UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS - HOUSTON DIVISION

GUARDIAN FLIGHT, LLC,	§	
Plaintiff,	§	**Civil Action No. 4:22-cv-03805**
VS.	§	
	§	**Consolidated (Case No. 4:22-cv-03979)**
AETNA HEALTH, INC., *et al.*	§	
Defendants.	§	

AETNA HEALTH INC.'S REPLY IN SUPPORT OF ITS MOTION FOR A PROTECTIVE ORDER OR, IN THE ALTERNATIVE, FOR A STAY ON DISCOVERY

Guardian's response is replete with inaccuracies or half-truths. At its core, Guardian argues: "The NSA provides for judicial review, which naturally requires discovery." Dkt. 58 at 2. But that is simply not true. The NSA allows for judicial review of IDR awards only under the FAA's four narrow grounds for vacatur. It follows that cases deciding the scope of post-hearing discovery in such actions under the FAA are directly on point. Guardian attempts to build a second level to its house of cards by arguing that "[t]he NSA does not provide statutory limits on discovery when a court is conducting judicial review." *Id*. at 5. ***Neither does the FAA***. Yet, courts have universally recognized that the general, liberal approach to discovery does not apply to vacatur proceedings under the FAA.

Cutting to the chase, Guardian avoids directly addressing Aetna's arguments in favor of hyperbolic rhetoric that is entirely misplaced. This case is about Guardian's dissatisfaction with Congress' efforts to reel in emergency service providers who, for years, held the healthcare industry hostage with egregious charges for out-of-network services. Crying "fraud" is Guardian's *modus operandi*, as Guardian (or its affiliates) make similar claims against unrelated payers in this and other jurisdictions. In every dispute, Guardian challenges how QPAs were calculated, which is precisely the information it seeks from Aetna. *See* Dkt. 48-2 (discovery requests). Importantly, how payers calculate their QPAs is exactly what federal regulations place within the Departments' purview—not the courts'. *See* Dkt. 48 at 6; *see also* Dkt. 43 at 1–3. Moreover, Guardian's discovery seeks competitive rate information of Aetna ***and Guardian's competitors***, which would result in irreparable

harm to both. Allowing Guardian to proceed with its end-run around the NSA's legislative scheme would open the floodgates for any dissatisfied provider to sue based on unsubstantiated allegations of fraud and then attack the very processes Congresses prescribed for resolving these disputes.

A. Guardian Has the Burden of Proof Backwards

Guardian accuses Aetna of citing the wrong legal standard. But as the party seeking to vacate an award under § 9 of the FAA, Guardian—not Aetna—bears the burden of showing the sought-after discovery's necessity. *Vantage Deepwater Co. v. Petrobras Am., Inc*., 966 F.3d 361, 372–73 (5th Cir. 2020) ("The party seeking [post-arbitration] discovery bears the burden of showing its necessity." (quotation omitted)). Guardian has failed to do so. Regardless, Aetna has demonstrated good cause to, at the very least, stay discovery until the Court decides the defendants' pending motions to dismiss.

B. Protecting Against Inappropriate Discovery Is Consistent with the Limits of the FAA

Guardian boldly claims that "Aetna's extraordinary request for protection from discovery has no basis in law or fact." Dkt. 58 at 3. But it is well established that discovery in the context of a motion to vacate is extremely limited. *See Legion Ins. Co. v. Ins. Gen. Agency, Inc.*, 822 F.2d 541, 542–44 (5th Cir. 1987); *Midwest Generation EME, LLC v. Continuum Chem. Corp.*, 768 F. Supp. 2d 939, 943 (N.D. Ill. 2010) ("Post-arbitration discovery is rare, and courts have been extremely reluctant to allow it."). Disallowing discovery in this case is consistent with the strict limits that apply when a party challenges an arbitration award under the FAA, as well as Congress' goal of efficient and economical resolution of these types of disputes. *See* Dkt. 12 at 2–5.

Even if one were to adopt Guardian's view of the world, Aetna has provided the Court with three cases[1] in which a court considering near-identical arguments to vacate IDR awards under the NSA has stayed discovery (hereinafter, "*Med-Trans*"). Indeed, Chief Judge Timothy Corrigan of the

[1] Case No. 3:22-cv-1077, (M.D. Fla. 2022); Case No. 3:22-cv-1139, (M.D. Fla. 2022); and Case No. 3:22-cv-1153, (M.D. Fla. 2022).

Middle District of Florida is currently entertaining a trio of cases brought by Guardian's counsel on behalf of Guardian affiliates. *See* Dkt. 48 at 3. In those cases, Judge Corrigan *sua sponte* stayed discovery until the court first determines whether it has jurisdiction to decide the parties' dispute. *See id*. Viewed through this lens, it is disingenuous for Guardian to argue that Aetna's request for protection from discovery has no basis in law or fact—clearly, it is rooted in both law *and* fact.[2]

Guardian cannot avoid the inconvenient truth: Aetna has supplied the Court with three cases directly on point, while Guardian has proffered none. Instead, Guardian cites a slew of cases that bear no resemblance to the facts of this case in a misguided effort to patch together a response that avoids directly addressing Aetna's principal arguments in favor of a protective order (or temporary stay).

C. Irreparable Harm Would Result from Permitting Discovery

Guardian repeatedly laments that "confidentiality concerns can be addressed through a protective order." Dkt. 58 at 3. But a cursory review of Guardian's response reveals that it never once denies Aetna's allegation that it will share information gained through discovery with its affiliates or use such information against Aetna in future IDR proceedings. In the same vein, Guardian does not dispute (or even address) Aetna's concern that a protective order will not afford its confidential information—or the confidential information of other providers who are ***Guardian's competitors***—necessary protection. Nor does Guardian disagree that it seeks competitively valuable information to

[2] Guardian takes Aetna's statement in an unrelated case (*Reach Air*) out of context to suggest that Aetna "acknowledges" the FAA's procedural rules and principles do not apply because the NSA only incorporates the FAA's vacatur provisions. *See* Dkt. 58 at 7. This is a gross mischaracterization. In *Reach Air*, Guardian does not seek to vacate any IDR awards, which is the ***only*** ground for judicial review available under the NSA. Aetna's point in *Reach Air* was that Guardian cannot rely on the FAA's venue provision to argue this Court is a proper venue when ***it has sued under the NSA*** for relief that ***falls outside the NSA's limited scope of judicial review***. Plainly, that argument has nothing to do with this case, where Guardian ***is*** suing to vacate IDR awards; in fact, Guardian cites the FAA's vacatur provision (Section 10) in its venue allegations. *See* Dkt. 1, ¶ 12. It is impossible to reconcile Guardian's argument that cases interpreting motions to vacate under Section 10 of the FAA are inapplicable when its ***only*** right to judicial review under the NSA stems from Section 10 of the FAA.

which it otherwise would not have access or that it can leverage this information to its advantage in future IDR disputes with Aetna. These omissions are telling. For reasons explained in Aetna's motion, there is little doubt any information Guardian gets its hands on via discovery will immediately be shared with its affiliates and used to gain a competitive advantage against Aetna. *See id*. at 8–9. This factor, on its own, should give the Court great pause when considering whether to allow discovery to go forward before it decides the pending motions to dismiss. That is, were the Court to allow discovery only to later dismiss Aetna from the case, the prejudice would be irreversible.

D. FAA Caselaw is Plainly Applicable to Vacatur Proceedings Under the NSA

Without the slightest hint of irony, Guardian argues: "Lacking persuasive authority stating that discovery should be carried out in any way other than the usual fashion, Aetna resorts to its favorite refrain: that matters are handled differently under the FAA." Dkt. 58 at 6. First, it is Guardian who has failed to supply persuasive authority. As mentioned, Aetna has provided the Court with three cases directly on point. Moreover, Aetna has taken the position that "matters are handled differently under the FAA" because courts hold that they are:[3]

> The pleadings stage of a civil action serves as a gateway to discovery and discovery available under the Civil Rules. By contrast the summary proceedings that result from an FAA motion to confirm or vacate an arbitration award are not intended to involve complex factual determinations, other than a determination of the limited statutory conditions for confirmation or grounds for refusal to confirm.

PG Publ'g, Inc. v. Newspaper Guild of Pittsburgh, 19 F.4th 308, 313–14 (3d Cir. 2021) (cleaned up).

Despite expressly acknowledging that the NSA incorporates the FAA's grounds for vacatur, *see* Dkt. 58 at 7, Guardian somehow insists that the Court adopt a different standard for discovery in

[3] Indeed, the proper procedural vehicle to vacate an IDR award is through a motion—not a complaint under Rule 8. *See Kruse v. Sands Bros. & Co.*, 226 F. Supp. 2d 484, 486–87 (S.D.N.Y. 2002) ("[A] party cannot initiate a challenge to an arbitration award by filing a complaint or an application"). Even if that were not grounds alone to dismiss Guardian's complaint—and it is—this notion reinforces why Rule 26's discovery rules are inapplicable to an action to vacate an IDR award.

this case—a case to vacate an IDR award under § 9 of the FAA—than courts regularly apply when considering motions to vacate under § 9 of the FAA. The absurdity of this argument is self-evident. Instead of relying on facts or reason, Guardian summarily argues that "judicial review—and therefore discovery—must be broader under the NSA." *Id*. Tellingly, Guardian provides no analysis to support its extraordinary conclusion. Instead, it cites statements made by Judge Corrigan at the initial conference in *Med-Trans*—statements made mere days before Judge Corrigan *sua sponte* stayed discovery, given his serious concern whether the court has jurisdiction over near-identical disputes.

E. Pending Motions to Dismiss Demonstrate Good Cause to Stay Discovery

Citing unreported cases bearing no resemblance to the facts of this case, Guardian argues that "[a] stay of discovery is a rare exception." Dkt. 58 at 9. Once again, Guardian has its wires crossed. While a stay on discovery may be the exception were this a traditional case, this is not a traditional case—this is a suit to vacate brought under § 9 of the FAA. Thus, discovery is the rare exception, not the other way around. *See Vantage Deepwater Co.*, 966 F.3d at 372. But even if this were your run-of-the-mill case, the Fifth Circuit has repeatedly confirmed that it is well within a court's discretion to stay discovery until it has determined preliminary dispositive questions, particularly where, as here, there are serious doubts over its jurisdiction to decide the dispute. *See* Dkt. 48 at 11 (collecting cases).

For the foregoing reasons, Aetna asks the Court to disallow discovery and reject Guardian's attempt to obtain Aetna's confidential and highly valuable information. In the alternative, Aetna requests the Court stay discovery until it has ruled on Aetna's pending motions to dismiss. *See* Dkt. 12 (lack of jurisdiction and failure to state a claim) and Dkt. 46 (mootness).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed electronically on June 7, 2023. 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
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