United States District Court
Southern District of Texas
ENTERED
January 06, 2024
Nathan Ochsner, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GUARDIAN FLIGHT, LLC, *et al.*,	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	CIVIL ACTION NO. 4:22-CV-03805
	§	
AETNA HEALTH INC., *et al.*,	§	
	§	
Defendants.	§	

ORDER

Before the Court are several motions and the respective responses and replies thereto: Defendant Medical Evaluators of Texas ASO, LLC's ("MET") Motions to Dismiss (Doc. #8; Doc. #24 in 4:22-cv-3979[1]); Defendant Aetna Health, Inc.'s ("Aetna") 12(b)(6) Motion to Dismiss (Doc. #12); Aetna's Motion to Dismiss the Complaint as Moot (Doc. #46); Aetna's Motion for a Protective Order (Doc. #48); Movant America's Health Insurance Plans' ("AHIP") Motion for Leave to File Amicus Curiae Brief (Doc. #53); Defendant Kaiser Foundation Health Plan, Inc.'s ("Kaiser") Motion to Dismiss (Doc. #25 in 3979), Kaiser's Motion to Stay Discovery (Doc. #29 in 3979), and MET's Motion for Joinder (Doc. #30 in 3979). The Court is also in receipt of supplemental briefing filed by the parties. Doc. Nos. 42, 43, 44, 70, 71, 72, 73.

Having considered the parties' arguments and the applicable legal authorities, the Court

[1] On May 10, 2023, the above-captioned case was consolidated with *REACH Air Medical Services, LLC v. Kaiser Foundation Health Plan, Inc.*, 4:22-cv-3979. Doc. #47. For the sake of brevity and clarity, when distinguishing between the two cases, the Court will refer to the member case as *REACH Air* and the lead case as *Guardian Flight*. Further, when citing to documents filed in *REACH Air*, the Court will specify such by using the last four digits of the cause number, 3979. If no case-specific identifier is used, then the citation is to a document on the *Guardian Flight* docket.

grants Aetna's 12(b)(6) Motion to Dismiss (Doc. #12), and Kaiser's Motion to Dismiss (Doc. #25 in 3979), denies MET's Motions to Dismiss (Doc. #8; Doc. #24 in 3979), Aetna's Motion to Dismiss the Complaint as Moot (Doc. #46), and AHIP's Motion for Leave to File Amicus Curiae Brief (Doc. #53), and denies as moot Aetna's Motion for a Protective Order (Doc. #48), Kaiser's Motion to Stay Discovery (Doc. #29 in 3979), and MET's Motion for Joinder (Doc. #30 in 3979).

I. Background

a. The No Surprises Act

In 2020, Congress enacted the No Surprises Act (the "NSA"), codified in 42 U.S.C. §§ 300gg-111–12, to end surprise medical billing related to services rendered by air ambulance providers. To achieve this end, the NSA requires that if a patient's health insurance would cover air ambulance medical services by an in-network provider, then the same cost-sharing benefits must extend to out-of-network providers as well. 42 U.S.C. §§ 300gg-112(a)(1)–(2). The NSA sets forth a standardized process to facilitate the presentation and payment of air ambulance transport claims. After the air ambulance provider submits a bill to the health insurance company, the insurance company has thirty days to notify the provider if it will make or deny the payment. *Id.* § 300gg-112(a)(3). Should the insurer deny payment, the provider can initiate open negotiations with the insurance company to determine an agreed upon payment amount for the air ambulance services rendered. *Id.* § 300gg-112(b)(1)(A).

If the open negotiations fail, then the NSA calls for the parties to initiate an independent dispute resolution ("IDR"), described as a "baseball-style arbitration," with a certified IDR entity. *Id.* § 300gg-112(b)(2)(A); *see also Med-Trans Corp. v. Capital Health Plan, Inc.* ("*Med-Trans*"), Nos. 3:22-cv-1077-TJC-JBT, 3:22-cv-1153-TJC-JBT, 2023 WL 7188935, at *1 (M.D. Fla. Nov. 1, 2023). The parties may select their own IDR entity or one is randomly assigned if the parties

cannot agree. *Id.* § 300gg-112(b)(4). During the IDR, the parties each submit an amount for the cost of the air ambulance services rendered, in addition to any information requested by the IDR entity and/or any information related to the amount proposed to the IDR entity. *Id.* §§ 300gg-112(b)(5)(B), (C)(ii). When determining which amount to select, one factor that the IDR entity should consider is the "qualifying payment amount" (the "QPA"), which represents "the equivalent median in-network reimbursement rate or, if the insurer has no equivalent in-network data, the median in-network rate for the geographic area." *Med-Trans*, 2023 WL 7188935, at *1 (citing §§ 300gg-111(a)(3)(E)(i)–(iii)). The Departments of the Treasury, Labor, and Health and Human Services or applicable state authorities are responsible for monitoring the accuracy of the QPA calculation methodology via audits. Requirements Related to Surprise Billing, 87 Fed. Reg. 52627 n.31 (Aug. 26, 2022) (to be codified in 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, & 45 C.F.R. pt. 149). The IDR entity is not responsible for monitoring or confirming the accuracy of an insurer's QPA calculation. *See id.* After considering the information before it, the IDR entity picks one of the two proposed amounts.

Most relevant for this case are the NSA's mandates on the effects of the IDR entity's payment amount determination. The NSA states,

> A determination of a certified IDR entity under subparagraph [§ 300gg-111(c)(5)(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, expect in a case described in any of paragraphs (1) through (4) of section 10(a) of Title 9.

§ 300gg-111(c)(5)(E)(i). Paragraphs 1 through 4 of Section 10(a) of Title 9, the Federal Arbitration Act (the "FAA"), states as follows:

> 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—(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them;

> (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.

b. *Guardian Flight*'s Factual Background

On February 18, 2022, Plaintiff Guardian Flight, LLC ("Guardian Flight"), an air ambulance provider, transported a patient in Alliance, Nebraska, to a hospital 225-miles away in Kearney, Nebraska. Doc. #1 ¶¶ 14–16. The patient was insured through Aetna. Guardian Flight is not within Aetna's network. *Id.* ¶ 4. Guardian Flight claimed that the services rendered cost $56,742.20. Aetna claimed the total QPA for Guardian Flight's services was $31,965.53. *Id.* ¶ 28. Guardian Flight disagreed and initiated the thirty-day open negotiation period required by the NSA on June 6, 2022. *Id.* ¶ 26. Guardian Flight claims that it asked Aetna to disclose information regarding how the QPA was calculated, but Aetna refused. *Id.* ¶¶ 26–27. As such, the parties selected MET as their IDR entity. *Id.* ¶ 6. On October 12, 2022, MET selected Aetna's QPA during the IDR. *Id.* ¶ 6, 24. Guardian Flight alleges that Aetna did not calculate its QPA in accordance with federal standards, thereby misrepresenting its QPA to MET during the IDR. Further, Guardian alleges that MET violated the NSA by applying an illegal presumption in favor of Aetna's QPA. *Id.* ¶ 6.

c. *REACH Air*'s Background

The facts of the *REACH Air* case are similar to those in *Guardian Flight*. Between January 17 and February 22, 2022, Plaintiffs REACH Air Medical Services, LLC ("REACH"), CALSTAR Air Medical Services, LLC ("CALSTAR"), and Guardian Flight (collectively, "Plaintiffs") provided emergency air ambulance services for six different patients, all of whom were insured or had health plans administered by Kaiser. Doc. #1 ¶¶ 4, 17–22 in 3979. On various days in April

2022, Kaiser allowed between $19,186.68 and $38,784.96 to be paid to cover the six air ambulance services provided by Plaintiffs. *Id.* ¶¶ 36–40. For three of the claims, Kaiser represented that the allowed amount was also its QPA and disclosed the relevant information to Plaintiffs. *Id.* ¶¶ 36, 39–40. Plaintiffs allege that the totals for the six allowed amounts "were far below reasonable market rates for the transports at issue," so they initiated an open negotiations period for each dispute. *Id.* ¶ 41. MET served as the IDR entity for these disputes. *See id.* ¶ 31. Between September 29 and October 5, 2022, MET decided on the six disputes and selected Kaiser's submission for each. *Id.* Plaintiffs claim that although Kaiser represented that three of the six allowed amounts were also its QPAs, Kaiser submitted purported QPAs that were lower than the allowed QPAs to MET during the IDR. *Id.* ¶ 42. Plaintiffs claim that by submitting lower QPAs, Kaiser violated the NSA by misrepresenting its QPAs and/or failing to make the statutory disclosures required by law. *Id.* ¶ 47. Plaintiffs further allege that MET applied an illegal presumption in Kaiser's favor when it selected the QPAs. *Id.* ¶ 48.

d. Procedural History of Both Cases

Accordingly, on November 1, 2022, Guardian Flight sued Aetna and MET in this Court seeking to vacate the IDR award and requesting that the Court declare that:

> (1) Aetna made a misrepresentation of fact to MET when it submitted what it represented was its QPA for the claim;
>
> (2) Aetna procured the IDR award at issue through misrepresentation and undue means; and
>
> (3) by applying an illegal presumption in favor[] of the QPA, . . . MET revealed evident partiality, committed prejudicial misbehavior, and exceeded its powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Doc. #1 ¶ 41. Similarly, on November 16, Plaintiffs sued Kaiser and MET seeking to vacate the six IDR awards and requesting that the Court make the same declarations but as to Kaiser instead of Aetna. Doc. #1 ¶ 57 in 3979. The Plaintiffs in both cases are represented by the same attorneys.

Due the similarities in facts, parties, and procedural postures,[2] the Court consolidated the cases on May 10, 2023. Doc. #47.

Shortly after consolidation here, Chief United States District Judge Timothy Corrigan of the Middle District of Florida notified the Court that a consolidated case with similar facts, parties, and motions was pending before him, *Med-Trans Corporation v. Capital Health Plan* ("*Med-Trans*"), 3:22-cv-1153-TJC-JBT. As such, during a June 30, 2023 status conference, the Court notified the parties that it would await a ruling from Chief Judge Corrigan on the case before him before proceeding with this case. The Court also granted the parties leave to file additional briefing to advise the Court on how Chief Judge Corrigan's ruling impacted, if at all, this case. Chief Judge Corrigan ruled on *Med-Trans* on November 1, 2023. *See Med-Trans*, 2023 WL 7188935. The Court now considers the parties' respective motions and supplemental briefing.

II. Legal Standard: Federal Rule of Civil Procedure 12(b)(6)

To survive a 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted). This standard is met when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In evaluating the complaint, the court takes "the well-pleaded factual allegations in the complaint as true" but does "not credit conclusory allegations or allegations that merely restate the legal elements of a claim." *Chhim v. Univ. of Tex. at Austin*, 836 F.3d 467, 469 (5th Cir. 2016).

[2] At the time of consolidation, Motions to Dismiss filed by the Defendants in both cases were ripe for consideration. Doc. #8; Doc. #24 in 4:22-cv-3979; Doc. #25 in 3979. The parties also disputed whether discovery should be stayed pending a ruling on the Motions to Dismiss.

III. *Med-Trans Corporation v. Capital Health Plan* Ruling

Before turning its attention to the merits of the pending motions, the Court first outlines Chief Judge Corrigan's ruling in *Med-Trans* because that decision will partially guide the Court's analysis. In *Med-Trans*, air ambulance companies Med-Trans Corporation and REACH Air Medical Services, LLC (collectively, the "*Med-Trans* plaintiffs") sued health insurance providers Capital Health Plan, Inc. ("Capital") and Kaiser, and IDR entity C2C Innovative Solutions, Inc. ("C2C") in the Middle District of Florida. 2023 WL 7188935. The *Med-Trans* plaintiffs challenge the IDR awards they received during their respective IDRs with Capital, Kaiser, and C2C, claiming that Capital and Kaiser misrepresented their QPAs to C2C and that C2C erroneously gave too much weight to Capital and Kaiser's QPAs during the IDRs. *Id.* at *2–3. In *Med-Trans*, Chief Judge Corrigan determined: (1) how the NSA and the Federal Arbitration Act (the "FAA") intersect; (2) the proper way to seek judicial review of IDR awards; and (3) whether IDR entities are proper parties to lawsuits. *Id.* at *3.

As to the intersection of the NSA and the FAA, Chief Judge Corrigan held that "[a]lthough the NSA invokes the FAA, it incorporates only one specific aspect," Section 10(a) regarding vacating an arbitration award. *Id.* at *4. As such, none of the other provisions of the FAA, including its procedural rules, are applicable to interpretations of the NSA. *See id.* at *4–5. If it were Congress' intent to incorporate other parts of the FAA, it would have done so. *Id.* at *4. Thus, Chief Judge Corrigan held, "Neither the NSA nor the FAA says that the FAA bears on the NSA outside the four explicitly incorporated paragraphs. The Court will not assume otherwise." *Id.* at *5.

As to the proper way to seek judicial review of IDR awards, Chief Judge Corrigan analyzed Section 300gg-111(c)(5)(E)(i)(I)–(II) of the NSA, which states:

> A determination of a certified IDR entity under subparagraph [§ 300gg-111(c)(5)(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, expect in a case described in any of paragraphs (1) through (4) of section 10(a) of Title 9.

Initially, Chief Judge Corrigan found that the NSA is clear—"IDR awards are reviewable in only four situations," the four paragraphs in Section 10(a) of the FAA. *Id.* at *6. Relying on Eleventh Circuit law, he states that "[b]ecause these paragraphs are directly incorporated from the FAA, the 'understood meaning' of their terms is incorporated as well." *Id.* (quoting *Assa'ad v. U.S. Att'y Gen.*, 332 F.2d 1321, 1329 (11th Cir. 2003)). And the understood meaning of the terms in Section 10(a) of the FAA are "extremely narrow," which accords with the prevailing view that courts "give both FAA and non-FAA arbitrations awards limited and deferential review." *Id.* at *6. Thus, Chief Judge Corrigan concluded, "The bottom line is that courts review arbitration awards with deference and restraint, interpreting the § 10(a) categories narrowly. Thus, challenges by either air ambulance companies or insurers to NSA IDR awards may rarely succeed." *Id.* at *7. This is consistent with Fifth Circuit precedent as well. *See, e.g.*, *Antwine v. Prudential Bache Sec., Inc.*, 899 F.2d 410, 413 (5th Cir. 1990) ("Judicial review of an arbitration award is extraordinarily narrow and this Court should defer to the arbitrator's decision when possible."); *Gulf Coast Indus. Workers Union v. Exxon Co., U.S.A.*, 991 F.2d 244, 248 (5th Cir. 1993) ("Congress's decided preference for arbitration . . . establishes a standard of review that is highly deferential to the arbitrator's bargained-for judgment.").

Next, Chief Judge Corrigan considered the *Med-Trans* plaintiffs' argument that subsection I of Section 300gg-111(c)(5)(E)(i)(I)–(II) of the NSA regarding fraudulent claims or misrepresentation of facts to the IDR entity creates additional avenues for judicial review of IDR awards. *Id.* Chief Judge Corrigan was unpersuaded by these argument for three reasons:

> First, subsection (I) provides no information on how to bring an action based solely on misrepresentation of facts to the IDR entity or what the standards should be. In contrast, subsection (II), by incorporating § 10(a) of the FAA and its standards, provides a detailed roadmap to pleading a claim. Second, the apparent subject of subsection (I)—whether an award is 'binding upon the parties involved'—does not speak directly to judicial review. Third, subsection (II) is the final word on reviewability. It contains exclusive language—'shall not be subject to judicial review, except'—and lists § 10(a) of the FAA as supplying the only grounds for judicial review.

Id. As such, he concluded, "So while the Court does not foreclose that misrepresentation of facts to the IDR entity might support judicial review in a given case, such claims must be asserted within the confines of § 10(a) of the FAA." *Id.*

And finally, Chief Judge Corrigan summarily concluded that IDR entities are not proper parties to these lawsuits, stating, "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. Nothing suggests that IDR entities are proper parties to suit under the NSA, so here the inquiry ends." *Id.* at *8.

IV. Analysis

The Court adopts Chief Judge Corrigan's rulings regarding how the NSA and FAA intersect and the proper way to seek judicial review of IDR awards and will apply those conclusions where applicable. However, the Court reaches a different conclusion than Chief Judge Corrigan with regard as to whether the IDR entities are proper parties to these lawsuits, which will be explained in turn.

a. Collateral Estoppel

As a preliminary matter, Kaiser and MET argue in their respective supplemental briefs that Chief Judge Corrigan's ruling collaterally estops Plaintiffs' claims in this case. Doc. Nos. 71, 72. Collateral estoppel bars a party from relitigating issues provided: "(1) that the issue at stake be identical to the one involved in the prior litigation; (2) that the issue has been actually litigated in

the prior litigation; and (3) that the determination of the issue in the prior litigation has been a critical and necessary part of the judgment in that earlier action." *Terrell v. DeConna*, 877 F.2d 1267, 1270 (5th Cir. 1989). "[C]ollateral estoppel can only be applied against parties who have had a prior full and fair opportunity to litigate their claims." *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 338 (5th Cir. 1982) (cleaned up). Thus, while complete identity of parties in both suits is not required, there are only limited circumstances when a non-party may be collaterally estopped by a prior lawsuit—if the non-party is in "privity" with a party in the original suit. *Terrell*, 877 F.2d at 1270; *Sw. Airlines Co. v. Tex. Int'l Airlines, Inc.*, 546 F.2d 84, 95 (5th Cir. 1977). Courts have recognized two types of relationships that are sufficient to justify preclusion that are relevant here: (1) "a non-party who controlled the original suit"; and (2) "a non-party whose interests were represented adequately by a party in the original suit." *Id.*

Kaiser and MET each argue that the Plaintiffs in this case are in privity with the *Med-Trans* plaintiffs because they are all air ambulance companies that are subsidiaries of the same parent company, Global Medical Response ("GMR"). Doc. #71 at 5 ("Here, Plaintiffs have admitted that the affiliated entities that brought the several parallel actions are all subsidiaries of GMR."); Doc. #72 at 4 ("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."). Further, Kaiser and MET argue that Plaintiffs' interests were adequately represented in *Med-Trans* because the plaintiffs in both cases are represented by the same attorneys, so the Plaintiffs in this case had a full and fair opportunity to litigate the issues in *Med-Trans*.

While Kaiser and MET raise their collateral estoppel arguments collectively as to all Plaintiffs, the Court opts to consider the Plaintiffs separately. First, REACH is a plaintiff in this

case and in *Med-Trans*, and it seeks a ruling on the exact same issues that have been ruled upon by Chief Judge Corrigan. *Compare* Doc. #1 in 3979 *with Med-Trans*, 2023 WL 7188935. Therefore, REACH's claims are collaterally estopped by the ruling in *Med-Trans* because it had a full and fair opportunity to litigate its claims. Accordingly, REACH's claims are dismissed with prejudice in this case.

As to Guardian Flight and CALSTAR, however, their affiliation as subsidiaries of the same parent company and representation by the same attorneys are not enough to preclude their claims. In *Pollard v. Cockrell*, the Fifth Circuit held that "[r]epresentation by the same attorneys cannot furnish the requisite alignment of interests" for preclusion. 578 F.2d 1002, 1009 (5th Cir. 1978). In *Hardy v. Johns-Manville Sales Corporation*, the Fifth Circuit adopted the Texas Supreme Court's holding that "privity is not established by the mere fact that persons may happen to be interested in the same question or in proving the same state of facts." 681 F.2d at 340 (agreeing with *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 363 (Tex. 1971)). Therefore, just because Guardian Flight and CALSTAR are air ambulance providers like the *Med-Trans* plaintiffs, are affiliated subsidiaries of the same parent company, and are raising similar questions of law and fact as the issues in *Med-Trans*, it is not enough to establish privity between the plaintiffs. Thus, in accordance with the Fifth Circuit's precedent, Kaiser and MET have failed to show that Guardian Flight and CALSTAR were in privity with the *Med-Trans* plaintiffs such that collateral estoppel bars their claims.

b. Aetna and Kaiser's Motions to Dismiss

In their respective Motions to Dismiss, Aetna and Kaiser each contend that Plaintiffs'[3]

[3] In light of the Court's finding that REACH's claims are barred due to collateral estoppel, *see supra* Section IV(a), any reference to "Plaintiffs" from this point onward will solely refer to Guardian Flight and CALSTAR.

Complaints (Doc. #1; Doc. #1 in 3979) should be dismissed because they fail to properly allege corruption, fraud, or undue means to trigger judicial review of the IDR awards. Doc. #12 at 15–18; Doc. #25 at 17–21 in 3979. Plaintiffs aver that their Complaints properly allege that Aetna and Kaiser misrepresented their respective QPAs to MET during the IDR and ultimately procured their respective IDR awards via misrepresentation and undue means. *See* Doc. #16 at 7–9, 15–19; Doc. #28 at 13–16 in 3979.

Plaintiffs' reading of the NSA is that misrepresentations of facts are a type of "undue means," which triggers judicial review. Doc. #28 at 14 in 3979 ("The statute includes misrepresentations to IDR entities as a form of 'undue means,' . . . ."); Doc. #16 at 9 ("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."). But as Chief Judge Corrigan wisely opined, the NSA uses exclusive language regarding when judicial review is permitted—only when one of the four paragraphs in Section 10(a) of the FAA is triggered. *See Med-Trans*, 2023 WL 7188935, at *5–7. Otherwise, judicial review is prohibited, and subsection I of Section 300gg-111(c)(5)(E)(i)(I) does not create an additional avenue for judicial review. *Id.* If Congress intended to make misrepresentations of fact a type of "undue means" that triggers judicial review, it would have stated as such. Instead, the NSA clearly separates when an IDR award is binding—absent a fraudulent claim or evidence of misrepresentation of fact to the IDR entity—and when an IDR award is subject to judicial review—pursuant to Section 10(a) of the FAA. § 300gg-111(c)(5)(E)(i)(I)–(II). Thus, to the extent Plaintiffs seek judicial review of the IDR awards based on the allegations in their Complaints that Aetna and Kaiser misrepresented their

respective QPAs, those arguments fail.

Out of an abundance of caution, the Court also considers if Plaintiffs properly allege in their Complaints that Aetna and Kaiser used fraud or undue means to procure their IDR awards that would fall within the ambit of Section 10(a). Generally, courts interpret "fraud" and "undue means" together, although there is not an explicit definition of these terms in Section 10(a). *In re Arb. Between Trans Chem. Ltd. & China Nat'l Mach. Imp. & Exp. Corp.*, 978 F. Supp. 266, 304 (S.D. Tex. 1997). "Fraud requires a showing of bad faith during the arbitration proceedings, such as bribery, undisclosed bias of an arbitrator, or willfully destroying or withholding evidence[.]" *Id.* "Undue means connotes behavior that is 'immoral if not illegal' or otherwise in bad faith." *Id.* (quoting *A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1403 (9th Cir. 1992)). Finally, courts interpret Section 10(a) as requiring a "nexus between the alleged fraud or undue means and the basis for the arbitrators' decision." *Id.*

Based on these definitions, the allegations in Plaintiff's Complaints fall woefully short of alleging fraud or undue means. As to Aetna, Guardian Flight asserts,

> Aetna secured the award through undue means and misrepresentations of fact to MET. It misrepresented the facts by submitting a purported QPA that was not properly calculated under federal law. It further refused to provide the information needed on its QPA for Guardian [Flight] to explain why it was improperly calculated and was not an appropriate rate for the transport at issue.

Doc. #1 ¶ 35. And as to Kaiser, CALSTAR similarly alleges,

> For some of the disputes, Kaiser created two QPAs, submitting the lower one to the IDR entity to create the false impression that it was offering to pay more than its QPA. At the same time, it reported a higher QPA to Plaintiffs, resulting in Plaintiffs submitting their IDR briefs under false pretenses. For other disputes, it concealed its purported QPA, denying Plaintiffs the information required under federal law and further gaming the IDR process. Upon information and belief, none of the multiple QPAs being calculated by Kaiser are being done so accurately or in accordance with federal law. These actions were taken in bad faith and to secure an undue advantage in the IDR process.

Doc. #1 ¶ 51 in 3979. The majority of Plaintiffs' allegations are based on alleged

misrepresentations, which the Court has already addressed. But the other allegations do not rise to the level of suggesting that Aetna nor Kaiser engaged in immoral or illegal behavior. And any allegations about either entity behaving in bad faith are conclusory, at best, and are not factually supported. Further, according to footnote thirty-one in the Requirements Related to Surprise Billing, the Departments of the Treasury, Labor, and Health and Human Services are responsible for monitoring the accuracy of the QPA calculation methodology. 87 Fed. Reg. 52627 n.31. Thus, Plaintiffs complaints about the accuracy of Aetna and Kaiser's QPA calculations are better suited for the aforementioned Departments to address.

As such, Plaintiffs' allegations are deficient, and Aetna and Kaiser's Motions to Dismiss (Doc. #12; Doc. #25 in 3979) are granted. However, the Court grants Plaintiffs leave to amend their Complaints if they can do so consistent with this Order.

c. MET's Motions to Dismiss

In its Motions to Dismiss, MET first contends that Plaintiffs' claims against it should be dismissed because it is entitled to arbitrator's immunity. Relying on federal common law that shields arbitrators from lawsuits to protect their "judicial-like functions," MET likens itself to an arbitrator and avers that it is entitled to the same immunities. Doc. #8 at 4–8; Doc. #24 at 9–13 in 3979. But the Court disagrees. The NSA clearly refers to entities presiding over IDRs, like MET, as IDR entities, not arbitrators. Similarly, the NSA calls for the parties to engage in IDRs, not arbitrations. As such, the Court will not summarily assume that the protections afforded to arbitrators under the federal common law automatically extend to IDR entities. And MET does not direct the Court to any language in the NSA to the contrary. It is the Court's belief that if Congress intended for the IDR process to receive the same protections as arbitrations, including immunity to protect IDR entities, it would have clearly stated so in the NSA. Thus, MET's

arbitrator immunity argument fails, and the Court finds that it is a proper party to this lawsuit.[4]

Next, MET summarily concludes that Plaintiffs' allegations do not meet any of the requirements in Section 10(a) to trigger judicial review. Doc. #8 at 8–11; Doc. #24 at 13–16 in 3979. The Court disagrees. In its Complaint, Guardian Flight alleges,

> . . . [T]he particular reviewer at MET handling this file revealed evident partiality, committed prejudicial misbehavior, and exceeded its powers by using an illegal presumption in favor of the undisclosed QPA. The reviewer refused to consider the market data evidence submitted by Guardian [Flight], a fact that alone warrants vacatur. The reviewer also applied the illegal standard, stating that Guardian [Flight's] evidence did not 'clearly demonstrate[] that the qualifying payment amount if materially different from the appropriate out-of-network rate.'

Doc. #1 ¶ 36. Similarly, CALSTAR contends, "As acknowledged in MET's short awards, Kaiser's payment offers prevailed solely because they were the closest to the QPA and/or because of the illegal presumption applied in their favor. An anonymous person at MET reviewed and applied illegal, vacated rules and selected the offers closest to the purported QPA." Doc. #1 ¶ 52 in 3979. These allegations do suggest that MET may have exceeded its powers in contravention of Section 10(a)(4) of the FAA.

Although the Fifth Circuit has held that "mere mistake[s] of fact or law" are not sufficient bases to vacate an arbitration award, the IDR process established in the NSA creates a wrinkle. *Rain CII Carbon, LLC v. ConocoPhillips Co.*, 674 F.3d 469, 472 (5th Cir. 2012). When analyzing Section 10(a)(4), the Fifth Circuit emphasizes that an arbitrator's power arises from the parties' contract. *See, e.g.*, *Timegate Studios, Inc. v. Southpeak Interactive, LLC*, 713 F.3d 797, 802–03

[4] Here, the Court differs from Chief Judge Corrigan, who concluded that IDR entities are not proper parties to suits under the NSA because the NSA does not create a cause of action to sue the IDR entity itself. *Med-Trans*, 2023 WL 7188935, at *8. However, considering that paragraphs 2, 3, and 4 of Section 10(a) of the FAA, which is expressly incorporated into the NSA, regards the arbitrator's conduct, it would seem that parties to the IDR must be able to assert claims against the IDR entity if the IDR entity's conduct falls within paragraphs 2–4 of Section 10(a). The Court declines to opine on whether IDR entities can be sued for any other conduct.

(5th Cir. 2013) ("Thus, the substantive question of whether an arbitrator has exceeded his arbitration powers is a function of our highly deferential standard of review in such cases: an arbitrator has not exceeded his powers unless he has utterly contorted the evident purpose and intent of the parties—the 'essence' of the contract."). But under the NSA, the parties do not contract to engage in the IDR process. Indeed, the parties engage in the IDR pursuant to the NSA, and IDR entities' powers are derived from the language of the NSA and its related guidance. As such, if Plaintiffs allege that MET applied an illegal presumption in selecting the prevailing payment amounts, then such conduct would violate the NSA and exceed MET's powers. Accordingly, Plaintiffs have alleged sufficient facts to trigger judicial review pursuant to Section 10(a)(4), and MET's Motions to Dismiss (Doc. #8; Doc. #24 in 3979) are denied.

d. Other Outstanding Motions

1. Aetna's Motion to Dismiss the Complaint as Moot

Aetna also moves to dismiss Guardian Flight's Complaint on the grounds that it is moot. Doc. #46. On April 20, 2023, Aetna filed a letter notifying the Court that it offered to pay Guardian Flight $24,776.67, which is the difference between the amount Guardian Flight sought during the IDR and the amount MET awarded.[5] Doc. #36. Thus, according to Aetna, Guardian Flight's claims are moot if Aetna pays the disputed difference. *Id.* During a motion hearing on April 21, the Court inquired about whether Guardian Flight accepted Aetna's settlement offer. Guardian Flight stated that it did not accept the offer. Doc. #40 at 9:13-18 ("The Court: . . . [J]ust to be clear . . . the offer of the $25,000 is rejected and does not resolve the case to your satisfaction? Mr. Schramek [(Guardian Flight's counsel)]: Yes, Your Honor."). Yet, Aetna asked to file written

[5] In its letter, Aetna states that Guardian Flight claims that it was owed $56,742.20 for the services rendered. During the IDR, MET selected Aetna's payment amount totaling $31,965.53.

briefing on the matter, which the Court permitted but also warned, "You can [file a motion to dismiss for mootness] and I'll deny it. I'll deny it on the record. I've just heard from opposing counsel that they do not accept your offer. And I'm not going to compel them to take it." Doc. #40 at 9:25–10:1-3. Having considered Aetna's Motion to Dismiss, which raises similar arguments that were raised during the April 21 motion hearing, the Court stands by its ruling that it will not compel Guardian Flight to accept Aetna's offer. As such, Aetna's Motion to Dismiss the Complaint as Moot (Doc. #46) is denied.

2. America's Health Insurance Plans' Motion for Leave to File Amicus Curiae Brief

After the cases were consolidated, AHIP moved for leave to file an amicus curiae brief in support of Defendants Aetna and Kaiser's Motions to Dismiss. Doc. #53. However, considering the Court received ample briefing, heard oral arguments from the parties, and received guidance from Chief Judge Corrigan's well-reasoned opinion in *Med-Trans*, the Court finds that additional briefing from AHIP is not warranted. As such, AHIP's Motion for Leave (Doc. #53) is denied.

3. Aetna's Motion for Protective Order, Kaiser's Motion to Stay Discovery, and MET's Motion for Joinder

Aetna moves for a protective order or alternatively for a stay of discovery pending resolution of its Motion to Dismiss. Doc. #48. Similarly, Kaiser moves for the Court to disallow discovery or alternatively to stay discovery pending resolution of its Motion to Dismiss. Doc. #29 in 3979. MET moves to join Kaiser's Motion to Disallow Discovery. Doc. #30 in 3979. Considering the Court has now addressed the outstanding Motions to Dismiss, each of these Motions (Doc. #48; Doc. #29 in 3979; Doc. #30 in 3979) are denied as moot.

V. Conclusion

For the foregoing reasons, REACH's claims in this case are collaterally estopped by Chief Judge Corrigan's ruling in *Med-Trans* and are accordingly DISMISSED WITH PREJUDICE. Aetna's 12(b)(6) Motion to Dismiss (Doc. #12) and Kaiser's Motion to Dismiss (Doc. #25 in 3979) are hereby GRANTED. Thus, Plaintiffs Guardian Flight and CALSTAR's claims against Aetna and Kaiser are DISMISSED WITHOUT PREJUDICE. However, Plaintiffs are granted leave to amend their complaints to address the issues raised herein and must do so forty-five days after the entry of this Order.

Further, MET's Motions to Dismiss (Doc. #8; Doc. #24 in 3979) and Movant AHIP's Motion for Leave to File Amicus Curiae Brief (Doc. #53) are DENIED.

Finally, Aetna's Motion for Protective Order (Doc. #48), Kaiser's Motion to Stay Discovery (Doc. #29 in 3979), and MET's Motion for Joinder (Doc. #30 in 3979) are DENIED AS MOOT.

It is so ORDERED.

JAN 05 2024

Date

The Honorable Alfred H. Bennett
United States District Judge