UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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

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

Plaintiff Guardian Flight, LLC ("Guardian") opposes Defendant Aetna Health Inc.'s ("Aetna") Motion to Dismiss Guardian's Original Complaint and would show the Court as follows:

INTRODUCTION

Guardian seeks judicial review of an Independent Dispute Resolution ("IDR") decision obtained through undue means and misrepresentations under the No Surprises Act ("NSA"). It is not, as Aetna contends, asking to "relitigate the issue." Litigation implies that the parties were afforded due process and the opportunity to fairly contest each other's evidence and arguments, which did not occur in the IDR process. Nor is this a challenge to the IDR process or the NSA itself. While flawed, when parties act in good faith, the system functions as intended. Instead, Guardian seeks judicial review of an award that was improperly secured by a payor and improperly determined by an IDR entity acting in violation of the NSA and federal law.

The IDR process, which is nothing like a voluntary arbitration under the FAA, lacks the features and due process protections inherent to proceedings governed by an agreement of the parties. FAA case law and the traditional presumption in favor of confirming awards should not

apply here. And even under the FAA's procedure for vacatur, which also should not apply, dismissal would be inappropriate.

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

LEGAL STANDARD

Aetna states that "[j]udicial review under the FAA is 'extraordinarily narrow' and limited to the four grounds identified" in Section 10(a) of the FAA. Doc. 12 at 8. But this case is not governed by the FAA and, for reasons detailed below, Guardian has filed a Complaint in this District—not a motion to vacate.

Aetna's standard of review is wrong. While it is true that the "burden of proof" ultimately lies with Guardian, *id.*, that is not the standard at the motion-to-dismiss stage, before the parties have had the opportunity to engage in discovery. Guardian should be allowed the opportunity to uncover information central to its claims—information solely in the possession of Aetna. Accordingly, this Court should review the Complaint under the standard prescribed by the Federal Rules of Civil Procedure.

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) (internal citations and quotations omitted). When a federal court reviews a complaint on a motion to dismiss, it must be mindful that "a plaintiff's complaint must [only] contain a 'short and plain statement of the claims showing that the pleader is entitled to relief'" *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994) (quoting Fed. R. Civ. P. 8(a)(2)).

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 [the claimant] is entitled ***to offer evidence to support [the] claims***." *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) (emphasis added). "Dismissal is improper if the allegations support relief on ***any*** possible theory." *Cinel v. Connick*, 15 F.3d 1338, 1341 (5th Cir. 1994).

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 showing entitlement 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 court's inquiry should focus on the complaint as a whole, 'regardless of how much of it is discussed in the motion to dismiss'" *U.S. ex rel. Bias v. Tangipahoa Par. Sch. Bd.*, 816 F.3d 315, 321 (5th Cir. 2016) (quoting *Wilson v. Birnberg*, 667 F.3d 591, 595 (5th Cir. 2012)).

ARGUMENT

I. IDR determinations are not arbitrations.

To begin, this Court should recognize that IDR determinations under the NSA bear no resemblance to any traditional form of arbitration. 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."). Without 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). Before 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.

II. Courts may review QPA calculations where there are allegations of fraud or misrepresentation, and as part of its due process review.

Aetna proclaims that "the Court must dismiss the claim for lack of jurisdiction" 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." Dkt. 12 at 13. This position, unsupported by case law, is based on a flawed interpretation of the NSA—one that not only renders a portion of the statute meaningless, in violation of well-established principles of statutory construction, but also yields an absurd result from a due process perspective.

A. The NSA specifically allows judicial review where an award is procured through fraud or misrepresentation.

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)). "It is axiomatic that [courts] must construe statutes so as to give meaning to all terms, and simultaneously to avoid interpretations that create internal inconsistencies or contradictions." *In re McBryde*, 120 F.3d 519, 525 (5th Cir. 1997). Additionally, "[s]tatutes generally should be construed to avoid an absurd result," meaning ones that "no reasonable person could intend." *United States v. Bittner*, 19 F.4th 734, 748 (5th Cir. 2021), cert. granted, 142 S. Ct. 2833 (2022)(citation omitted).

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).

Aetna argues that "judicial review is *not* available to determine whether a party misrepresented facts presented to the IDR entity." Doc. 12 at 13. This is because, Aetna argues, 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.* Aetna further argues that because the "Departments' recently promulgated final rule" states that "it is the Departments' (or applicable State authorities') responsibility, not the certified IDR entity, to monitory the accuracy of the plan's or issuer's QPA calculation," "[i]t follows that the Court, likewise, is not responsible for assessing the validity of Aetna's QPA calculation or methodology." *Id.*

Aetna asks this Court to make a remarkable leap in logic. First, Aetna demands that this Court relinquish jurisdiction when the plain language of the Departments' final rule does not even purport to reserve them exclusive jurisdiction. The rule simply states it is not ***the IDR entities'*** responsibility to verify the QPA. Second, the Departments themselves were clear in their guidance that they have no obligation to monitor or investigate payor QPA calculations. The Departments stated:

> It is not the role of the certified IDR entity to determine whether the QPA has been calculated correctly by the plan, make determinations of medical necessity, or to review denials of coverage. NOTE: If the certified IDR entity or a party believes that the QPA has not been calculated correctly, the certified IDR entity or party ***is encouraged to notify*** the Departments through the Federal IDR portal, and the Departments ***may*** take action regarding the QPA's calculation.

See Depts. of Health & Human Servs., Labor, and the Treasury, Federal Independent Dispute Resolution (IDR) Process Guidance for Certified IDR Entities (2022) (emphasis added).[1] The Departments merely *encourage* parties to notify the Departments if they believe the QPA has not been calculated correctly. And even if the Departments are notified, they need not take any action in response.

Aetna does not cite a single case supporting its argument that a federal court ***lacks jurisdiction*** over a claim where a regulator "may" investigate a consumer complaint involving the same subject matter. Aetna does not cite to a single part of the NSA that even suggests the Departments have exclusive jurisdiction over disputes that in any way implicate the accuracy of an insurer's QPA. Presumably, payors may not simply prevail in IDR proceedings by lying about the QPA, leaving providers with no recourse to challenge such awards. But that is precisely what Aetna advocates to this Court.

[1] https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Federal-Independent-Dispute-Resolution-Process-Guidance-for-Certified-IDR-Entities.pdf at 19.

A more logical, common-sense interpretation is that Congress specifically enumerated one of the situations in which an award is procured using "undue means," which is one of the four grounds for vacatur under the FAA. An award is not enforceable where a payor like Aetna misrepresents facts to the IDR entity, such as its QPA for the transport. This gives meaning to all terms, does not lead to an absurd result, and promotes the public policy of IDR proceedings being free from misrepresentations and bad faith gamesmanship.

B. *Judicial review is broader under compelled processes like IDR proceedings.*

Aetna's attempt to limit this Court's jurisdiction is contrary to the Constitutional requirement that greater judicial review be given to compelled processes like IDR proceedings. While the IDR process bears little resemblance to arbitration, even it were considered an arbitration, there is a significant difference between the level of judicial scrutiny afforded private arbitrations under the FAA and that required when arbitration is compelled by statute. While "voluntary arbitration" is based on consent and "may be conducted using any procedure acceptable to the participants," "compulsory arbitration must comport with due process." *Bd. of Educ. of Carlsbad Mun. Schools v. Harrell*, 882 P.2d 511, 518 (N.M. 1994). Many courts have held that when arbitration is mandatory, "more due process is required than when it is voluntary." *AT&T Commun. of the S.W., Inc. v. S.W. Bell Tel. Co*., 86 F. Supp. 2d 932, 966 (W.D. Mo. 1999) (citation omitted). As one New York federal court has stated:

> The simple and ineradicable fact is that voluntary arbitration and compulsory arbitration are ***fundamentally different*** if only because one may, under our system, consent to almost any restriction upon or deprivation of a right, ***but similar restrictions or deprivations if compelled by government must accord with procedural and substantive due process***.

United States v. American Society of Composers, Authors, and Publishers, 708 F. Supp. 95, 96–97 (S.D.N.Y. 1989) (emphasis added). When arbitration is compulsory, "the award must satisfy an additional layer of judicial scrutiny," "due process rights must be scrupulously protected," and the

award must "be supported by adequate evidence; *i.e.*, there must be a 'rational basis [in the whole record] for the findings of fact.' *Caroli v. New York City Dep't of Educ.,* 132 N.Y.S.3d 517, 525 (N.Y. Sup. Ct. 2020) (citations omitted).

A fundamental requirement of procedural due process is the opportunity to be heard in a "meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (emphasis added). A hearing does not satisfy due process if it "is totally devoid of a meaningful opportunity to be heard." *Washington v. Kirksey*, 811 F.2d 561, 564 (11th Cir. 1987). For review to be meaningful, "the court must determine whether the litigant received a fair hearing before an impartial tribunal, whether the decision is supported by substantial evidence, and whether the decision is in accordance with law." *Bd. of Educ. of Carlsbad Mun. Schools v. Harrell*, 882 P.2d 511, 526 (N.M. 1994).

Substantive due process ordinarily requires that the court be provided "the full evidentiary basis" of decisions so it can conduct meaningful appellate review. *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); *see also State ex rel. Ormet Corp. v. Indus. Commn. of Ohio*, 561 N.E.2d 920, 925 (Ohio 1990) (due process demands a meaningful evidentiary review by commission members).

Similarly, due process requires that a court know the legal and factual basis for a decision. As the Supreme Court of New Mexico explained:

> We agree that due process, together with separation of powers considerations, requires that parties to ***statutorily mandated arbitration*** be offered meaningful review of the arbitrator's decision. In order for review of the arbitrator's decision to be meaningful, ***the court must determine whether the litigant received a fair hearing before an impartial tribunal, whether the decision is supported by substantial evidence, and whether the decision is in accordance with law.***

Bd. of Educ. of Carlsbad Mun. Schools v. Harrell, 882 P.2d 511, 526 (N.M. 1994) (emphasis added)." Indeed, a court should vacate an award where an arbitrator fails to follow procedures established by law. *See Matter of Lancer Ins. Co*. (Great Am. Ins. Co.), 651 N.Y.S.2d 852, 855 (N.Y. Sup. Ct. 1996) (vacating award in compulsory arbitration where arbitrator acknowledged he failed to review certain submissions before arbitration hearing, stating that "the rights of a party [were] prejudiced due to the arbitrator's failure to follow the procedures established by law").

In *U.S. Lines, Inc. v. Federal Maritime Commission*, the U.S. Court of Appeals for the District of Columbia remanded a federal agency's decision where the agency "made critical findings on the basis of data which was not included in the record" and "unknown to the parties and to th[e] court." 584 F.2d 519, 533, 543 (D.C. Cir. 1978).[2] The court held that because "the data relied on by the Commission in reaching its decision [wa]s not included in the administrative record," the agency's reliance on unknown information to support its decision "preclude[d] effective judicial review in th[e] case" and "effectively eliminate[d] the roles of the . . . court in the decisionmaking and review processes." *Id.*

The Court must provide a greater level of scrutiny to the IDR process under the NSA than it does to voluntary arbitration proceedings under the FAA. That includes inquiry into whether Aetna secured an award through misrepresenting its QPA.

III. Applying an illegal presumption is grounds for vacatur.

Aetna also asserts that "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." Doc. 12 at 10. The Complaint says otherwise.

[2] While the federal government has outsourced the IDR process, due process cannot be evaded through federal contractors. It is the process that must comport with due process. Accordingly, case law on due process protections required of agency decision making applies equally to IDR determinations.

By applying a rebuttal presumption, MET "revealed evident partiality, committed prejudicial misbehavior, and exceeded its powers by using an illegal presumption in favor of the undisclosed QPA." Compl. ¶ 36. Each of these is grounds for vacatur.

A. MET exceeded its powers by violating the NSA.

Aetna contends "that even grave errors of law or fact are not bases for vacatur under the FAA." Doc. 12 at 8, 10. First, FAA case law was developed in the context of traditional arbitrations based on the agreement of the parties. As explained above, IDR proceedings are nothing like traditional arbitration proceedings and this Court is not required to blindly apply FAA case law to them. But even under that case law, the discretion of arbitrators has limits and vacatur is appropriate here.

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) (emphasis added). In traditional arbitrations, an arbitrator's power derives from and is limited by the arbitration agreement. 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).

In IDR proceedings, there is no arbitration agreement. Instead, the IDR entity's authority derives from the NSA. Accordingly, an IDR entity exceeds its powers when it fails to decide

disputes in accordance with the NSA. The suggestion that an IDR entity 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 Fifth Circuit's decision in *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. 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 in two ways. First, it applied an illegal presumption in favor of the QPA. Following the district court's rulings in *Texas Med. Association, et al. v. United States Dep't of Health and Hum. Services, et al.*, Case No. 6:21-cv-425 (E.D. Tex.) (February 23, 2022) and *LifeNet, Inc. v. United States Dep't of Health and Hum. Services, et al.*, Case No. 6:22-cv-162 (E.D. Tex.) (July 26, 2022), an IDR entity could not place its "thumb on the scale for the QPA." Compl. ¶ 33. But that is precisely what MET did when it found that Guardian had not "clearly demonstrated that the qualifying payment amount is materially different from the appropriate out-of-network rate." *Id.* In fact, the very regulation cited and applied by the MET reviewer is the exact language that was held illegal and invalidated months before the claim at issue here was adjudicated. This alone is grounds for vacatur.

Second, MET refused to consider independent market data, instead claiming it was "prohibited" from taking market data into account. *Id.* While Aetna is correct that the NSA

prohibits consideration of "usual and customary charges," that is not the market data that was submitted by Guardian. Aetna incorrectly assumes that charge data was submitted because, as noted above, the parties are not provided access to each other's submissions. The market data submitted by Guardian was in fact proper under the NSA and should have been considered by MET. This refusal to consider relevant and permissible information is a separate ground for vacatur.

MET exceeded its powers by applying an illegal presumption in Aetna's favor and refusing to consider Guardian's evidence. Aetna's motion to dismiss must be denied.

B. Applying an illegal standard in favor of insurers qualifies as evident partiality.

Applying an illegal presumption in favor of the QPA is also grounds for vacatur because it qualifies as evident partiality. Section 10(a)(2) of the FAA 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) (emphasis added).

Guardian's allegations support that conclusion here. The Complaint 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. This was done months *after* the rule was invalidated. *Id.* at ¶¶ 23-24. The reviewer also 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.

Guardian is also 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). Guardian was harmed by the application of an illegal presumption, which resulted in Aetna paying less for Guardian's air ambulance services than it should have. For the same reasons Guardian's factual allegations state other grounds for vacatur, it pleads grounds for prejudicial misbehavior.

IV. Guardian sufficiently alleges that Aetna procured the IDR award through "undue means."

Aetna claims that Guardian "provides no factual basis for its conclusory allegation" that Aetna "procured the IDR award at issue through misrepresentations and undue means." Doc. 12 at 13. On the contrary, the Complaint meets the federal pleading standard even if Fed. R. Civ. P. 9(b) is applied.

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) (emphasis added). "[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) (emphasis added).

Although Aetna tries to minimize the Complaint's allegations, they clearly provide a factual basis for Guardian's belief that Aetna misrepresented its QPA. First, the Departments have acknowledged that several payors are not properly calculating the QPA in accordance with the regulations—this is not mere speculation. Compl. ¶ 29. And in this case, Guardian and its affiliates were OON with Aetna and certain other commercial payors in 2019. Even so, Guardian was reimbursed by them for many transports during that year. *Id.* at ¶ 30. The historical OON rate from commercial payors including Aetna (base and mileage) for a trip in Nebraska of this length and type was much higher than Aetna's purported QPA. *Id*. And Guardian has contracted rates for air ambulance services in Nebraska, and its contracted rates are much higher than the purported QPA. *Id.* Aetna's 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. Said differently, compared to rates Guardian has experienced with Aetna's competitors, ***and with Aetna itself***, Aetna's QPA

is so low that Guardian believes the QPA was calculated fraudulently.[3] Far from "speculation and conclusory assertions," Guardian's suspicions are backed by hard data and its considerable market knowledge. Doc. 12 at 18.

Based on these facts, Guardian alleges upon information and belief that Aetna made a misrepresentation of fact to MET and thus fraudulently procured the award in violation of the NSA. To Aetna's point that Guardian's "allegations regarding Aetna's QPA calculation fail to satisfy Rule 9(b)'s *what* and *how* elements," Doc. 12 at 17, that is ***precisely*** the information "peculiarly within the opposing party's knowledge" described in *Tuchman*. 14 F.3d at 1068. How the QPA was calculated, what contracts were included, and what the proper QPA should be are all facts uniquely in Aetna's hands. Far from the "sue first, ask questions later," approach that Aetna implies, Guardian conducted a "careful pretrial investigation." Doc. 12 at 17. But Guardian was stymied in its efforts by Aetna.

In response, Aetna attaches an exhibit to its motion that purports to show it did not "withhold information from Guardian Flight during the open-negotiation period regarding its QPA calculation or methodology during the open-negotiations period, as alleged." Doc. 12 at 9, n. 7. But in fact, Aetna engages in the very "sleight of hand" of which it accuses Guardian. Doc. 12 at 13. As Aetna's exhibits demonstrate, the air ambulance claim at issue in this lawsuit is DISP-32032. Doc. 12-2 (payment determination). Guardian Flight's position statement for that claim

[3] In response to Guardian's allegations, Aetna inserts a bevy of unsupported "facts" in its motion, *see, e.g.*, Doc. 12 at 17, n. 13, which should be disregarded. *Jones v. Tex. Dep't of Criminal Justice*, No. CV 16-2232, 2016 WL 8711418, at *4 (S.D. Tex. Dec. 5, 2016)("disregarding the additional 'facts' argued by Defendants in their Motion to Dismiss"). Moreover, these "facts" from Aetna are the types of information uniquely in Aetna's possession, which Guardian should be afforded the opportunity to test in discovery.

was due on August 12, 2022.[4] GMR, Guardian's parent entity, submitted its position statement on the dispute to MET on that date. *See* Exhibit 1, e-mail submitting DISP-32032. Aetna's email, which came ten days later, was ***for a different claim*** (Aetna's exhibit blacked out the claim number), meaning that Guardian did not have the information requested when it submitted its position statement for the only claim at issue in this lawsuit.

Moreover, the information provided by Aetna in late August, after the claim at issue was submitted, does not provide the information about its improbably low QPA that Guardian has been requesting since at least February. *See* Exhibit 2, letter dated February 18, 2022, from T. Cook to T. Moriarty.[5] Aetna did not respond to Guardian's February letter for over three months. *See* Exhibit 3, letter dated May 27, 2022, from M. Driscoll to T. Cook. And when it did, it ***admitted*** that its QPA calculation on at least three claims contained errors that resulted in understated QPAs, but it did not disclose what the errors were or why they happened. *Id.* Yet Aetna still refused to provide the key information requested and needed in order to verify its purported new QPA calculations, including the rates on which they were based. *Id.* Aetna continued to refuse to provide this information in the e-mail it heralds as its disclosure. Dkt. 12-1.

Aetna admitted to misrepresenting its QPA on at least three claims. Guardian cannot allege the specific details on how Aetna continues to misrepresent its QPA because those details are uniquely within Aetna's possession and it has refused to provide them despite numerous requests. Guardian has no way of obtaining this information except through discovery, and it should be

[4] Aetna attaches an August 21, 2022 email as Exhibit 1 to its Motion to Dismiss. To the extent that this Court considers Aetna's Exhibit 1, Guardian requests that the Court also consider the exhibits it submits with this response.

[5] As reflected by the exhibits attached to this response, Guardian is a subsidiary of Global Medical Response and Aetna is a subsidiary of CVS Health. Commercially sensitive or personally identifying information has been redacted from the exhibits.

afforded the opportunity to do so. The factual basis for Guardian's belief, which is based on hard data and market experience, meet the requirements of Rule 9(b). For the same reasons, Guardian's allegations meet the pleading standard under *Twombly* and *Iqbal*, as the Complaint contains far more than "naked assertions devoid of further factual enhancement." Doc. 12 at 15, 18. Guardian states a claim, and Aetna's motion to dismiss should be denied.

CONCLUSION

For all these reasons, Guardian asks this Court to deny Aetna's Motion to Dismiss. 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 30, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 30th 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