UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GUARDIAN FLIGHT, LLC, Plaintiff, vs. AETNA HEALTH, INC., and MEDICAL EVALUATORS OF TEXAS ASO, LLC, Defendants.	Civil Action No. 4:22-cv-03805

AETNA HEALTH INC.'S MOTION TO DISMISS
GUARDIAN FLIGHT, LLC'S ORIGINAL COMPLAINT

Defendant Aetna Health Inc.[1] moves to dismiss Plaintiff Guardian Flight, LLC's ("Guardian Flight") original complaint (Dkt. 1) under Rule 12(b)(6) for failure to state a claim.

INTRODUCTION

Guardian Flight asks the Court to vacate an arbitration award that determined the appropriate payment amount for a 225-mile air ambulance flight. The award was entered as part of a binding arbitration proceeding under the No Surprises Act ("NSA").[2] Pursuant to the NSA's "baseball style" framework, each side submitted a proposed payment amount, and the arbitrator determined that the amount submitted by Aetna ($31,965.53) was the appropriate amount. Dissatisfied with the result, Guardian Flight now asks the Court to unwind the arbitration process

[1] Guardian Flight's complaint names "Aetna Health, Inc." as a defendant. The correct Aetna entity that administered the health plan at issue is Aetna Life Insurance Company.

[2] Pub. L. No. 116–260, div. BB, tit. I, 134 Stat. 1182, 2758–2890 (2020). The NSA addresses "surprise medical bills" that arise when a patient receives services unexpectedly from an out-of-network provider. It ensures that the patient will only have to pay their in-network cost-share amount and provides a process for the healthcare provider and the payer to resolve payment disputes, taking "the consumer out of the middle." H.R. Rep. No. 116-615, at 57 (2020).

because it *believes* the arbitration award amount should have been more. Guardian Flight, however, fails to plead any basis upon which the Court could vacate the arbitration award.

The NSA incorporates the Federal Arbitration Act's ("FAA") standard for overturning an arbitration award. Under this well-established standard, judicial review is available only for the enumerated grounds contained in 9 U.S.C. § 10(a), which are reserved to address *egregious* abuses by an arbitrator, such as when the arbitrator commits fraud or is clearly biased in favor of one party. Judicial review is ***not***, however, available to reexamine the legal or factual underpinnings of an award. Ignoring this bedrock principle, Guardian Flight asks the Court to vacate the arbitration award here based on alleged errors of fact or law. But controlling precedent is settled—courts cannot entertain such claims or disturb the arbitrator's award on these alleged grounds.

Nor can Guardian Flight wedge itself into the very limited grounds available for judicial review with unfounded speculation that Aetna "secured the award through undue means." This theory lacks any factual support whatsoever in the pleading (or in reality) and certainly fails to meet the federal pleading standards, warranting dismissal. Moreover, Guardian Flight merely strings together a series of its own alleged experiences and speculation about payors generally to repackage its challenge to the proper payment amount under the award. Allowing a provider to challenge an arbitration award in this fashion—under the guise of alleged fraud or undue means—would ***completely undermine a central purpose of the NSA—i.e., to preserve costs***.

For these reasons, the Court must dismiss this action with prejudice.

BACKGROUND

I. Overview of the Healthcare Industry and the No Surprises Act

A. Background of Surprise Bills

As it relates to this case, Aetna Life Insurance Company provides third-party claims administrative services to self-funded, employer-sponsored plans. In its role as a third-party claims

administrator, Aetna enters into "network" contracts with healthcare providers setting the rates for services provided to Aetna members. Providers that do not have network contracts with Aetna are referred to as "out-of-network" providers. Because out-of-network providers do not have an agreement setting the rates for their services, Aetna generally pays these services according to the out-of-network benefits under a given member's plan.

A significant difference between out-of-network providers and in-network providers is the ability of out-of-network providers to "balance bill" patients. In-network providers are usually prohibited (or limited) from balance billing patients by their network contracts. In contrast, out-of-network providers have no such restrictions and can directly "balance bill" patients for the difference between what Aetna pays and the amount the provider bills.

This can pose a substantial burden on patients because out-of-network charges are often arbitrary and egregiously high, *see* H.R. Rep. No. 116-615, at 52 (2020) ("These unexpected medical bills can result in financial ruin[.]"), and reflect "prices that are set to be discounted and not paid." George A. Nation III, *Healthcare and the Balance-Billing Problem*, 61 VILL. L. REV. 153, 153 (2016); *see also Temple Univ. Hosp., Inc. v. Healthcare Mgmt. Alts.*, Inc., 832 A.2d 501, 508 (Pa. Super. Ct. 2003) (noting that billed charges "cannot be considered the value of the benefit conferred because that is not what people in the community ordinarily pay for medical services"). As a result, most patients choose in-network providers over out-of-network providers.

Situations arise, however, where patients may have little opportunity to seek treatment from an in-network provider (i.e., emergency services) or receive services in a setting that leads them to believe they are receiving in-network services when they are, in fact, not (e.g., services provided by an out-of-network doctor at an in-network facility). In these situations, a balance bill from a provider will often come as a "surprise" to the unwitting patient. To make matters worse,

providers of these types of services are particularly well-situated to charge excessive prices, as Congress explained:

> Economists generally regard the practice of surprise medical billing as arising from a failure in the health care market, which causes [certain] providers to have little or no incentive to contract to join a health plan's network due to a number of unique circumstances. These providers face highly inelastic demands for their services because patients lack the ability to meaningfully choose or refuse care, such as during an emergency or when ancillary services are provided of which a patient may not even be aware. They also often hold substantial market power, resulting in one or only very few providers available to provide critical items or services in a geographic area. These circumstances enable some providers to charge amounts for their services that exceed the marginal cost of producing those services and resulting in compensation far above what is needed to sustain their practice.

H.R. Rep. No. 116-615, at 53 (2020).

With this background, the NSA was enacted to eliminate the harm from these surprise medical bills. It does so by limiting the amount the patient pays and setting up a dispute-resolution framework between the provider and payer to arrive at a payment amount that reflects what would be paid under realistic market conditions. *See* 42 U.S.C. §§ 300gg-111, 300gg-112, 300gg-131, 300gg-132.

B. The NSA's Independent Dispute Resolution Framework

The NSA sets forth a detailed process for out-of-network providers (i.e., Guardian Flight) and payors (i.e., Aetna) to resolve payment disputes arising from surprise medical bills. Beyond eliminating the ability to "balance bill" patients, the process's primary goal is to "tether payment rates for surprise out-of-network bills directly to market-based prices, curbing cost growth relative to the status quo." H.R. Rep. No. 116-615, at 57 (2020).

As relevant here, if the parties cannot agree on a service price after a mandatory negotiation period, either the payer or the provider may initiate Independent Dispute Resolution ("IDR") arbitration. *See* 42 U.S.C. § 300gg-112(b)(1)(B). IDR arbitration is "baseball style," meaning the

"provider and insurer each submits a proposed payment amount and explanation to the arbitrator," and the arbitrator "must select one of the two proposed payment amounts." *Tex. Med. Ass'n v. United States HHS*, 587 F. Supp. 3d 528, 534 (E.D. Tex. 2022).

In determining which payment amount to accept for air ambulance services, the NSA provides the following considerations for IDR arbitrators to take into account:

1. The Qualifying Payment Amount ("QPA"), which is the median of the contracted rates recognized by the payer in the same market for the "same or a similar item or service that is provided";
2. The quality and outcome measurements of the provider that furnished such services;
3. The acuity of the individual receiving such services or the complexity of furnishing such services to such individual;
4. The training, experience, and quality of the medical personnel that furnished such services;
5. Ambulance vehicle type, including the clinical capability level of such vehicle;
6. Population density of the pick-up location (such as urban, suburban, rural, or frontier); and
7. Demonstrations of good-faith efforts (or lack of good-faith efforts) made by the nonparticipating provider or nonparticipating facility or the plan or issuer to enter into network agreements and, if applicable, contracted rates between the provider and the plan or issuer, as applicable, during the previous 4 plan years.

See 42 U.S.C. § 300gg-112(b)(5)(C); *see also id.* § 300gg-111(a)(3)(E)(i) (defining "qualifying payment amount").

II. The NSA's Application to the Services in this Case

A. The Services

Guardian Flight is an out-of-network air ambulance provider that provided emergency air transport to a patient/participant in a plan administered by Aetna on February 18, 2022. Dkt. 1 at 2. Guardian Flight alleges it transported the patient 225 miles from Alliance, Nebraska, to a hospital in Kearney, Nebraska. *Id.* at 6. Afterward, Guardian Flight submitted a healthcare claim.

Aetna reviewed the relevant records and, consistent with the NSA, paid Guardian Flight what it would have paid an in-network provider for the same services: $31,965.53. *See id*. at 3. Thereafter, Guardian Flight sent Aetna an open-notice request in June 2022, triggering the NSA's open-negotiation period. Notably, during the open-negotiation period, Aetna provided Guardian Flight information (by e-mail) regarding its QPA calculation—information that Guardian Flight insists it had requested but Aetna failed to disclose. *Compare id.* at 11–12, *with* **Exhibit 1**.[3]

B. The IDR Award

After the parties were unable to agree on a payment amount, Guardian Flight initiated IDR arbitration. The parties agreed on Medical Evaluators of Texas ASO, LLC ("MET"), an approved IDR entity (hereinafter, the "arbitrator"). *See id*. Pursuant to the NSA, both parties timely and appropriately submitted final offers and associated briefings. *See id.* The arbitrator considered the

[3] In deciding a motion to dismiss, courts may consider, *inter alia*, "documents incorporated into the complaint by reference or integral to the claim." *Meyers v. Textron, Inc.*, 540 F. App'x 408, 409 (5th Cir. 2013); *see In re Sec. Litig. Bmc Software*, 183 F. Supp. 2d 860, 883 (S.D. Tex. 2001) ("Courts may routinely consider not just documents named in Plaintiffs' complaint, but even documents that, if not named, are pertinent, central or integral to Plaintiffs' claim." (cleaned up)). Guardian Flight repeatedly alleges that Aetna did not disclose certain information regarding its QPA calculation. *See* Dkt. 1 at 11–12, 16–17. However, as Aetna's e-mail to Guardian Flight's client contact, Robert Robidou, plainly demonstrates, Aetna provided Guardian Flight with the very information it now complains it did not receive during the open-negotiation period on August 21, 2022. *See* **Exhibit 1**. Accordingly, Aetna requests the that Court consider the August 21 e-mail in deciding this motion. *See United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) ("Even if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document *or the document forms the basis of the plaintiff's claim*." (emphasis added)). However, even if the Court were not to consider Exhibit 1, Guardian Flight's allegations still fail to state a claim for the reasons explained in this motion.

evidence submitted by the parties, ***properly*** excluded certain data submitted by Guardian Flight under the statute,[4] and, on October 12, 2022, issued a final award of $31,965.53. *See* **Exhibit 2**.[5]

LEGAL STANDARD

A determination under the NSA "shall not be subject to review, except in a case described in any of paragraphs (1) through (4)" of Title 9, Section 10(a) of the United States Code. 42 U.S.C. § 300gg-111(c)(5)(E)(i). Title 9, Section 10(a) of the United States Code provides the four well-known statutory grounds for vacating an arbitration award under the FAA:

> In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
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> (1) where the award was procured by corruption, fraud, or undue means;
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> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
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> (3) 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; or
>
> (4) 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. § 10(a)(1)–(4). Guardian Life lacks any such grounds here.

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[4] The arbitrator—properly—refused to consider the data that Guardian Life calls "market data" in its complaint because the NSA expressly prohibits arbitrators from considering "usual and customary charges" of this type. 42 U.S.C. § 300gg-112(b)(5)(C)(iii). In fact, the arbitrator's decision, attached as Exhibit 2, *see* footnote 5, *infra*, cites to the Federal Regulation prohibiting the consideration of "[u]sual and customary charges." *See* Exhibit 2 at 1 (citing 29 C.F.R. 2590.716-8(c)(4)(v)). Contrary to Guardian Flight's protestation, the final rule does not "emphasize[] the importance of quantifiable evidence such as market data." Dkt. 1 at 15. Rather, the final rule emphasizes the exact opposite. *See* 87 Fed. Reg., 52630 (Aug. 26, 2022) ("when making a payment determination, a certified IDR entity must not consider information on the prohibited factors, such as the usual and customary charges").

[5] Aetna requests the Court consider the arbitrator's written payment determination (i.e., the IDR award), attached hereto as **Exhibit 2**, as Guardian Flight repeatedly references the arbitrator's written payment determination in its complaint but fails to attach it. *See, e.g.*, Dkt. 1 at 14–15.

Judicial review under the FAA is "extraordinarily narrow" and limited to the four grounds identified above. *Lummus Glob. Amazonas, S.A. v. Aguaytia Energy Del Peru, S.R. Ltda*., 256 F. Supp. 2d 594, 604 (S.D. Tex. 2002). Accordingly, it follows that the standard to obtain relief under the FAA is extraordinarily high. *See Apache Bohai Corp., LDC v. Texaco China B.V.*, No. H-01-2019, 2005 WL 6112664, at *9 (S.D. Tex. Feb. 28, 2005) ("The standard for vacatur is so high that courts have noted that 'serious error' or 'improvident, even silly, factfinding' will not support vacatur." (quoting *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001)), *aff'd sub nom. Apache Bohai Corp. LDC v. Texaco China BV*, 480 F.3d 397 (5th Cir. 2007).

The Supreme Court has held that "[i]t is not enough . . . to show that the [arbitrator] committed an error—or even a serious error." *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671 (2010). Similarly, the Fifth Circuit has repeatedly held that even grave errors of law or fact are not bases for vacatur under the FAA. *See Kergosien v. Ocean Energy, Inc*., 390 F.3d 346, 356 (5th Cir. 2004) ("[T]he failure of an arbitrator to correctly apply the law is not a basis for setting aside an arbitrator's award."); *Pfeifle v. Chemoil Corp.*, 73 F. App'x 720, 722 (5th Cir. 2003) ("[A]n arbitrator's erroneous interpretation of law or facts is not a basis for vacatur of an award."). As the party seeking to vacate the IDR award, the heavy burden of proof sits squarely on Guardian Flight's shoulders. *See Lummus Glob. Amazonas*, 256 F. Supp. 2d at 604.

SUMMARY OF THE ARGUMENT

Disappointed with the outcome at arbitration, Guardian Flight attempts to relitigate the issue in this Court based on an assortment of interrelated arguments that all flow from the same central theme: Guardian Flight's belief that the arbitrator incorrectly applied the law in reaching its decision. But it is well-settled that this cannot be a basis for vacating an arbitration award.

In an effort to salvage its doomed argument,[6] Guardian Flight complains the IDR award "was secured through undue means and misrepresentations by Aetna," thereby ostensibly placing it within the ambit of one of the four narrow grounds for vacatur under the FAA. Dkt. 1 at 1–2. Specifically, Guardian Flight alleges that Aetna's QPA was not "calculated in accordance with federal requirements" and, therefore, was misleading. *Id.* at 3.

As an initial matter, federal law is clear that it is not for the courts to regulate a payer's QPA calculations, and allegations regarding such calculations are no grounds for vacatur here. Nor does Guardian Flight provide any basis for any conclusion that Aetna secured the IDR award through "undue means." Instead, Guardian Flight relies on generalized allegations that "[c]ertain payors are not properly calculating the QPA in accordance with regulations," historical out-of-network rates by other payors, and its own contracted in-network rates (with other payors) to cast aspersions on Aetna's QPA calculation. *See id.* at 12–13. In no way do these allegations implicate the credibility of Aetna's QPA calculation *in this case*.[7] Rather, Guardian Flight's rank speculation is the very sort of naked assertion devoid of further factual enhancement that the Supreme Court has labeled insufficient as a matter of law.

[6] To the extent that Guardian Life suggests that Aetna exercised undue influence over the arbitrator, it bears noting that Aetna does not know the identity of the arbitrator deciding the matter. *See* 42 U.S.C. § 300gg-111(c)(4)(F). Thus, Aetna could not have exerted any undue influence.

[7] Nor did Aetna withhold information from Guardian Flight during the open-negotiation period regarding its QPA calculation or methodology during the open-negotiations period, as alleged. *Compare* Dkt. 1 at 11–12, *with* Exhibit 1. Still, even when setting aside the undeniable proof that Aetna did, in fact, send Guardian Flight the complained-of information on August 21, 2022, Guardian Flight's pleadings fail to state a claim upon which relief may be granted.

ARGUMENT & AUTHORITIES

I. Applying a Rebuttable Presumption is Not a Basis to Vacate the Award.

Guardian Flight complains, in part, that the arbitrator applied an improper presumption in favor of Aetna's QPA. *See* Dkt. 1 at 14–15.[8] Yet, Guardian Flight does not (and cannot) explain how the alleged application of this rebuttable presumption places the IDR award within the ambit of one of the four narrow grounds for vacatur under the FAA. *See id.* at 14–16. Indeed, "[i]t is not enough . . . to show that the [arbitrator] committed an error—or even a serious error." *Stolt-Nielsen S. A.*, 559 U.S. at 671. The Fifth Circuit has repeatedly held that even grave errors of law or fact are not bases for vacatur under the FAA. *See Kergosien*, 390 F.3d at 356 ("[T]he failure of an arbitrator to correctly apply the law is not a basis for setting aside an arbitrator's award."); *Pfeifle*, 73 F. App'x at 722 ("[A]n arbitrator's erroneous interpretation of law or facts is not a basis for vacatur of an award.").

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[8] As relevant background, the initial regulations implementing the NSA called for arbitrators to apply a rebuttable presumption in favor of the QPA because such a rate accurately reflects the market rate as "established through arms-length negotiations between providers and facilities and plans and issuers (or their service providers)." Requirements Related to Surprise Billing: Part II (Interim Final Rules), 86 Fed. Reg., 55,996 (Oct. 7, 2021). Subsequently, the district court in *Texas Medical Association* enjoined the use of a presumption in favor of the QPA. *See* 587 F. Supp. 3d at 542. Later that year, the same district court extended this reasoning to claims involving air ambulance services under the NSA. *See LifeNet, Inc. v. United States Dep't of Health & Hum. Servs*., --- F. Supp. 3d ---, 2022 WL 2959715, at *8 (E.D. Tex. July 26, 2022). In response, the Centers for Medicare & Medicaid Services adjusted the regulations to remove the presumption to allow for consideration of all relevant factors. *See Federal Independent Dispute Resolution (IDR) Process Guidance for Certified IDR Entities: August 2022*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Aug. 18, 2022), https://www.hhs.gov/guidance/document/federal-independent-dispute-resolution-idr-process-guidance-certified-idr-entities-august; *see also Cicalese v. Univ. of Tex. Med. Branch*, 456 F. Supp. 3d 859, 871 (S.D. Tex. 2020) ("[G]overnmental websites are proper sources for judicial notice.") (collecting cases). But the QPA is still a relevant factor. *See* 87 Fed. Reg., 52628 (Aug. 26, 2022) ("The Departments are of the view that it will often be the case that the QPA represents an appropriate out-of-network rate, as the QPA is largely informed by similar information to what would be provided as information in support of the additional statutory circumstances.").

At most, the arbitrator's alleged application of a rebuttable presumption is an error of law.[9] Thus, even when accepting Guardian Flight's allegations as true, the Court may not do what Guardian Flight asks of it—"revisit, reinterpret, or overrule the arbitrator's legal or factual analysis." *Teamsters Local 312 v. Matlack, Inc*., 118 F.3d 985, 995 (3d Cir. 1997); *see Wilko v. Swan*, 346 U.S. 427, 436–37 (1953) (an arbitrator's "interpretations of the law . . . are not subject, in the federal courts, to judicial review for error in interpretation").

II. The Arbitrator Correctly Refused to Consider Guardian Life's "Market Data."

Guardian Flight also complains that "the [arbitrator] refused to consider the market data evidence submitted by Guardian [Flight]." Dkt. 1 at 17. The NSA, however, ***prohibits*** an arbitrator from considering the very data (i.e., "usual and customary charges") that Guardian Flight complains the arbitrator refused to consider here. 42 U.S.C. § 300gg-112(b)(5)(C)(iii); *see* footnote 4, *supra*. But even assuming, *arguendo*, the arbitrator did refuse to consider *proper* evidence, at most, such refusal is an error of law that will not support vacatur. *See Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 301 (5th Cir. 2004) ("A federal court may vacate an arbitrator's award only if the arbitrator's refusal to hear pertinent and material evidence prejudices the rights of the parties to the arbitration proceedings." (quotation

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[9] Notably, the final rules recognize that the QPA is still a critical factor in the arbitrator's analysis. As stated by the Departments:

> [I]n many cases, the additional factors for the certified IDR entity to consider other than the QPA will already be reflected in the QPA. The QPA is generally calculated to include characteristics that affect costs, including medical specialty, geographic region, and patient acuity and case severity, all captured in different billing codes or the QPA calculation methodology. Therefore, in the Departments' view, giving additional weight to information that is already incorporated into the calculation of the QPA would be redundant[.]

87 Fed. Reg., 52630 (Aug. 26, 2022). As such, even if errors of law could be challenged under the FAA—which they undoubtedly cannot—giving the QPA a significant amount of consideration is appropriate under the current regulations.

omitted)); *see also Symank Bus. Sys. v. FedEx Ground Package Sys., Inc*., 2022 WL 270868, at *9 (N.D. Tex. Jan. 28, 2022) (" . . . [A]lleged errors made in admitting or excluding evidence will not justify vacatur unless the evidentiary consideration was fundamentally unfair.").

It is not a court's role to act as a legal screen, combing the record for technical errors in the receipt of evidence, as this would open the door for ad infinitum relitigation of arbitration decisions that were supposed to be final and binding. Rather, only where the refusal to hear or receive evidence is so egregious that it can be said to have deprived the affected party of receiving a fundamentally fair hearing may a court intervene. Here, the IDR award plainly states that the arbitrator "carefully" considered Guardian Flight's submission but excluded a portion of that submission—the proffered market data—based on the NSA's text. *See* Exhibit 2 at 1. Guardian Flight has not alleged any facts to so much as hint that the arbitrator's refusal to consider unspecified market data rendered the arbitration process fundamentally unfair.

III. It Is Not for Courts to Assess Payors' QPA Calculations or Methodology.

Next, Guardian Flight's principle argument regarding Aetna's QPA calculation conflates two separate sections of 42 U.S.C. § 300gg-111(c)(5)(E), which provide:

> (E) Effects of determination.
>
> (i) In general. A determination of a certified IDR entity under subparagraph (A)—
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> (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
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> (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, United States Code.

42 U.S.C. § 300gg-111(c)(5)(E)(i); *see also id.* § 300gg-112(b)(5)(D).

Guardian Flight attempts to shoehorn its argument that Aetna misrepresented facts through its supposedly miscalculated QPA—which falls squarely under subsection (c)(5)(E)(i)(I)—into an

argument for vacatur under subsection (c)(5)(E)(i)(II). This is nothing more than a rhetorical sleight of hand. The NSA's text is clear: an IDR award "*shall not be subject to judicial review*" unless one of the FAA's four grounds for vacatur applies. *Id.* § 300gg-111(c)(5)(E)(i)(II) (emphasis added). The NSA's text is equally clear that judicial review is *not* available to determine whether a party misrepresented facts presented to the IDR entity. *Id*. § 300gg-111(c)(5)(E)(i)(I).

Any doubt regarding the contours of the Court's jurisdiction to consider Guardian Flight's (unfounded) complaint that Aetna's "QPA had not been calculated in accordance with federal requirements," Dkt. 1 at 3, is laid to rest by the Departments' recently promulgated final rule:

> To the extent there is a question whether a plan . . . has complied with the July 2021 interim final rules' requirements[10] for calculating the QPA, ***it is the Departments' (or applicable State authorities') responsibility, not the certified IDR entity, to monitor the accuracy of the plan's or issuer's QPA calculation methodology by conducting an audit of the plan's or issuer's QPA calculation or methodology.***

Requirements Related to Surprise Billing (Final Rules), 87 Fed. Reg., 52627 n.31 (Aug. 26, 2022) (emphasis added). It follows that the Court, likewise, is not responsible for assessing the validity of Aetna's QPA calculation or methodology. Rather, this responsibility rests exclusively with the Departments or the applicable State authorities. *See id*. Thus, to the extent Guardian Flight asks the Court to vacate the IDR award based on the accuracy of Aetna's QPA calculation or the soundness of its methodology, the Court must dismiss the claim for lack of jurisdiction.

IV. To the Extent Guardian Flight Alleges Aetna Procured the IDR Award Purportedly Through "Undue Means," Guardian Flight Has Failed to State a Claim.

Finally, Guardian Flight provides no factual basis for its conclusory allegation that Aetna "procured the IDR award at issue through misrepresentations and undue means."[11] Dkt. 1 at 19.

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[10] The interim final rules were in effect when the arbitrator issued the IDR award in this case. *See* 87 Fed. Reg., 52618 (Aug. 26, 2022) ("The final rules are effective on October 25, 2022.").

[11] Guardian Flight also complains that it did not select the arbitrator who decided the dispute. *See* Dkt. 1 at 18–19. This overlooks the fact that Aetna, too, had no input in selecting the arbitrator.

Critically, Guardian Flight cannot undermine the NSA's intent that the arbitrations be final and not routinely subject to judicial review by simply alleging fraud or undue influence.

A. Rule 9(b)'s Heightened Pleading Standard Applies.

Guardian Flight's allegations that Aetna made misrepresentations to the arbitrator through its QPA calculation are plainly fraud-based allegations. When a plaintiff's claims are grounded in fraud, the plaintiff must satisfy the heightened pleading requirements of Rule 9(b), which provides: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Fed. R. Civ. P. 9(b).

Rule 9(b) applies to ***all averments of fraud***, whether they are part of a claim of fraud or not. *See Lone Star Ladies*, 238 F.3d at 368. Thus, Rule 9(b)'s heightened pleading standard applies to Guardian Flight's allegations of fraud in this case.[12] *See, e.g., SanMartino v. Toll Bros., Inc*., No. CV 09-274S, 2010 WL 11693556, at *6 (D.R.I. Mar. 16, 2010) (applying Rule 9(b)'s heightened standard where plaintiff sought to vacate arbitration award under § 10(a)(1)).

Rule 9(b) requires the plaintiff to identify the "who, what, when, where, and how" of the allegedly fraudulent content. *See United States ex rel. Williams v. Bell Helicopter Textron, Inc*., 417 F.3d 450, 453 (5th Cir. 2005) ("At a minimum, this requires that a plaintiff set forth the who, what, when, where, and how of the alleged fraud." (cleaned up)). That is, a plaintiff must "specify the statements contended to be fraudulent, identify the speaker, state when and where the

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Under the NSA, the parties jointly select the *IDR entity* to decide their dispute, which then assigns an arbitrator. *See* 42 U.S.C. § 300gg-111(c)(4)(F). So, for Guardian Flight to complain that the arbitrator's selection of Aetna's QPA demonstrated evident partiality is nonsense. *See* Dkt. 1 at 19. Taken to its logical conclusion, under Guardian Flight's theory, any award at arbitration is subject to challenge by the adversely affected party.

[12] The Fifth Circuit has instructed that, where allegations of fraud fall short of Rule 9(b)'s standard, "[t]he proper route is to disregard averments of fraud not meeting Rule 9(b)'s standard and then ask whether a claim has been stated." *Lone Star Ladies*, 238 F.3d at 368. Here, disregarding Guardian Flight's allegations of fraud would sound the death knell to its entire complaint.

statements were made, and explain why the statements were fraudulent." *Herrmann Holdings Ltd. v. Lucent Techs. Inc*., 302 F.3d 552, 564–65 (5th Cir. 2002) (quotations omitted); *see Bennett v. Lindsey (In re Lindsey)*, 733 F. App'x 190, 192 (5th Cir. 2018) ("At a minimum, these rules require that a plaintiff allege the nature of the fraud, some details, a brief sketch of how the fraudulent scheme operated, when and where it occurred, and the participants." (quotation omitted)).

"What constitutes particularity will necessarily differ with the facts of each case." *Afshani v. Spirit SPE Portfolio 2006-1, L.L.C.*, No. 21-10137, 2022 WL 964201, at *3 (5th Cir. Mar. 30, 2022) (quotation omitted). Nonetheless, Rule 9(b) sets a "high bar." *Colonial Oaks Assisted Living Lafayette, L.L.C. v. Hannie Dev., Inc*., 972 F.3d 684, 694 (5th Cir. 2020). Naked assertions devoid of further factual enhancement will not suffice. *See In re Lindsey*, 733 F. App'x at 192.

Relatedly, "[i]f 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 Commc'ns Corp*., 14 F.3d 1061, 1068 (5th Cir. 1994). But the Fifth Circuit has cautioned that "this exception ***must not be mistaken for license to base claims of fraud on speculation and conclusory allegations***." *U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997) (emphasis added). That is, "even where allegations are based on information and belief, the complaint ***must set forth a factual basis for such belief***." *Id.* (emphasis added).

B. Guardian Flight's Allegations Fail to Satisfy Rule 9(b)'s Pleading Standard.

Guardian Flight alleges that Aetna "secured an award through undue means and misrepresentations of fact . . . . by submitting a purported QPA that was not properly calculated under federal law." Dkt. 1 at 16. But Guardian Flight's complaint is devoid of any reason whatsoever why Aetna's QPA was not calculated properly under federal law. *See generally id*. Instead, Guardian Flight complains that Aetna did not disclose its methodology in calculating its

QPA during the *pre-arbitration* open-negotiation period. *See id.* at 11–12. Even if that were fraud—which it is not—Aetna ***did*** send Guardian Flight's client contact the very information it alleges Aetna failed to disclose on August 21, 2022. *Compare id., with* Exhibit 1.

Regardless, setting aside the fact that Aetna did not withhold information regarding its QPA calculation, Guardian Flight's allegations regarding the alleged "undue means" by which Aetna purportedly obtained the IDR award fail to survive the motion-to-dismiss stage. *See Lone Star Ladies*, 238 F.3d at 368 ("Rule 9(b) applies by its plain language to all averments of fraud, whether they are part of the claim or not."). "Although 'fraud' and 'undue means' are not defined in section 10(a) of the FAA, courts interpret the terms together." *Trans Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Corp.*, 978 F. Supp. 266, 304 (S.D. Tex. 1997); *see Nat'l Cas. Co. v. First State Ins. Grp.*, 430 F.3d 492, 499 (1st Cir. 2005) ("The phrase 'undue means' in the statute follows the terms 'corruption' and 'fraud.' It is a familiar principle of statutory construction that a word should be known by the company it keeps."). In this context, "undue means connotes behavior that is immoral if not illegal or otherwise in bad faith." *Trans Chem. Ltd.*, 978 F. Supp. at 304 (quotation omitted); *see Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 52 F.3d 359, 362 (D.C. Cir. 1995) ("undue means must be limited to an action by a party that is equivalent in gravity to corruption or fraud, such as a physical threat to an arbitrator or other improper influence").

Guardian Flight's allegations fall woefully short of what Rule 9(b) demands. Guardian Flight begins its attack on Aetna's alleged misrepresentation(s) by casting general aspersions on the NSA's IDR process as a whole. *See* Dkt. 1 at 12 ("Certain payors are not properly calculating the QPA in accordance with the regulations"). Then, rather than assert factual allegations related to Aetna or this fee dispute, Guardian Flight references out-of-network rates from other

commercial payors,[13] *see id.* at 13 ("The historical [out-of-network] rate from these [other] commercial payors (base and mileage) for a trip in Nebraska of this length and type was much higher than Aetna's purported QPA."), and its in-network rates. *See id.* ("Guardian has contracted rates for air ambulance services in Nebraska. Its contracted rates are much higher than the purported QPA."). From there, Guardian Flight finally pivots to Aetna's purportedly misleading QPA, conclusively proclaiming that Aetna's QPA calculation "is improbably low" because it was less than Guardian Flight's own calculation. *Id*. (emphasis omitted). But these complaints are not tantamount to fraud or undue means and instead relate to the merits of the payment amount, which is exactly what Guardian Flight ***cannot*** ask this Court to review under the NSA.

At the very least, Guardian Flight's nebulous allegations regarding Aetna's QPA calculation fail to satisfy Rule 9(b)'s *what* and *how* elements, as they do not rise to the requisite level of particularity that the Federal Rules demand. *See Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. v. Walgreen Co.*, 631 F.3d 436, 441 (7th Cir. 2011) ("[T]he particularity requirement of Rule 9(b) is designed to discourage a 'sue first, ask questions later' philosophy."); *Fidelity Nat'l Title Ins. Co. of N.Y. v. Intercounty Nat'l Title Ins. Co.*, 412 F.3d 745, 748–49 (7th Cir. 2005) (the particularity requirement "forces the plaintiff to conduct a careful pretrial investigation"); *see also*

[13] In support of its argument that Aetna's QPA calculation is "improbably low," Guardian Flight attempts to draw a false equivalence between Aetna's QPA in this case and its "average historical" out-of-network rate before the NSA's enactment. Dkt. 1 at 13. Although not relevant to this motion to dismiss, prior to the NSA, Aetna did, on occasion, pay an out-of-network provider more than its in-network rate for service(s) provided. But Aetna only did so to prevent its members from receiving a "balance bill" from the out-of-network provider. First, these prior allowances do not accurately reflect Aetna's in-network rate for the service(s) provided. But more importantly, Aetna overpaying to prevent its members from receiving an egregious "surprise bill" goes to the heart of what the NSA was enacted to prevent. So, it should come as no surprise that Aetna no longer voluntarily elects to pay amounts that do not accurately reflect its true in-network rate when the NSA now safeguards its members from out-of-network providers "balance billing" them for the difference between what Aetna pays and the amount the provider claims it is owed.

United States ex rel. Grubbs v. Ravikumar Kanneganti, 565 F.3d 180, 191 (5th Cir. 2009) ("Rule 9(b) also prevents nuisance suits and the filing of baseless claims as a pretext to gain access to a 'fishing expedition.'").

Guardian Flight's allegations are textbook examples of "speculation and conclusory assertions" that the Fifth Circuit has categorically held do not pass muster under Rule 9(b). Because the complaint provides no *factual basis* from which fraud can be inferred, Rule 9(b) precludes the Court from making the speculative, inferential leap Guardian Flight asks of it in this case.

C. Alternatively, Guardian Flight Fails to State a Claim Under Rule 8.

Should the Court decide that Rule 9(b)'s heightened pleading standard does not apply, Guardian Flight's "undue means" allegations still fall short of Rule 8's pleading standard, largely for the same reasons identified in the preceding section.

Rule 8(a) requires a plaintiff to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Rule 8(a) "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation," and "naked assertions devoid of further factual enhancement" will not suffice. *Id*. (cleaned up). Although the Court must accept all *well-pleaded* facts as true under Rule 12(b)(6), in deciding whether Guardian Flight's complaint satisfies Rule 8(a)'s plausibility standard, the Court "is not required to strain to find inferences favorable to the plaintiff and is not to accept conclusory allegations, unwarranted deductions, or legal conclusions." *Cicalese*, 456 F. Supp. 3d at 866.

Put simply, Guardian Flight's suspicions and rank speculation regarding Aetna's QPA calculation do not satisfy even Rule 8(a)'s plausibility standard. A cursory review of the complaint

reveals that, aside from its own unwarranted deduction, Guardian Flight never once provides a factual basis for its belief that Aetna's QPA was misleading or otherwise contained ***inaccurate*** factual information. *See* Dkt. 1 at 12–13. Accepting Guardian Flight's argument would require the Court to make numerous inferential leaps unsupported by factual allegations, far beyond what is allowed at the motion-to-dismiss stage. Accordingly, its complaint must be dismissed under any federal pleading standard.

CONCLUSION

Guardian Flight's complaint contains no allegations from which the Court can glean any basis to vacate the IDR award. The NSA allows for judicial review under four limited circumstances, none of which apply. To the extent Guardian Flight attempts to shoehorn its contention that Aetna's QPA contained inaccurate information into a claim that the IDR award "was procured by corruption, fraud, or undue means," the final rule makes clear that the judiciary is not the proper forum to challenge the accuracy of a QPA calculation. And even if the Court were to overlook this fatal flaw, Guardian Flight's conclusory allegations regarding Aetna's QPA calculation fall well short of what is necessary to state a claim for relief under both Rule 9(b)'s heightened pleading standard and Rule 8(a)'s plausibility pleading standard.

Guardian Flight's true grievance is its belief that the IDR award should have been more, and its complaint is nothing more than a thinly veiled attempt to relitigate the merits of a fee dispute that has already been decided at arbitration. However, finality is arbitration's core component. Guardian Flight cannot circumvent the federal pleading requirements by simply pleading fraud without providing even the most minimal of context. "This flies in the face of Rule 9(b)'s heightened pleading requirement." *Sharifan v. NeoGenis Labs, Inc.*, --- F. Supp. 3d. ---, 2022 WL 3567010, at *9 (S.D. Tex. Aug. 18, 2022).

Allowing Guarding Flight to proceed past the pleading stage on these allegations would thwart the strong federal policy in favor of arbitration. For these reasons, Aetna respectfully requests that the Court dismiss Guardian Flight's claims against Aetna with prejudice.

Respectfully submitted,

By: */s/ John B. Shely*
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed electronically on December 9, 2022. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

/s/ John B. Shely
John B. Shely

EXHIBIT 1

From: FederalNSA
Sent: Sunday, August 21, 2022 2:25 PM
To: Robert.Robidou@gmr.net
Subject: qb rec 47318 claim id [redacted]

Claim: [redacted]

Our attempt to negotiate a settlement with you for the noted claim(s) was unsuccessful; we could not agree on a final allowed amount for the covered service(s). You may file for Independent Dispute Resolution (IDR) following the guidelines for that process set forth in the regulation. Our contact for submission of an eligible IDR is FederalNSAIDR@Aetna.com and should be included when you submit your IDR application to the Federal Portal. You must send us a copy of your submitted IDR Application, with the claim number included, to the FederalNSAIDR@Aetna.com mailbox.

For your information, we benefitted the claim(s) as required by the Federal No Surprises Act using the Qualified Payment Amount (QPA) less the member's in-network cost share.

The QPA is the difference between the "submitted charges" and "not payable" amount shown on each covered service line on the Explanation of Provider Payment notice issued for each claim.
Per the Act, we calculated the QPA as the median of our contracted rates for the same or similar services(s), supplied by a provider in the same or a similar specialty, and delivered in the Metropolitan Statistical Area (MSA) determined by the service location provided on the claim(s). If applicable, the QPA was adjusted to account for billed modifier(s) that provided a more specific description of the furnished item(s) or service(s) and that affected the processing or allowance for the code(s) billed. In general, the median contracted rate for an item or service is calculated by arranging in order from least to greatest the contracted rates of all plans of the plan sponsor (or of the administering entity, if applicable) or all coverage offered by the issuer in the same insurance market for the same or similar item or service that is provided by a provider in the same or similar specialty or facility of the same or similar facility type and provided in the geographic region in which the item or service is furnished, and selecting the middle number.

- We did not include contracted rates that were not on a fee-for-service basis. Our QPA was determined based on derived amounts.
- Aetna did not use a database to determine our QPA; internal data was used.
- We did not use related services codes to determine a QPA for a new service code. If a service code was created or substantially revised in a year after 2019, our 2020/2021 rates were used
- Our calculated median contracted rate(s) do not include risk-sharing, bonus or other incentive-based or retrospective payments or payment adjustments.

Additionally, we are providing the following details about the calculation of our QPA:

Table 2. Additional Circumstances/Factors for Qualified Air Ambulance Items and Services
1. **The quality and outcomes measurements** of the provider of air ambulance services that furnished the services

- Information that is credible about the quality and outcomes measurements of the provider of air ambulance services that furnished the services could justify a different rate if it clearly demonstrates that the QPA is materially different from the appropriate OON rate

2. **The acuity of the condition of the participant, beneficiary, or enrollee** receiving the services, **or the complexity of providing** services to the participant, beneficiary, or enrollee.
   - Credible information about the acuity of the condition of the participant, beneficiary, or enrollee receiving the services, or the complexity of providing the services to the participant, beneficiary, or enrollee, may justify a higher rate if it clearly demonstrates that the QPA is materially different from the appropriate OON rate

3. **The level of training, experience, and quality of medical personnel that furnished the air ambulance services**.
   - Credible information about whether the level of training, experience, and quality of medical personnel that furnished the air ambulance services clearly demonstrates the QPA is materially different from the appropriate OON rate.

4. **The air ambulance vehicle type, including the clinical capability level of such vehicle.**
   - Certified IDR entities must consider whether credible information about the ambulance vehicle type, including the clinical capability level of the vehicle, clearly demonstrates that the QPA is materially different from the appropriate OON rate.
   - Certified IDR entities may not consider whether the air ambulance is fixed wing or rotary wing, as that will be reflected in the QPA.
   - Certified IDR entities must consider whether credible information that the air ambulance vehicle type and the vehicle's level of clinical capability only to the extent not already taken into account by the QPA.

5. **The population density of the point of pick-up for the air ambulance of** the participant, beneficiary, or enrollee (such as urban, suburban, rural, or frontier).
   - The QPA for the geographic regions used to calculate the QPA may already reflect the population density of the pick-up location. Nevertheless, in certain circumstances, the QPA for air ambulance services may not adequately capture the population density, due to additional distinctions, such as between metropolitan areas within a state, or between rural and frontier areas.
   - Credible information about additional circumstances must clearly demonstrate that the QPA is materially different from the appropriate OON rate for a particular air ambulance service.

6. **Demonstrations of good faith efforts (or lack of good faith efforts) made by the provider of air ambulance services or the plan to enter into network agreements, as well as contracted rates between the** provider and the plan during the previous 4 plan years.
   - Credible information about demonstrations of good faith efforts (or lack thereof) made by the nonparticipating provider of air ambulance services or the plan to enter into network agreements, as well as contracted rates between the provider and the plan, as applicable, during the previous 4 plan years, must clearly demonstrate that the QPA is materially different from the appropriate OON rate for such air ambulance services.

If you are interested in joining our network, you can contact our network team at https://cldaz.aetna.com/pocui/

Thank you,
Surprise Bill Review Team

EXHIBIT 2

Written Payment Determination Notice-DISP-32032

I

IDR <idr@met-hcs.com>

Reply all

Wed 10/12, 5:44 PM

nsalegal@gmr.net;

federalnsaidr@aetna.com

Encrypt: This message is encrypted. Recipients can't remove encryption.

Show all 0 attachments

IDR dispute status: Payment determination made

MET Healthcare Solutions has reviewed your Independent Dispute Resolution (IDR) dispute referenced in the subject above and determined:

Determination 1-CPT Code A0430 (DLI 21253)

According to 29 Code of Federal Regulations 2590.717-2 (b)(2), the arbitrator's decision is based upon a thorough and careful consideration of the evidence submitted by both parties, "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." Further, "Federal IDR Process Guidance for Certified IDR Entities" prohibits consideration of the factors enumerated in 29 Code of Federal Regulations 2590.716-8(c)(4)(iii)(v), and these factors have not been considered.

The qualifying payment amount ("QPA") for this service is $12,755.87. The initiating party, Guardian Flight LLC ("Guardian"), urges us to adopt $26,926.00 as the appropriate out-of-network ("OON") rate. Guardian states that the non-initiating party, Aetna, did not provide a rationale for its QPA when requested and references "FAIR Health" as support for its OON rate offer. We are prohibited from taking FAIR Health into consideration regarding this dispute.

Guardian's submission has been considered carefully. However, Guardian has not "clearly demonstrated that the qualifying payment amount is materially different from the appropriate out-of-network rate." 29 Code of Federal Regulations 2590.716-8(c)(4)(iii)(C).

Credible evidence presented by Aetna supports the determination that the OON payment amount of $12,755.87 offered by Aetna under this dispute has been selected as the appropriate OON rate.

Determination 2- CPT Code A0435 (DLI 221256)

According to 29 Code of Federal Regulations 2590.717-2 (b)(2), the arbitrator's decision is based upon a thorough and careful consideration of the evidence submitted by both parties, "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." Further, "Federal IDR Process Guidance for Certified IDR Entities" prohibits

consideration of the factors enumerated in 29 Code of Federal Regulations 2590.716-8(c)(4)(iii)(v), and these factors have not been considered.

The qualifying payment amount ("QPA") for this service is $19,134.00. The initiating party, Guardian Flight LLC ("Guardian"), urges us to adopt $29,700.00 as the appropriate out-of-network ("OON") rate. Guardian states that the non-initiating party, Aetna, did not provide a rationale for its QPA when requested and references "FAIR Health" as support for its OON rate offer. We are prohibited from taking FAIR Health into consideration regarding this dispute.

Guardian's submission has been considered carefully. However, Guardian has not "clearly demonstrated that the qualifying payment amount is materially different from the appropriate out-of-network rate." 29 Code of Federal Regulations 2590.716-8(c)(4)(iii)(C).

Credible evidence presented by Aetna supports the determination that the OON payment amount of $19,134.00 offered by Aetna under this dispute has been selected as the appropriate OON rate.

Determination 3- CPT Code A0420 (DLI 221263)

According to 29 Code of Federal Regulations 2590.717-2 (b)(2), the arbitrator's decision is based upon a thorough and careful consideration of the evidence submitted by both parties, "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." Further, "Federal IDR Process Guidance for Certified IDR Entities" prohibits consideration of the factors enumerated in 29 Code of Federal Regulations 2590.716-8(c)(4)(iii)(v), and these factors have not been considered.

The qualifying payment amount ("QPA") for this service is $75.66. The initiating party, Guardian Flight LLC ("Guardian"), urges us to adopt $116.20 as the appropriate out-of-network ("OON") rate. Guardian states that the non-initiating party, Aetna, did not provide a rationale for its QPA when requested and references "FAIR Health" as support for its OON rate offer. We are prohibited from taking FAIR Health into consideration regarding this dispute.

Guardian's submission has been considered carefully. However, Guardian has not "clearly demonstrated that the qualifying payment amount is materially different from the appropriate out-of-network rate." 29 Code of Federal Regulations 2590.716-8(c)(4)(iii)(C).

Credible evidence presented by Aetna supports the determination that the OON payment amount of $75.66 offered by Aetna under this dispute has been selected as the appropriate OON rate.

Next Step:

If any amount is due to either party, it must be paid not later than 30 calendar days after the date of this notification, as follows:

• If payment is owed by a plan or issuer to the non-participating provider, facility, or provider of air ambulance services, the plan or issuer is liable for additional payment when the amount of the offer selected exceeds the sum of 1) any initial payment the plan or issuer has paid to the non-participating provider, facility, or provider of air ambulance services and 2) any cost sharing paid or owed by the participant, beneficiary, or enrollee.

• If the plan or issuer is owed a refund, the non-participating provider, facility, or provider of air ambulance services is liable to the plan or issuer when the offer selected by the certified IDR entity is

less than the sum of the plan's or issuer's initial payment and any cost sharing paid by the participant, beneficiary, or enrollee.

NOTE: The non-prevailing party is ultimately responsible for the certified IDR entity fee, which is retained by the certified IDR entity for the services performed. MET Healthcare Solutions has determined that Guardian had the fewest determinations in its favor and is therefore the non-prevailing party in the dispute referenced in the subject above and is responsible for paying the certified IDR entity fee. MET Healthcare Solutions will refund the certified IDR entity fee in the amount of $350 to the prevailing party within 30 business days of the date of this notification.

Pursuant to Internal Revenue Code sections 9816(c)(5)(E) and 9817(b)(5)(D), Employee Retirement Income Security Act sections 716(c)(5)(E) and 717(b)(5)(D), and Public Health Service Act sections 2799A-1(c)(5)(E) and 2799A-2(b)(5)(D), and their implementing regulations at 26 CFR 54.9816–8T (c)(4)(vii), 29 CFR 2590.716-8(c)(4)(vii) and 45 CFR149.510(c)(4)(vii), this determination is legally binding unless there is fraud or evidence of intentional misrepresentation of material facts to the certified IDR entity by any party regarding the dispute.

The party that initiated the Federal IDR Process, may not submit a subsequent Notice of IDR Initiation involving the same other party with respect to a claim for the same or similar item or service that was the subject of the initial Notice of IDR Initiation during the 90-calendar-day suspension period following the date of this email, also referred to as a "cooling off" period.

If the end of the open negotiation period for such an item or service falls during the cooling off period, either party may submit the Notice of IDR Initiation within 30 business days following the end of the cooling off period, as opposed to the standard 4-business-day period following the end of the open negotiation period. This 30-business-day period begins on the day after the last day of the cooling off period.

Resources

Visit the No Surprises website for additional IDR resources.

Contact information

For questions, contact MET Healthcare Solutions at IDR@met-hcs.com. Reference your IDR reference number above.

Thank you,

IDR Department