UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GUARDIAN FLIGHT, LLC	§	
Plaintiff	§	
	§	
v.	§	
	§	**Civil Action No. 4:22-CV-03805**
AETNA HEALTH, INC. and	§	**Judge Alfred Bennett**
MEDICAL EVALUATORS OF	§	
TEXAS ASO, LLC,	§	
Defendants	§	

REACH AIR MEDICAL SERVICES	§	
LLC., CALSTAR AIR MEDICAL	§	
SERICES, LLC., AND GUARDIAN	§	
FLIGHT LLC.,	§	
Plaintiffs	§	**Civil Action No. 4:22-CV-03979**
	§	**Judge Alfred Bennett**
v.	§	
	§	
KAISER FOUNDATION HEALTH	§	
PLAN INC., AND MEDICAL		
EVALUATORS OF TEXAS ASO,		
LLC.,		
Defendants		

SUPPLEMENTAL BRIEF

Pursuant to this Honorable Court's Minute Entry Order of June 30, 2023, Defendant Medical Evaluators of Texas ASO, LLC files this Supplemental Memorandum in Support of its Motions to Dismiss (Doc. 8 in Case No. 4:22-cv-03805 and Doc. 24 in Case 4:22-cv-03979).

I. BACKGROUND

1. On June 30, 2023, this Honorable Court held a status conference during which the Court advised the parties that in a similar case pending before United States District Court Judge Corrigan in Florida, Judge Corrigan expected to make a ruling within a few weeks on several

Motions to Dismiss ("Florida Motions to Dismiss") involving near identical issues under the "No Surprises Act" ("NSA"). That consolidated case is No. 3:22-cv-1077-TCJ-JBT, *Med-Trans Corporation v. Capital Health Plan, Inc. and C2C Innovative Solutions, Inc*., and No. 3:22-cv-1153-TJC-JBT, *Reach Air Medical Services, LLC v. Kaiser Foundation Health Plan, Inc. and C2C Innovative Solutions, Inc.*, pending in the United States District court for the Middle District of Florida, Jacksonville Division.

2. This Honorable Court stated that it would wait for Judge Corrigan's ruling to ensure there was no conflict and that, upon a ruling by Judge Corrigan, the parties would have 14 days to submit a supplemental brief of no more than seven pages.

3. On November 1, 2023, Judge Corrigan issued an Order on the Florida Motions to Dismiss, dismissing all claims. Defendant Medical Evaluators of Texas ASO, LLC ("MET") files this Supplement Memorandum in Support of its Motions to Dismiss. MET seeks dismissal because (a) the relief sought by Plaintiffs is not permitted under the NSA and (b) even if the relief sought by Plaintiffs was allowed under the NSA, MET is entitled to arbitrator immunity.

4. The deadline to file this Supplemental Memorandum is November 15, 2023.

II. ARGUMENT & AUTHORITY

5. The Court in Florida held that the NSA creates a very narrow right of judicial review. *Med. Trans Corp. v. Cap. Health Plan, Inc.*, Nos. 3:22-cv-1153-TJC-JBT and 3:22-cv-1077-TJC-JBT, 2023 U.S. Dist. LEXIS 195736 (M.D. Fla. Nov. 1, 2023.

6. The Court concluded that judicial review of IDR decisions was provided for in the NSA and permitted only under a narrow set of circumstances described in 9 U.S.C. § 10(a)(1)-(4) of the FAA. *Id*. at 16. Stated differently, the IDR award is not subject to judicial review except where: (a) it was procured by corruption, fraud, or undue means, (b) there was evident partiality

or corruption by the IDR entity, (c) the IDR entity was guilty of misconduct, or (d) the IDR exceeded its powers or so imperfectly executed them that a mutual, definite, and final award upon the subject matter submitted was not made. *See* 9 U.S.C. § 10(a).

7. The court's emphasis on the narrowness of review under the FAA enforces the public policy behind the FAA—to provide an alternative to traditional litigation—and that the review of arbitration awards is narrow to prevent arbitration from becoming "merely a prelude to a more cumbersome and time-consuming judicial review process." *Id*. at 18.

8. That is, of course, what Congress intended to create in the NSA's IDR process—an alternative to traditional litigation that avoids the length of cost of the latter. That intent is clearly expressed in the text of the statute. Congress wanted a quick and easy determination of disputed out-of-network charges and how much should be paid to the out-of-network health care provider on a disputed claim. Baseball style arbitration fits that bill perfectly. Allowing unhappy parties to sue not only the opposite party in the dispute but the IDR entity, such as MET, utterly defeats Congress' goal.

9. This is essentially what MET argued in its Motion to Dismiss. Though MET couched its argument in terms of 'arbitration,' the thrust is the same: an NSA award may be set aside only under the narrowest of circumstances—those identified in under 9 U.S.C. § 10(a)(1)-(4)—and those circumstances do not include nor contemplate a cause of action against an IDR entity.

10. The Florida Court reached the same conclusion— that the NSA's limited scope of judicial review did not create a cause of action against IDR entities. The last paragraph of Judge Corrigan's opinion before the orders sums it up:

> The NSA creates a limited right to judicial review of IDR decisions. It does not, however, create a cause of action to sue the IDR entity itself. See 42 §

> 300gg-111(c)(5)(E)(i). Nothing suggests that IDR entities are proper parties to suit under the NSA, so here the inquiry ends. The Court will grant C2C's motions to dismiss with prejudice.

Id.

11. MET would further note that Judge Corrigan's decision in the Florida lawsuits now bars Plaintiffs claims in this lawsuit under the doctrine of collateral estoppel.

12. Collateral estoppel precludes a party from litigating an issue already raised in an earlier action between the same parties if: (1) the issue at stake is identical to the one involved in the earlier action; (2) the issue was actually litigated in the prior action; and (3) the determination of the issue in the prior action was a necessary part of the judgment in that action. *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 868 (5th Cir. 2000).

13. The issues in the Florida lawsuits are identical to the issues here. The Plaintiffs here allege that MET reviewed and applied illegal, vacated rules, and selected the offers closest to the purported QPA. The same allegation was made against the IDR entity in the Florida lawsuits. Those plaintiffs claimed this was enough to trigger judicial review under 42 U.S.C. § 300gg–111 (c)(5)(E)(1).

14. Whether that claim was enough to trigger judicial review was also the issue actually litigated before the Florida Court. Ultimately, that Court decided that review under the NSA is extremely narrow and that it did not permit a lawsuit against IDR entities. Finally, whether an IDR entity can be sued under the NSA was a necessary part of the Florida Court's Order dismissing the claims against the IDR entity with prejudice.

15. The plaintiffs in the lawsuits are effectively the same. The air ambulance companies that are plaintiffs in the Florida lawsuits and the air ambulance companies that are plaintiffs in the lawsuits before this Court are subsidiaries of Global Medical Response and are therefore in

privity. They are represented by the same counsel. Even so complete identity of parties is not required in the Fifth Circuit. *Wehling v. Columbia Broadcasting System*, 721 F.2d 506, 508 (5th Cir. 1983) ("Complete identity of parties in the two suits is not required"); *Harmon v. Bayer Bus. & Tech. Servs., L.L.C.*, No. H-14-1732, 2016 U.S. Dist. LEXIS 10622, 2016 WL 397684 * 13-14 (S.D. Tex. Jan. 29, 2016) ("If a litigant has fully and fairly litigated an issue, third parties unrelated to the original action can bar the litigant from relitigating that same issue in a subsequent suit through the principle of non-mutual collateral estoppel"). Plaintiffs had an opportunity to fully and fairly litigate the issue in the Florida Court.

16. Furthermore, where two suits are pending at the same time and address the same issues, the suit which first progresses to judgment collaterally estops relitigation of the claims in the second lawsuit. *Jones v. Sheehan, Young & Culp, P.C.*, 82 F.3d 1334, 1338 n. 3 (5th Cir. 1996). The Florida lawsuits proceeded to judgment first. Thus, Plaintiffs claims here are barred by collateral estoppel.

17. For the foregoing reasons, and the arguments presented in MET's Motions to Dismiss, Defendant MET asks this Honorable Court to dismiss Plaintiffs' claims against it with prejudice to refile.

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Respectfully submitted,

THE VETHAN LAW FIRM, PC

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that a true and correct copy of the foregoing *Defendant's Motion to Consolidate* served on all counsel of record or registered agents, on the 15th day of November 2023 in compliance with the Texas Rules of Civil Procedure.

By: /s/ Joseph L. Lanza
Joseph L. Lanza