UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GUARDIAN FLIGHT, LLC, Plaintiff, v. AETNA LIFE INSURANCE COMPANY, and MEDICAL EVALUATORS OF TEXAS ASO, LLC, Defendants.	§ § § § § § § § § § §	CIVIL ACTION NO. 4:22-cv-03805

PLAINTIFF GUARDIAN FLIGHT, LLC'S RESPONSE TO DEFENDANT MEDICAL EVALUATORS OF TEXAS ASO, LLC'S MOTION TO DISMISS AND MOTION TO STRIKE

Plaintiff Guardian Flight, LLC ("Guardian") opposes Defendant, Medical Evaluators of Texas ASO, LLC's ("MET") Motion to Dismiss Plaintiff's Complaint and Motion to Strike Demand for Attorney's Fees and would respectfully show the Court as follows:

INTRODUCTION

The mandatory IDR process under the No Surprises Act ("NSA") is not a traditional arbitration and lacks the fundamental due process protections that are the basis of arbitration case law and the Federal Arbitration Act itself. To put an IDR proceeding in context, imagine a courthouse the parties are not allowed to enter and at which no hearings occur. At this courthouse, the federal government has appointed a secret judge to adjudicate all claims. A plaintiff can file a claim, but it gets no discovery and is prohibited from seeing the defendant's answer, pleadings or evidence. The secret judge need not provide a reasoned opinion, and instead merely designates the "winner" in an unsigned judgment. That is what happens in IDR proceedings, and the secret judge is now asking this Court to declare him immune from judicial scrutiny by the federal judiciary.

MET asks this Court to blindly apply "arbitrator immunity" when in fact it does not qualify as an arbitrator under federal law, and the IDR process provides none of the due process protections on which arbitrator immunity case law is premised. Most importantly, there is no agreement of the parties to arbitrate their dispute, no agreement on the procedures to be used, and the parties have no input on the individual who will make the decision. And unlike arbitrators, IDR entities are subject to specific rules and regulations that ***must*** be followed under federal law, meaning they may not make legal errors in applying the statutory scheme on behalf of the federal agencies they serve. The NSA does not provide immunity to certified IDR entities, or even mention the word arbitration. Because MET has not established that IDR entities under the NSA are entitled to arbitrator immunity, its motion must be denied.

In addition, because the IDR process is nothing like a traditional arbitration and lacks the features and protections inherent to proceedings governed by agreement of the parties, the FAA case law and presumption in favor of confirming awards simply does not apply here. And even under the FAA's standard of review for vacatur, which also does not control, Guardian has alleged enough in its Complaint to defeat MET's bid for dismissal. Finally, MET fails to support its contention that Guardian lacks Article III standing. To the contrary, Guardian has established its standing under the law of this Circuit.

Due process requires this Court to adjudicate this dispute on a full record following discovery. MET is mistaken on the law and the facts, and its dismissal bid should be denied.

STANDARD OF REVIEW

Motions to dismiss for failure to state a claim are "viewed with disfavor and [are] rarely granted." *Tanglewood E. Homeowners v. Charles—Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988) (quoting *Sosa v. Coleman*, 646 F.2d 991, 993 (5th Cir. 1981)). A complaint "should not be dismissed pursuant to Rule 12(b)(6) for failure to state a claim unless it appears ***beyond doubt*** that

the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Ramming v. U.S.*, 281 F.3d 158, 161 (5th Cir. 2001) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, (1957)) (emphasis added). In reviewing for sufficiency under Rule 12(b)(6), "the district court must accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff." *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996) (citing *McCartney v. First City Bank*, 970 F.2d 45, 47 (5th Cir. 1992)).

The "threshold of sufficiency that a complaint must meet to survive a motion to dismiss is exceedingly low." *Ramteq Inc., v. Alfred Karcher, Inc.*, 2006 WL 8451174, at *1 (S.D. TX., Jan. 12, 2006) (quoting *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Communications, Inc.*, 376 F.3d 106, 1070 (11th Cir. 2004)). "The issue is not whether the plaintiff will ultimately prevail, but whether he is entitled ***to offer evidence to support his claim[s]***." *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999) (citing *Doe v. Hillsboro Indep. Sch. Dist.*, 81 F.3d 1395, 1401 (5th Cir. 1996). Dismissal is improper if the allegations support relief on ***any*** possible theory. *See Cinel v. Connick*, 15 F.3d 1338, 1341 (5th Cir. 1994).

As for motions to dismiss under Fed. R. Civ. P. 12(b)(1), "it is extremely difficult to dismiss a claim for lack of subject matter jurisdiction." *Santerre v. Agip Petroleum Co., Inc.*, 45 F. Supp. 2d 558, 566 (S.D. TX., Mar. 29, 1999) (quoting *Garcia v. Copenhaver, Bell & Assocs., M.D.'s, P.A.*, 104 F.3d 1256, 1260 (11th Cir. 1997)). "12(b)(1) challenges to subject matter jurisdiction come in two forms: 'facial' attacks and 'factual' attacks." *A.W. v. Humble Indep. Sch. Dist.*, 25 F. Supp. 3d 973, 981 (S.D. Tex. June 11, 2014) (citing *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981)). "A facial attack consists of a rule 12(b)(1) motion unaccompanied by supporting evidence that challenges the court's jurisdiction based solely on the pleadings." *Id.* "A factual attack challenges the existence of subject matter jurisdiction in fact—irrespective of the

pleadings—and matters outside the pleadings, such as testimony and affidavits, are considered" *Id.*

ARGUMENT

I. MET is not entitled to immunity because the IDR process is not arbitration and MET is not an arbitrator.

MET claims that Guardian's claims should be dismissed because "it has long been accepted across most jurisdictions that arbitrators have immunity." Doc. 8 at 5. But MET is an IDR entity, not an arbitrator, and the IDR process is not arbitration—far from it.

A. IDR Determinations are not actually arbitrations as they lack the key features of arbitration.

MET tries to shield itself by claiming that it is an "arbitrator" under the NSA. But the IDR process created by the NSA bears no resemblance to any traditional form of arbitration. Moreover, MET's interpretation of the NSA ignores the rules of statutory construction.

The bedrock foundation of the American arbitration system is consent. *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (quoting *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 469 (1989)) ("Arbitration under the [FAA] is a matter of consent, not coercion."). An arbitrator derives his authority from the parties' agreement, which defines the scope of his decision making power. *Davis v. Chevy Chase Fin. Ltd.*, 667 F.2d 160, 165 (D.C. Cir. 1981) ("Arbitration is, however, a matter of contract, and the contours of the arbitrator's authority in a given case are determined by reference to the arbitral agreement."). That is why in arbitrability disputes, the query turns on the scope of what the parties agreed to arbitrate. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (whether arbitrators or courts have primary power to decide whether parties agreed to arbitrate merits of dispute depends on whether parties agreed to submit questions to arbitration); *Peabody Holding Co., LLC v. United Mine Workers of Am., Intern. Union*, 665 F.3d 96, 103 (4th Cir. 2012) ("The twin pillars of consent

and intent are the touchstones of arbitrability analysis."). Absent agreement, the courthouse door remains wide open.

The hallmark features of arbitration are exemplified by arbitration rules such as those promulgated by the American Arbitration Association ("AAA") and the American Health Law Association ("AHLA"). Indeed, parties often select their preferred rules in their arbitration agreements. *See, e.g., Ninety Nine Physician Services, PLLC v. Murray,* No. 05-19-01216-CV, 2021 WL 711502, at *4 (Tex. App.—Dallas 2021, no pet.) (mem. op). (parties adopted the AAA Commercial Rules in their arbitration agreement); *City of Chesterfield v. Frederich Constr. Inc.,* 475 S.W.3d 708, 712 (Mo. Ct. App. 2015) (same). Under arbitration rules, the parties not only know the identity of their decision maker, they receive their resumes and determine who will serve through strikes and rankings. *See, e.g.,* AAA Commercial Rule 13 (requiring that at least ten "names of persons" be sent to the parties, who can then strike and rank the candidates); AHLA Rule 3.2 (allowing parties to select between 5 and 15 candidates, with each party receiving between 1 and 5 strikes and stating that the parties will receive "the profiles and resumes of all candidates").

Arbitrations resemble litigation, including the requirement that each party be served with copies of all filings, including briefs on the merits. *See, e.g.,* AAA Commercial Rule 4(b)(ii) (requiring service of the demand and any supporting documents on the opposing party); AHLA Rule 2.2 (requiring service on opposing party). Most services now offer electronic case management systems similar to ECF, thus allowing all parties full access to the entire case file. *See, e.g.,* AAA Commercial Rule 4(b)(i)(a) (discussing access to the AAA's WebFile system); AHLA Rule 2.2(a) (discussing access to the electronic case management system).

Like a court, arbitrators preside over discovery, "safeguarding each party's opportunity to fairly present its claims and defenses." AAA Commercial Rule 23. Indeed, arbitrators "should

permit discovery that is relevant to the claims and defenses at issue and is necessary for the fair resolution of a claim." AHLA Rule 5.5 (emphasis added). And like at the courthouse, parties who arbitrate have the chance to present their evidence and argue their case. *See, e.g.,* AAA Rule 25 (Date, Time, Place, and Method of Hearing); AHLA Rule 6 (Hearings). Notably, prior to an arbitration hearing, "the parties must exchange copies of all exhibits they intend to introduce at the hearing and furnish a list of all witnesses they intend to call." AHLA Rule 6.1 (Exchange of Information).

The IDR process is nothing like arbitration. First, it is mandatory. Compl. ¶ 2. The process itself is similarly devoid of the consent of the parties. IDR disputes are overseen by a list of only thirteen (eleven at the time of the Complaint) IDR entities. *Id.* at¶ 18. The parties do not know the identity of the individual who renders the decision. *Id.* at ¶ 39. They do not know the qualifications (or lack thereof) of that person. *Id.* The award is made without a hearing or exchange of written submissions between the parties, and so neither party is allowed the opportunity to respond to the other's submission. *Id.* at 19. There is no chance for either party to correct or address false representations (indeed, unless the false statements are repeated in the IDR determination, the opposing party will never know they were made).

Simply put, an IDR proceeding is not an arbitration at all, as it lacks the bedrock principles on which arbitration is premised as reflected in federal case law and standard arbitration rules. And merely referring to a process as "arbitration" does not make it so. For instance, in *Illinois Bell Tel. Co. v. Box*, Judge Easterbrook, ruling on a dispute between phone companies under the Telecommunications Act of 1996, noted that the statute "provides that, when phone companies cannot agree on the answer to questions such as these, state public-utility commissions may decide." 526 F.3d 1069, 1070 (7th Cir. 2008). He also noted that "[t]he statute misleadingly calls

this process 'arbitration,' but it bears none of the features—such as voluntary consent, a privately chosen adjudicator, and finality—that marks normal arbitration." *Id.* "The state commission's decisions don't implement private agreements; they subject unwilling [phone companies] to public commands." *Id.*

In other words, although the statute referred to the dispute resolution process in the Telecommunications Act of 1996 as "arbitration," that term was misleading because the process bore none of the features or protections of arbitration. So too here. The IDR process lacks the most fundamental aspect of arbitration—consent of the parties—and so IDR entities should not receive the same protections as arbitrators, including arbitral immunity under federal common law.

B. MET is not an arbitrator under the plain language of the NSA.

With the Telecommunications Act of 1996, the statute expressly used the term "arbitrator" and "arbitration" to describe the process being created. The NSA does not.

When interpreting a statute, courts in the Fifth Circuit begin with "the language of the statute itself." *United States v. Orellana*, 405 F.3d 360, 365 (5th Cir. 2005) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). They follow the "plain and unambiguous meaning of the statutory language, interpreting undefined terms according to their ordinary and natural meaning and the overall policies and objectives of the statute." *Id.* (quoting *United States v. Kay*, 359 F.3d 738, 742 (5th Cir. 2004)). If the statute is ambiguous, a court may look to the legislative history or agency interpretations for guidance. *Id.*

The NSA does not refer to entities such as MET as "arbitrators."[1] Under the statute, the Secretary of Health and Human Services, in consultation with the Secretary of Labor and Secretary

[1] Neither do the Centers for Medicare & Medicaid Services ("CMS"). CMS refers to the process created by the NSA as the "Federal Independent Dispute Resolution system." *See, e.g.*, Notice of the Federal Independent Dispute Resolution (IDR) Team Technical Assistance to Certified

of the Treasury, was directed to "establish a process to certify (including to recertify) entities." 42 U.S.C.A. § 300gg-111(c)(4)(A). The Departments, following the statute's mandate, created a list of only thirteen approved IDR entities to make IDR determinations. Compl. ¶ 2.[2] Parties to a dispute covered by the NSA must pick an IDR entity from the list for their dispute; otherwise, the Departments appoint one for them. *Id*. The actual person at the IDR entity assigned to make the decision is never disclosed.

The statute provides that for the dispute, the "entity selected . . . to make a determination . . . shall be referred to in this subsection as the 'certified IDR entity' with respect to such determination." 42 U.S.C.A. § 300gg-111(c)(4)(F). Nowhere does the NSA mention an "arbitrator" or "arbitration," nor does it confer immunity on IDR entities.

MET cites a prolific body of case law supporting the existence of arbitral immunity. Doc. 8 at 5. That said, these cases all involved consensual arbitrations using agreed procedures. For instance, in *Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith*, the plaintiff submitted his claim to a three-member panel of National Association of Securities Dealers (NASD) arbitrators under an arbitration clause. 477 F.3d 1155, 1157 (10th Cir. 2007).

Finally, the No Surprises Act adopted the legal standard applicable in one small part of a single section of the Federal Arbitration Act because, otherwise, no part of the FAA would apply to IDR determinations. The FAA applies to contracts concerning maritime transactions or those

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Independent Dispute Resolution Entities (IDREs) in the Dispute Eligibility Determination Process, Centers for Medicare & Medicaid Services (November 21, 2022), available at https://www.cms.gov/files/document/idre-eligibility-support-guidance-11212022-final-updated.pdf.

[2] At the time the Complaint was filed, there were eleven certified IDR entities, with one not accepting disputes. There are currently thirteen IDR entities, with two not accepting disputes. List of certified independent dispute resolution entities, Centers for Medicare & Medicaid Services, available at https://www.cms.gov/nosurprises/help-resolve-payment-disputes/certified-idre-list.

involving interstate commerce. 9 U.S.C. § 2. It provides the parties to those agreements a right (and procedure) to compel the arbitration to which they voluntarily agreed. 9 U.S.C. § 4 (providing procedure applicable to party seeking to compel arbitration "under a written agreement for arbitration"). If the parties have provided "in their agreement" that a judgment of the court may be entered on the award, such an award is subject to confirmation proceedings. 9 U.S.C. § 9. It is against this backdrop—of a statute that applies to arbitrations based on voluntary agreements by the parties – that Congress decided to adopt ***the standard*** for vacating arbitration awards but none of the other terms or procedures of the FAA. In particular, the NSA states:

> A determination of a certified IDR entity under subparagraph (A)—
>
> (I) shall be binding upon the parties involved, in the absence of a fraudulent claim or evidence of misrepresentation of facts presented to the IDR entity involved regarding such claim; and
>
> (II) shall not be subject to judicial review, ***except in a case described in any of paragraphs (1) through (4) of section 10(a) of title 9.***

42 U.S. Code § 300gg–111(c)(5)(E)(i) (emphasis added). These four paragraphs provide the substantive standard for vacating FAA awards.[3] In other words, if the standards in paragraphs (1) through (4) are met, judicial review is allowed. The NSA provides no further details on how such judicial review will proceed, who the parties should be, or what relief the Court may provide. And none of the other terms or procedures of the FAA, including the use of motions instead of complaints (9 U.S.C. § 6), were adopted for challenges to IDR determinations.[4]

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[3] Awards may be vacated under the FAA when secured through "undue means." The NSA specifically adopts the standard of "misrepresentation of facts" as a type of undue means that will support vacatur.

[4] 9 U.S.C. § 6 states that any "application to the court hereunder" shall be by motion. As explained above, the FAA only applies to agreements between parties that involve interstate commerce or maritime activities. An IDR dispute does not meet these requirements. Accordingly, an IDR dispute must be brought under the NSA, as was done here.

According to the plain language of the No Surprises Act, MET is not entitled to arbitral immunity because it is not an arbitrator at all. Moreover, the IDR process does not otherwise qualify as an arbitration under federal law, which premises arbitration on the consent of the parties and the scope of their agreement to arbitrate. MET has not established immunity.

C. IDR Determinations lack the due process protections of arbitration.

IDR entities also do not merit immunity because the IDR process lacks the due process protections of voluntary arbitration proceedings. Voluntary arbitration is based on consent and "may be conducted using any procedure acceptable to the participants . . . ." *Bd. of Educ. of Carlsbad Mun. Schools v. Harrell*, 882 P.2d 511, 518 (N.M. 1994). "The simple and ineradicable fact is that voluntary arbitration and compulsory arbitration ***are fundamentally different***" from one another. *United States v. American Society of Composers, Authors, and Publishers*, 708 F. Supp. 95, 96–97 (S.D.N.Y. 1989) (emphasis added). Accordingly, meaningful judicial review is required when, as here, an IDR entity is alleged to have exceeded its authority under the NSA by applying an illegal standard of review.

Guardian did not agree to arbitrate its payment dispute—the IDR process is required by law. Compl. ¶ 39. It did not select the individual at MET who reviewed the claim, have the chance to review the individual's resume, or have the opportunity to strike that person from making the payment decision. *Id.* The parties were not afforded the opportunity exchange written submissions or briefs, meaning that Guardian had no chance of refuting any false statements in Aetna's submission. *Id.* at ¶ 19. Guardian also had no opportunity to conduct discovery. *Id*. at ¶ 39.

The IDR process lacks the due process protections present in arbitration, embodied in arbitration case law (consent of the parties) and arbitration rules such as the AHLA and AAA Rules. This Court should decline to extend arbitral immunity, which protects the integrity of a voluntary arbitration process based on agreed rules and procedures, to the IDR process, which is

mandatory and devoid of due process protections. This case should be adjudicated on the merits, and MET's Motion to Dismiss should be denied.

II. Guardian has sufficiently alleged grounds for vacatur.

MET asserts that Guardian "fails to meet any of the requirements to set aside arbitration" under Section 10 of the FAA. Doc. 8 at 8. Without elaborating or support, it declares that Guardian "has not specifically alleged any corruption, fraud, or undue means because [it] failed to plead fraud in its petition," that it "has not alleged any facts that suggest that either party wanted to postpone or delay the proceeding due to the QPA presented to Aetna," that it "has not alleged any facts that the arbitrator exceeded its powers." *Id.* at 9. MET is wrong on all counts.

A. Guardian has alleged that the IDR award was procured through corruption, fraud, or undue means, and that additional facts supporting its claim are solely in the possession of Defendants.

MET claims that Guardian "has not specifically alleged any corruption, fraud, or undue means because Plaintiff failed to plead fraud in its petition." *Id.* MET's argument is baseless.

Section 10(a)(1) of the FAA, which is incorporated by reference in the NSA, permits vacatur when an award was procured by corruption, fraud, or undue means. 9 U.S.C. § 10(a)(1). Courts of the Fifth Circuit have held that although "fraud" and "undue means" are not defined in Section 10(a) of the FAA, the terms should be interpreted together. *Matter of Arbitration Between Trans Chem. Ltd. & China Nat. Mach. Imp. & Exp. Corp.*, 978 F. Supp. 266, 304 (S.D. Tex. 1997), aff'd sub nom. *Trans Chem. Ltd. v. China Nat. Mach. Imp. & Exp. Corp.*, 161 F.3d 314 (5th Cir. 1998) (citing *Shearson Hayden Stone, Inc. v. Liang*, 493 F. Supp. 104, 108 (N.D. Ill. 1980), aff'd, 653 F.2d 310 (7th Cir. 1981). Fed. R. Civ. P. 9(b) states: "[i]n alleging fraud or mistake, a party must state with particularity ***the circumstances*** constituting fraud or mistake." (emphasis added). "If the facts pleaded in a complaint are peculiarly within the opposing party's knowledge, fraud pleadings may be based on information and belief." *Tuchman v. DSC Communications Corp.*, 14

F.3d 1061, 1068 (5th Cir. 1994). "[W]here allegations are based on information and belief, the complaint must [still] set forth a factual basis for such belief." *U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997).

Moreover, Fifth Circuit case law was developed in the context of vacating awards under the FAA, not the NSA. The NSA provides the following:

> A determination of a certified IDR entity under subparagraph (A)—
>
> (I) ***shall be binding*** upon the parties involved, ***in the absence of*** a fraudulent claim or ***evidence of misrepresentation of facts presented to the IDR entity*** involved regarding such claim; and
>
> (II) shall not be subject to judicial review, ***except in a case described in any of paragraphs (1) through (4) of section 10(a) of title 9.***

42 U.S. Code § 300gg–111(c)(5)(E)(i) (emphasis added).[5] Here, Congress specifically enumerated one of the situations in which an award is procured using fraud or undue means, which is where there has been a misrepresentation of fact s to the IDR entity. Where that has been alleged, a pleading to vacate an IDR award under the NSA is sufficient.

The Complaint sets forth a factual basis for why Guardian contends that Aetna misrepresented its QPA. First, the Departments have acknowledged that several payors are not properly calculating the QPA in accordance with the regulations. Compl. ¶ 29. Guardian and its affiliates were OON with Aetna and certain other commercial payors in 2019. That said, it was reimbursed by them for many transports during that year. *Id.* at ¶ 30. The historical OON rate from these commercial payors (base and mileage) for a trip in Nebraska of this length and type was much higher than Aetna's purported QPA. *Id*. Moreover, Guardian has contracted rates for

[5] The NSA amended the Internal Revenue Code, the Employee Retirement Income Security Act (ERISA), and the Public Health Service Act (PHS Act). All three statutory amendments are substantively identical. Accordingly, for sake of brevity, citations to NSA requirements are to the PHS Act, 42 U.S.C. 300gg et seq.). CHP cites to 26 U.S.C. § 9816(c)(5)(E), which is found in the Internal Revenue Code.

air ambulance services in Nebraska, and its contracted rates are much higher than the purported QPA. *Id.* Aetna did not disclose the in-network rates on which its QPA is purportedly based. *Id.* at ¶ 31. Its contracted rates are also much higher than the purported QPA. *Id.* Compared to Aetna's historical average OON rate, and Guardian's own in-network rates, Guardian's alleged QPA—$31,965.53—is improbably low. *Id.* at ¶ 32.

Based on these facts, Guardian alleges upon in formation and belief that Aetna made a misrepresentation of fact to MET and thus fraudulently procured the award in violation of the NSA. The additional evidence Guardian needs to prove its claim is uniquely in the possession and control of Aetna and MET (*i.e.* the Aetna's submission and the factual basis for its actual QPA). Guardian has no way of obtaining this information except through discovery.

To the extent Rule 9(b) applies to a claim under the NSA to vacate an IDR award, Guardian has satisfied the relaxed standard promulgated in this Circuit. While Guardian ultimately bears the burden to prove one of the statutory grounds, Defendants may not avoid discovery into their misconduct by imposing an incorrect standard at this initial stage. Guardian has alleged enough to meet the pleading standard under the Federal Rules of Civil Procedure, and MET's motion to dismiss should be dismissed.

B. Applying an illegal standard in favor of insurers is evidence of evident partiality.

MET claims that Guardian "has failed to allege that the arbitrator's conduct was not impartial in using the QPA from Aetna." Doc. 8 at 9. Section 10(a)(2) of the FAA also provides for vacatur "where there was evident partiality or corruption in the arbitrators, or either of them." To establish "evident partiality," a plaintiff must produce specific facts from which "a reasonable person would have to conclude that the arbitrator was partial to one party." *Householder Group v. Caughran*, 354 Fed. App'x. 848, 852 (5th Cir. 2009).

The allegations support such a conclusion here. Guardian alleges that a reviewer at MET put his "thumb on the scale" in favor of the insurer, applying an illegal presumption in favor of the QPA, just as the Departments had originally instructed IDR entities to do in its original rule. Compl. ¶ 33. However, this was done months *after* the rule was invalidated. *Id.* at ¶¶ 23-24. The reviewer further refused to consider market data submitted by Guardian. *Id.* at ¶ 33. This means that the MET reviewer continued to make biased decisions in favor of payors by applying (and citing to) an illegal rule and refusing to even consider contrary evidence submitted by providers. It is hard to imagine a clearer situation of someone being "partial to one party" (*i.e.* payors over providers) than where he applies an illegal evidentiary presumption in that party's favor and refuses to consider some of the opposing party's evidence..

C. By applying an illegal presumption, MET committed misconduct and prejudiced Guardian's rights.

MET claims that "has not alleged any facts that suggest that either party involved wanted to postpone or delay the proceeding due to the QPA presented by Aetna." Doc. 8 at 9. That is true. But Guardian is still entitled to vacatur because MET committed misconduct and prejudiced Guardian's rights. Section 10 of the FAA provides that an award may be vacated

> where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; ***or of any other misbehavior by which the rights of any party have been prejudiced***.

9 U.S.C.A. § 10(a)(3)(emphasis added). For the same reasons Guardian's factual allegations plead a claim of evident partiality, it pleads a claim of prejudicial misbehavior.

D. MET exceeded its powers by violating the NSA.

MET claims that Guardian "has not alleged any facts that the arbitrator exceeded its powers so that a mutual, final, and definite award could not be made." Doc. 8 at 9. That is simply incorrect. Section 10 of the FAA provides for vacatur "where the arbitrators exceeded their

powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C.A. § 10(a)(3). MET exceeded its powers by applying an illegal presumption in favor of the QPA.

MET is not allowed to violate the NSA in making its decisions. Even if MET were considered an arbitrator, arbitrators cannot exceed their powers or perform their duties contrary to the terms of the parties' arbitration agreement. If so, the award may be vacated. See 9 U.S.C. § 10(a)(4) (stating awards may be vacated "where the arbitrators exceeded their powers"). For Example, an arbitrator may not conduct a class arbitration where the agreement does not explicitly provide for it. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672-73, (2010). Similarly, an arbitrator may not apply statutory grounds to remove a trustee where the grounds for removal are specified in the trust agreement. *Brown v. Brown-Thill*, 762 F.3d 814, 824-25 (8th Cir. 2014). As the Fifth Circuit explains, "'arbitral action contrary to express contractual provisions will not be respected' on judicial review." *Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314, 1325 (5th Cir. 1994)(citing *Delta Queen Steamboat Co. v. District 2 Marine Eng'rs Beneficial Ass'n*, 889 F.2d 599, 604 (5th Cir. 1989), cert. denied, 498 U.S. 853 (1990).

As discussed above, in IDR proceedings, there is no arbitration agreement. Accordingly, an IDR entity exceeds its powers when it fails to decide disputes in accordance with the NSA. The suggestion that IDR entities can ignore the NSA and its regulations, make any decision it wants based on any criteria it desires, and then is immune from suit because arbitrators may make "legal errors" is flawed, contrary to arbitration case law, and would eviscerate judicial review completely.

The case of *PoolRe Ins. Corp. v. Organizational Strategies, Inc.* is particularly instructive. 783 F.3d 256 (5th Cir. 2015). There the parties had agreed to arbitrate under the arbitration rules of the International Chamber of Commerce ("ICC"). *Id.* at 265. Still, the arbitrator decided to

conduct the proceedings under AAA rules. *Id.* Noting that the rules to be applied is an "important" part of an arbitration agreement, the Fifth Circuit affirmed the district court's decision to vacate the award because the wrong rules had been applied to the dispute. *Id.* at 264-65. Here, MET applied the wrong rules to the parties' dispute and its award should be vacated.

III. MET is a necessary party because it is needed to provide relief under the NSA and U.S. Constitution.

Finally, putting immunity aside, MET is a proper party to this lawsuit because it is needed for this Court to be able provide full relief to Plaintiff under the NSA and the U.S. Constitution. As explained above, IDR entities are not actual arbitrators. There is no reason for an arbitrator to be a party in a proceeding challenging an arbitration award because the arbitration requirement exists ***in a contract between the Plaintiff and Defendant***. Arbitration services will open a proceeding to whomever shows up with such an agreement and pays the filing fee. *See, e.g.,* AAA R-4(a) (Filling Procedures and Requirements). Moreover, the services will open a proceeding ***in response to a court order***. *Id.* at R-4(b) (requiring the filing of the court order when initiating an arbitration by court order). Here, neither the NSA nor its implementing regulations have any similar procedures or requirements for IDR entities to initiate IDR proceedings by court order. Unless and until Congress or the Departments create such a requirement, IDR entities are necessary parties to IDR challenges.

Without a statutory or regulatory requirement to initiate a new IDR proceeding in compliance with a court order, IDR entities remain governed by the initiation requirements of the NSA and current regulations. Those requirements include filing deadlines timed from the date the initial payment is received. See 42 U.S.C. § 300gg–111 (c)(1-2). Here, those deadlines have long expired because Med-Tran is seeking a rehearing after the initial award is vacated. There is

nothing in the NSA or its regulations requiring an IDR entity to rehear an award that is vacated. Accordingly, the IDR entity must be a party and subject to a rehearing order from this Court.[6]

Guardian has asked the Court to require MET, upon rehearing, to apply due process protections required by the Fifth Amendment to the U.S. Constitution. Compl. ¶ 40. Those protections include requiring MET to provide "the full evidentiary basis" of its determination in a reasoned decision. *AT&T Commun. of the S.W., Inc. v. S.W. Bell Tel. Co.*, 86 F. Supp. 2d 932, 954 (W.D. Mo. 1999), judgment vacated sub nom. *AT&T Commun. of the S.W., Inc. v. S.W. Bell Tel. Co.*, 535 U.S. 1075 (2002). The Court can only do so if MET is a party subject to its orders.

IV. Guardian has pled facts establishing Article III standing.

MET asserts that it moves to dismiss the Complaint for "lack of Article III standing," but wholly fails to brief the issue. Doc. 8 at 1, 4. For this reason alone, its motion to dismiss should be denied. *See Espinoza v. Garza*, No. 1:19-CV-226, 2020 WL 2310022, at *6 (S.D. Tex. Apr. 6, 2020), report and recommendation adopted sub nom. *Rico Espinoza v. Garza*, No. 1:19-CV-00226, 2020 WL 2309686 (S.D. Tex. May 8, 2020)(denying dismissal where "[a]side from one conclusory assertion," defendants "failed to brief the issue").

In an abundance of caution, Guardian addresses why it has cleared this low hurdle. Article III of the Constitution limits the jurisdiction of federal courts to the consideration of "Cases" and "Controversies." U.S. Const Art. III § 2. The "triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement, and…the party invoking federal jurisdiction, bears the burden of establishing its existence." *Inclusive Communities Project,*

[6] The necessity of the IDR entity's participation here is similar to the requirement under the Federal Rules that it be a party to any case seeking injunctive relief. Federal Rule of Civil Procedure 65(d)(2) states that an injunction is only binding on "(A) the parties; (B) the parties' officers, agents, servants, employees, and attorneys; and (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or(B)." An IDR entity would only qualify for category "A."

Incorporated v. Department of Treasury, 946 F.3d 649, 655 (5th Cir. 2019) (citations omitted). A motion to dismiss for lack of standing is treated as a motion for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1). *See Patterson v. Rawlings,* 287 F.Supp.3d 632, 637-38 (N.D. Tex., Feb. 7, 2018) (treating a motion to dismiss for lack of standing as a 12(b)(1) motion).

To show standing under Article III, a plaintiff need meet only three requirements. *Cruz v. Abbott*, 849 F.3d 594, 598 (5th Cir. 2017). First, a plaintiff must allege an injury in fact, meaning a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical. *Id.* Economic or financial harm satisfies this first requirement. *Pulse Network, LLC v. Visa, Inc.*, 30 F.4th 480, 491 n. 15 (5th Cir. 2022). Second, a plaintiff must allege causation, meaning a fairly traceable connection between the plaintiff's injury and the complained-of conduct by the defendant. *Ctr. for Biological Diversity v. United States Env't Prot. Agency*, 937 F.3d 533, 536 (5th Cir. 2019). This does not require the plaintiff to show proximate cause. *Inclusive Communities Project, Incorporated*, 946 F.3d at 655. Finally, there must be redressability—that is, a likelihood that the requested relief will redress the alleged injury. *Inclusive Communities Project Incorporated*, 946 F.3d at 655.

Guardian alleges injury-in-fact. It has suffered economic and financial harm—losing the IDR dispute at issue and thus not being paid the amount it sought in the IDR proceeding. Compl. ¶ 33. This economic harm, which is actual, imminent, concrete, and particularized, satisfies the first prong of Article III standing as stated in *Cruz*. Each dispute Guardian has lost—and will lose—due to MET's reliance on an illegal presumption and refusal to consider relevant evidence has caused and will continue to cause financial harm because Guardian is not paid the value of the air ambulance services it provides.

Guardian has also sufficiently alleged that its injury is traceable to MET's conduct. The Complaint states that a presumption in favor of choosing the purported QPA is illegal and that the refusal to consider market data submitted to it was a violation of the NSA. *Id.* at ¶ 36 It explains that this resulted in the selection of Aetna's offer, which was 100% of the purported QPA. *Id*. Guardian has alleged that its financial harm was caused by MET's conduct.

Last, Guardian has sufficiently alleged that its harm may be redressed by this Court. This Court is empowered to vacate MET's award under several possible grounds, including where there undue means were used to secure the award or a misrepresentation of fact occurred to the IDR entity. Compl. ¶ 34 (citing 42 U.S.C. § 300gg–111 (c)(5)(E)(1)). By vacating MET's award and directing MET to rehear the dispute while applying the appropriate standard and proper due process protections, this Court would be addressing Guardian's financial harm, as contemplated by the NSA, because a rehearing can result in a higher payment.

V. MET's Motion to Strike is Premature.

MET submits a naked request that this Court strike to Guardian's request for attorneys' fees, but that is premature at this stage of the litigation. While it is true that under the "American Rule," each party generally bears its own attorney's fees absent a statute or contractual provision, there are well-established exceptions to this rule, including when a party acts in bad faith before and during litigation. *See, e.g.*, *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975); *Fitzgerald v. Hampton*, 545 F. Supp. 53, 57 (D.D.C. 1982); *Richardson v. Communications Workers of Am.*, AFL-CIO, 530 F.2d 126 (8th Cir. 1976); *Thonen v. Jenkins*, 517 F.2d 3 (4th Cir. 1975). Guardian's request for fees merely preserves its right to such recovery as part of a final judgment, and accordingly it is improper to strike the request before the parties have litigated Guardian's claims.

For all these reasons, Guardian asks this Court to deny MET's Motion to Dismiss and Motion to Strike. Should the Court grant the Motion to Dismiss, Guardian requests that the dismissal be without prejudice and that it be granted an opportunity to amend.

Dated: December 27, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 27th day of December 2022, a true and correct copy of the foregoing was served via the Court's ECF system on all counsel of record.

/s/ Adam Schramek
Adam Schramek