing until it moved for summary judgment (and, indeed, Plaintiff's standing theory has proven to continue to be a moving target). Nonetheless, the Departments have shared draft discovery requests with the Plaintiff, in an effort to ensure that jurisdictional discovery could proceed promptly and efficiently if this Court grants the Departments leave to proceed. *See* Exh. 1.

II. THE RULE'S ARBITRATION PROCEDURES ARE CONSISTENT WITH THE NO SURPRISES ACT.

The Departments explained in their opening brief that their current rule governing arbitration proceedings for payment disputes involving out-of-network air ambulance services, 45 C.F.R. § 149.520(b), is fully consistent with the No Surprises Act. For example, although Plaintiff faulted the Departments for purportedly violating a statutory command that the arbitrator consider each of the factors in every case, the rule requires just that. *See* 45 C.F.R. § 149.520(b)(2); *see also id.* §§ 149.510(c)(4)(ii)(A) (instructing the arbitrator to "tak[e] into account" each of the statutory considerations); 149.520(b)(1) (incorporating this portion of § 149.510).

Plaintiff does not offer any new argument to challenge the statutory basis for the Departments' rule. It instead relies on this Court's decision in *Texas Medical Association v. U.S. Department of Health and Human Services*, No. 6:21-CV-425-JDK, 2022 WL 542879 (E.D. Tex. Feb. 23, 2022), *appeal docketed*, No. 22-40264 (5th Cir. Apr. 26, 2022). The Departments acknowledge that this Court reached a contrary conclusion with respect to the challenged portions of § 149.510 in *Texas Medical Association*, and respectfully note their disagreement with that conclusion for the reasons previously stated.

III. THE DEPARTMENTS WERE NOT REQUIRED TO ISSUE THE RULE THROUGH NOTICE-AND-COMMENT RULEMAKING.

The Departments issued the arbitration rule for out-of-network air ambulance services in an interim final rule. Plaintiff has argued that the Departments committed a procedural error by issuing the rule without first going through a period of notice and comment. This argument fails for three independent reasons.

1. The Departments have statutory authority to "promulgate any interim final rules as the Secretary determines are appropriate to carry out [the relevant] subchapter" of the statutes at issue.

42 U.S.C. § 300gg-92; *see also* 26 U.S.C. § 9833; 29 U.S.C. § 1191c. This statutory authorization to issue interim final rules as the Departments "determine[] are appropriate" creates a standard that "affords [the] agencies broad policy discretion." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2448-49 (2019) (Kavanaugh, J., concurring). This is a standard that departs from the ordinary APA standard of good cause, and the Departments appropriately exercised that broad discretion to issue interim final rules here. The Departments, of course, recognize that this Court reached a contrary conclusion in *Texas Medical Association*, and respectfully disagree with that conclusion for the reasons stated in their opening brief.

2. In any event, the Departments had good cause to issue the interim final rule. The major provisions of the No Surprises Act went into effect on January 1, 2022, and the Departments were obligated to issue a rule to establish the process for the arbitration of payment disputes under the Act well in advance of that date to permit providers, insurers, and arbitrators adequate time to prepare. The Departments could not have done so through notice-and-comment rulemaking, given that it generally takes federal agencies more than a year to complete that process even for routine rules. *See* Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 N.W. L. REV. 471, 513-19 (2011). Moreover, the Departments are proceeding promptly to complete a final rule, and they anticipate that a final rule will be issued in the coming weeks. These circumstances constitute good cause to issue an interim final rule. *See Coalition for Parity, Inc. v. Sebelius*, 709 F. Supp. 2d 10, 20 (D.D.C. 2010). The Departments, again, recognize that this Court has reached a contrary conclusion, and respectfully state their disagreement with that conclusion.

3. In any event, any procedural error was harmless. Unlike the plaintiffs in *Texas Medical Association*, Plaintiff never submitted a comment in response to the interim final rule when it had the opportunity to do so. This is fatal to Plaintiff's challenge, because it bears the burden to prove that it suffered prejudice from the alleged error. *See City of Arlington v. FCC*, 668 F.3d 229, 243 (5th Cir. 2012), *aff'd*, 569 U.S. 290 (2013). It cannot meet this burden; its lack of interest in the post-issuance comment period indicates that it wouldn't have bothered to submit a comment before the interim final rule was issued, either. *See Am. Bankers Ass'n v. NCUA*, 38 F. Supp. 2d 114, 140 (D.D.C. 1999).

In any event, the Association of Air Medical Services was in contact with the Departments regularly in advance of the issuance of the interim final rule, and the Departments considered the association's views in formulating the rule. This likewise defeats Plaintiff's claim that it suffered any prejudice. *See United States v. Johnson*, 632 F.3d 912, 932 (5th Cir. 2011). Plaintiff contends that the association did not present any views as to how arbitrators should treat the qualifying payment amount in payment disputes involving air ambulance services. This is plainly incorrect; the association specifically presented its recommendations to the Departments on this issue. *See* AR 4999-5000, 5783.

IV. THE RULE IS NOT ARBITRARY AND CAPRICIOUS.

A court evaluates whether an agency rule is arbitrary and capricious "solely on the basis of the agency's stated rationale at the time of its decision." *Luminant Generation Co. v. EPA*, 675 F.3d 917, 925 (5th Cir. 2012). Plaintiff does not contend that the arbitration rule was arbitrary and capricious at the time that it was issued. Instead, it asserts that subsequent events—namely, this Court's vacatur of portions of 45 C.F.R. § 149.510 in *Texas Medical Association*—have rendered analogous portions of 45 C.F.R. § 149.520 to be arbitrary. Plaintiff misunderstands the nature of APA review of a rulemaking. Later arising events do not undermine the "agency's stated rationale at the time of its decision." *Lumianat Generation Co.*, 675 F.3d at 925. Instead, if a party believes that changed circumstances warrant a different rule, its remedy is to petition the agency for a new rulemaking. *See Auer v. Robbins*, 519 U.S. 452, 459 (1997); *see also Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016). The Departments are already engaged in that rulemaking process, and they anticipate that a final rule will be issued in the coming weeks that addresses the standards for arbitrations for payment disputes involving all providers, including air ambulance service providers.

Plaintiff contends that it is not challenging the interim final rule directly, but instead is challenging the Departments' decision to issue guidance in April 2022, after this Court's decision in *Texas Medical Association*.[3] It asserts that the Departments should have revoked the challenged portions

[3] That guidance document "does not have the force and effect of law" or "bind the public in any way." ECF No. 27-1 at 1. Instead, it only advises the public as to how the interim final rule operates until that rule is replaced by a final rule. It accordingly is not a reviewable final agency action. *See Texas v. Rettig*, 987 F.3d 518, 530 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 1308 (2022).

of 45 C.F.R. § 149.520 when they issued that guidance. Pl.'s Reply at 18. The Departments could not have used guidance to accomplish that result; a guidance document may not override a published regulation. *See Kisor v. Wilkie*, 139 S. Ct. at 2415 (an agency may not use subregulatory guidance "under the guise of interpreting a regulation, to create *de facto* a new regulation"). The method to revise a regulation is instead to proceed with a new rulemaking. Again, the Departments are already engaged in that process, and that process is nearing its completion.

V. ANY RELIEF SHOULD BE APPROPRIATELY LIMITED.

In their opening brief, the Departments made two points with respect to the scope of any relief that could be awarded to the Plaintiff. First, given that other litigation is pending challenging the same rule, this Court should follow the "[p]rinciples of judicial restraint" identified in *Louisiana v. Becerra*, 20 F.4th 260, 263 (5th Cir. 2021), to avoid interference with other courts' consideration of the same challenge. This principle dictates that this Court should fashion relief with respect only to the plaintiff before it, rather than industry-wide or nationwide relief. Second, even in fashioning relief that is specific to Plaintiff, the appropriate remedy would be a remand without vacatur.

Plaintiff ignores *Louisiana v. Becerra* entirely in its reply brief. It thus has forfeited any argument for relief that would run in favor of parties that are not before the Court. *See Ortiz v. Am. Airlines, Inc.*, 5 F.4th 622, 628 (5th Cir. 2021) (argument not raised on summary judgment is forfeited); *Stults v. Conoco, Inc.*, 76 F.3d 651, 657 (5th Cir. 1996) (same). In any event, recent Fifth Circuit precedent is controlling here. "The question posed is whether one district court should make a binding judgment for the entire country." *Louisiana v. Becerra*, 20 F.4th at 263. The answer to that question is ordinarily that relief should be "limited to the parties at hand" to allow for "the airing of competing views" in other courts. *Id.* at 264 (quoting *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring)); *see also Arizona v. Biden*, 31 F.4th 469, 483 (6th Cir. 2022) (Sutton, J., concurring). Plaintiff has offered no explanation as to why any broader remedy would be necessary to remedy its alleged injuries. This Court should therefore tailor its remedy to address Plaintiff's claims alone.

And even with respect to Plaintiff's claims, the appropriate remedy would be remand without vacatur. "Only in 'rare circumstances' is remand for agency reconsideration not the appropriate

solution." *Tex. Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n*, 989 F.3d 368, 389 (5th Cir. 2021), 989 F.3d at 389 (quoting *O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 238-39 (5th Cir. 2007)). "Remand, not vacatur, is generally appropriate when there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so." *Id.* (citing *Cent. & S. W. Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000)).

The Departments have already taken comment on the interim final rule and are preparing a final rule that will address the standards for No Surprises Act arbitrations. The Departments anticipate that this final rule will be issued in the coming weeks. The issuance of this final rule would fully remedy the Plaintiff's claimed procedural violations. *See Tex. Ass'n of Mfrs.*, 989 F.3d at 390 (remanding without vacatur to allow agency to take comment to cure a notice-and-comment violation). No useful purpose would be served by a vacatur in the meantime, given that the challenged rule will soon be supplanted. After this Court's order of vacatur in *Texas Medical Association*, the Departments were required to delay the opening of the portal for independent dispute resolution requests for several weeks, until they were able to formulate guidance to implement this Court's ruling. *See* CMS, *Memorandum Regarding Continuing Surprise Billing Protections for Consumers* (Feb. 28, 2022), https://perma.cc/T6Y2-2UUM. An order of vacatur here (particularly if it is applied to providers other than Plaintiff) would similarly upend ongoing arbitrations, creating confusion in midstream both for air ambulance providers and for plans and issuers. In contrast, the Departments' forthcoming rulemaking will permit a smoother transition to a new rule and will avoid disrupting currently pending arbitration proceedings. Principles of equity thus counsel against vacatur under these circumstances. *See Cent. & S. W. Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000).

CONCLUSION

For the foregoing reasons, the Defendants' motion for summary judgment should be granted, and the Plaintiff's motion for summary judgment should be denied. In the alternative, this Court should defer consideration of the summary judgment motions to allow for a limited period of jurisdictional discovery.

Dated: June 14, 2022

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

BRIT FEATHERSTON
United States Attorney

JAMES GILLINGHAM
Assistant U.S. Attorney
Eastern District of Texas
110 N. College Street; Suite 700
Tyler, Texas 75702
E-mail: James.Gillingham@usdoj.gov
Phone: (903) 590-1400
Fax: (903) 590-1436
Texas State Bar # 24065295

SEAN C. DAY
Special Assistant United States Attorney
Eastern District of Texas
101 E. Park Blvd., Suite 500
Plano, Texas 75074
Phone: (202) 934-4060
Fax: (972) 590-1209
D.C. Bar No. 502363

ERIC B. BECKENHAUER
Assistant Branch Director

/s/ Joel McElvain
JOEL McELVAIN
Senior Trial Counsel
D.C. Bar No. 448431
ANNA DEFFEBACH
Trial Attorney
D.C. Bar No. 241346
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
Phone: (202) 616-8278
Fax: (202) 616-8470
E-mail: joel.l.mcelvain@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify on this 14th day of June, 2022, a true and correct copy of this document was served electronically by the Court's CM/ECF system to all counsel of record.

/s/ Joel McElvain
JOEL McELVAIN

Exhibit 1

U.S. Department of Justice

Civil Division
Federal Programs Branch
1100 L Street, NW
Washington, DC 20530

Joel McElvain
Senior Trial Counsel

Telephone: (202) 616-8298
Fax: (202) 616-8202
Email: Joel.L.McElvain@usdoj.gov

June 14, 2022

Via Electronic Mail

Steven M. Shepard
Susman Godfrey LLP
1301 Ave. of the Americas, Floor 32
New York, NY 10019

Re: *LifeNet, Inc. v. U.S. Dep't of Health and Human Servs., et al.*
(E.D. Tex. No. 6:22-cv-00162-JDK)

Dear Mr. Shepard:

Please find enclosed a draft of a set of interrogatories, as well as a draft of a set of requests for the production of documents, that the Defendants intend to serve on the Plaintiff in the above-referenced action if they are granted leave to conduct jurisdictional discovery. We are sharing these drafts with you in advance of an order granting such leave, so as to facilitate your client's prompt response to these requests once they are formally served.

Sincerely yours,

Joel McElvain
Joel McElvain

Encl.

cc: Stephen Shackelford, Jr.
Max I. Strauss
J. Craig Smyser

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

LIFENET, INC., Plaintiff, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*, Defendants.	Civil Action No. 22-cv-00162-JDK

DEFENDANTS' INTERROGATORIES [*DRAFT*]

Pursuant to Rules 56(d) and 33 of the Federal Rules of Civil Procedure, Defendants hereby request Plaintiff to respond in writing to the following interrogatories within 30 days from the date of service hereof.

DEFINITIONS

1. Unless otherwise specified, the term "Plaintiff" means LifeNet, Inc., including any subsidiaries or entities thereof; "Air Methods" means Air Methods Corporation; and "Defendants" refers to the United States Department of Health and Human Services, the United States Department of Labor, the United States Department of the Treasury, the Internal Revenue Service, and the Office of Personnel Management.

2. Unless otherwise specified, the term "identify" means, when referring to a person, to give, to the extent known, the person's full name, the present or last known place of employment, and job title or position. Once a person has been identified in accordance with this subparagraph, only

the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

3. Unless otherwise specified, the term "identify" means, when referring to documents, to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s), and recipient(s). In the alternative, the responding party may produce the documents, together with identifying information sufficient to satisfy Fed. R. Civ. P. 33(d).

4. Unless otherwise specified, the terms "refer," "relate," and "respecting" mean constituting, reflecting, relating to, concerning, referring to, stating, describing, recording, noting, embodying, containing, mentioning, studying, analyzing, discussing, or evaluating.

5. Unless otherwise specified, the terms "concern" and "concerning" means relating to, referring to, discussing, mentioning, responding to, identifying, containing, alluding to, commenting upon, disclosing, explaining, analyzing, comprising, describing, supporting, evidencing, contradicting, or constituting.

6. The terms "you" and "yours" mean the Plaintiff.

7. The use of any tense of any verb shall be considered to also include within its meaning all of the tenses of the verb so used.

8. The connectors "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

9. The terms "all," "any," and "each" shall each be construed as "all and any and each."

10. The use of the singular form of any word includes the plural and vice versa.

INSTRUCTIONS

1. These Interrogatories are directed to you as the Plaintiff and the answers are to be completed to the best of your knowledge, by the person with the most knowledge, and based on the best knowledge of your counsel, agents, servants, investigators, employees, predecessors, representatives, and any other person acting or purporting to act on your behalf.

2. Each Interrogatory shall be answered separately and fully in writing by Plaintiff, under oath, unless it is objected to, in which event the objecting party shall specifically state the grounds for the objection, including, but not limited to, any privilege or other immunity upon which you are relying, and shall answer to the extent the Interrogatory is not objectionable.

3. If the answer to all or any part of the Interrogatory is not presently known, or available, include a statement to that effect, furnish the information known or available, specify the nature and extent of your inability to answer the remainder, and respond to the entire Interrogatory by supplemental answer, in writing, under oath. Please also state whatever information you have concerning the unanswered portions and identify the person(s) who swears to the truth of that information.

4. For each Interrogatory, please identify the person(s) from whom the information contained in the answer was obtained and the person(s) who swears to the truth of that information.

5. Unless otherwise specified, the relevant time period covered by the document requests is December 27, 2020 (the date that the No Surprises Act became law), through the date of the responses to these interrogatories.

INTERROGATORIES

INTERROGATORY NO. 1:

Identify all attempts to obtain financing by or for LifeNet since December 27, 2020.

INTERROGATORY NO. 2:

Identify all communications with outside entities to discuss the valuation of LifeNet since December 27, 2020.

INTERROGATORY NO. 3:

Identify whether the valuation of LifeNet has changed as a result of the interim final rule that LifeNet challenges in the instant action, and whether any valuations based in whole or in part on the interim final rule have taken into account that a final rule will supersede the interim final rule.

INTERROGATORY NO. 4:

Identify all amounts that LifeNet has recovered for out-of-network emergency air ambulance services performed since December 27, 2020, and identify (a) whether those amounts were recovered from a patient or from a group health plan or health insurance issuer; (b) whether those amounts were determined through the open negotiation process established by the No Surprises Act; and (c) whether those amounts were determined by a certified IDR entity under the arbitration procedures established by the No Surprises Act.

INTERROGATORY NO. 5:

Identify all persons having knowledge of any discussions with Air Methods pertaining to the possibility of the termination of the contract between Air Methods and LifeNet, and identify whether and when those discussions of terminating the contract between Air Methods and LifeNet occurred.

Dated: June __, 2022

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

BRIT FEATHERSTON
United States Attorney

JAMES GILLINGHAM
Assistant U.S. Attorney
Eastern District of Texas
110 N. College Street; Suite 700
Tyler, Texas 75702
E-mail: James.Gillingham@usdoj.gov
Phone: (903) 590-1400
Fax: (903) 590-1436
Texas State Bar # 24065295

SEAN C. DAY
Special Assistant United States Attorney
Eastern District of Texas
101 E. Park Blvd., Suite 500
Plano, Texas 75074
Phone: (202) 934-4060
Fax: (972) 590-1209
D.C. Bar No. 502363

ERIC B. BECKENHAUER
Assistant Branch Director

/s/ Joel McElvain
JOEL McELVAIN
Senior Trial Counsel
D.C. Bar No. 448431
ANNA DEFFEBACH
Trial Attorney
D.C. Bar No. 241346
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
Phone: (202) 305-8356
Fax: (202) 616-8470
E-mail: joel.l.mcelvain@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify on this __ day of June, 2022, a true and correct copy of this document was served electronically by the Court's CM/ECF system to all counsel of record.

/s/ Joel McElvain
JOEL MCELVAIN

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

LIFENET, INC., Plaintiff, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*, Defendants.	Civil Action No. 22-cv-00162-JDK

DEFENDANTS' REQUESTS FOR THE PRODUCTION OF DOCUMENTS
[*DRAFT*]

Pursuant to Rules 56(d) and 34 of the Federal Rules of Civil Procedure, Defendants hereby request Plaintiff to produce the following documents within 30 days from the date of service hereof at the offices of the Department of Justice, Civil Division, Federal Programs Branch, 1100 L Street, NW, Washington, DC 20005.

DEFINITIONS

1. Unless otherwise specified, the term "Plaintiff" means LifeNet, Inc., including any subsidiaries or entities thereof; "Air Methods" means Air Methods Corporation; and "Defendants" refers to the United States Department of Health and Human Services, the United States Department of Labor, the United States Department of the Treasury, the Internal Revenue Service, and the Office of Personnel Management.

2. Unless otherwise specified, the term "document" means in scope and in usage "documents or electronically stored information" in Fed. R. Civ. P. 34(a)(1)(A) and includes, but is not limited

to, notes, memoranda, email, and correspondence. A draft or non-identical copy is a separate document within the meaning of this term.

3. Unless otherwise specified, the terms "refer," "relate," and "respecting" mean constituting, reflecting, relating to, concerning, referring to, stating, describing, recording, noting, embodying, containing, mentioning, studying, analyzing, discussing, or evaluating.

4. Unless otherwise specified, the terms "concern" and "concerning" means relating to, referring to, discussing, mentioning, responding to, identifying, containing, alluding to, commenting upon, disclosing, explaining, analyzing, comprising, describing, supporting, evidencing, contradicting, or constituting.

5. The terms "you" and "yours" mean the Plaintiff.

6. The use of any tense of any verb shall be considered to also include within its meaning all of the tenses of the verb so used.

7. The connectors "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

8. The terms "all," "any," and "each" shall each be construed as "all and any and each."

9. The use of the singular form of any word includes the plural and vice versa.

INSTRUCTIONS

1. You are required, in responding to these requests, to furnish all documents in your possession, custody, or control.

2. If you withhold responsive documents due to an assertion of attorney-client privilege or work product, you shall produce a privilege log that complies with the requirements of the Federal Rules of Civil Procedure.

3. If an objection is made to a document request, or any portion thereof, the document request or portion thereof shall be specified and, as to each, all reasons for objections shall be stated fully.

4. If you consider any document request ambiguous, set forth the matter that you consider "ambiguous," select a reasonable construction of that request, and set forth the reasonable construction used in answering the request.

5. If a document request cannot be fully responded to, respond to the extent possible, state the reason for the inability to produce documents responsive to the remainder, and produce whatever documents you have regarding the unanswered portion.

6. Unless otherwise specified, the relevant time period covered by the document requests is December 27, 2020 (the date that the No Surprises Act became law), through the date of the production of documents.

DOCUMENT REQUESTS

REQUEST FOR PRODUCTION NO. 1:

Documents relating to any attempts on the part of LifeNet to secure financing since December 27, 2020.

REQUEST FOR PRODUCTION NO. 2:

Documents relating to any communications with outside entities that discuss the valuation of LifeNet, including any documents relating any discussions concerning whether the valuation of LifeNet has changed as a result of the interim final rule at issue in this case, and documents reflecting whether those attempts at valuation have taken into account the fact that the interim final rule will be superseded by a final rule.

REQUEST FOR PRODUCTION NO. 3:

Documents reflecting any communications between Air Methods and LifeNet relating to the possible termination or renegotiation of the contract between Air Methods and LifeNet.

REQUEST FOR PRODUCTION NO. 4:

Documents reflecting all amounts LifeNet has recovered for out-of-network emergency air ambulance services performed since December 27, 2020, including documents reflecting (a) whether those amounts were recovered from a patient or from a group health plan or health insurance issuer; (b) whether those amounts were determined though the open negotiation process established by the No Surprises Act; and (c) whether those amounts were determined by a certified IDR entity under the arbitration procedures established by the No Surprises Act.

Dated: June __, 2022

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

BRIT FEATHERSTON
United States Attorney

JAMES GILLINGHAM
Assistant U.S. Attorney
Eastern District of Texas
110 N. College Street; Suite 700
Tyler, Texas 75702
E-mail: James.Gillingham@usdoj.gov
Phone: (903) 590-1400
Fax: (903) 590-1436
Texas State Bar # 24065295

SEAN C. DAY
Special Assistant United States Attorney
Eastern District of Texas
101 E. Park Blvd., Suite 500
Plano, Texas 75074

Phone: (202) 934-4060
Fax: (972) 590-1209
D.C. Bar No. 502363

ERIC B. BECKENHAUER
Assistant Branch Director

/s/ Joel McElvain [draft]
JOEL McELVAIN
Senior Trial Counsel
D.C. Bar No. 448431
ANNA DEFFEBACH
Trial Attorney
D.C. Bar No. 241346
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
Phone: (202) 305-8356
Fax: (202) 616-8470
E-mail: joel.l.mcelvain@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify on this __ day of June, 2022, a true and correct copy of this document was served electronically by the Court's CM/ECF system to all counsel of record.

/s/ Joel McElvain
JOEL MCELVAIN