UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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

JOINT DISCOVERY/CASE MANAGEMENT PLAN
UNDER RULE 26(f) FEDERAL RULES OF CIVIL PROCEDURE

Please restate the instruction before furnishing the information.

1. State where and when the meeting of the parties required by Rule 26(f) was held, and identify the counsel who attended for each party.

Counsel conferred via Zoom teleconference at 1:30 p.m. on February 20, 2023.

Adam Schramek of Norton Rose Fulbright LLP was present for Plaintiff Guardian Flight, LLC ("Guardian Flight").

Kathy Strahan and David Hughes from Hunton Andrews Kurth LLP were present for Defendant Aetna Health, Inc. ("Aetna").

Cameron Weir and Mischa Montgomery from the Vethan Law Firm were present for Defendant Medical Evaluators of Texas ASO, LLC ("MET").

2. List the cases related to this one that are pending in any state or federal court with the case number and court.

Guardian Flight, along with two other plaintiffs, filed a subsequent lawsuit, which the plaintiffs in that case listed as being "related" to this action. *See* Civil Action No. 4:22-cv-03979, *Reach Air Medical Services, LLC, et al. v. Kaiser Foundation Health Plan, Inc. and MET*, in the United States District Court for the Southern District of Texas (Hanen, J.).

Guardian Flight's contention: There are also three cases pending in the Middle District of Florida filed by companies affiliated with Guardian Flight that raise many of the same legal issues with respect to challenges to IDR determinations under the No Surprises Act. Those

cases are: *Med-Trans Corporation v. Capital Health Plan, Inc. and C2C Innovative Solutions, Inc.*, Case No. 3:22-cv-1077, (M.D. Fla. 2022); *Med-Trans Corporation v. Blue Cross and Blue Shield of Florida, Inc. and C2C Innovative Solutions, Inc.*, Case No. 3:22-cv-1139, (M.D. Fla. 2022); and *Reach Air Medical Services LLC v. Kaiser Foundation Health Plan Inc. and C2C Innovative Solutions, Inc.* Case NO. 3:22-cv-1153, (M.D. Fla. 2022).

***MET's contention*:** The subject matter of this case is related to the three cases out of Florida.

Aetna's contention: The cases pending in the Southern District of Texas and the Middle District of Florida are not truly related, as each dispute arises from unrelated events, and disposition will turn on distinct facts (i.e., no common issues of fact). Thus, consolidation would not be in the interest of judicial economy and, in fact, would hinder resolution.

3. <u>Briefly</u> describe what this case is about.

Guardian Flight has filed this case to vacate an Independent Dispute Resolution ("IDR") determination (DISP-32032) of $31,965.53 that was entered as part of a binding dispute resolution proceeding under the No Surprises Act ("NSA"). Aetna and Guardian Flight disagree whether the award was entered "in favor of" Aetna or Guardian Flight. The award was issued by MET, an IDR entity.

***Guardian Flight's contention*:** Guardian Flight seeks judicial review of an out-of-network reimbursement determination made by federal contractor MET pursuant to the No Surprises Act ("NSA"), which selected Aetna's purported Qualifying Payment Amount ("QPA") as the appropriate out-of-network payment for a 225-mile air ambulance transport. The award was secured through undue means and misrepresentations by Aetna and the application of a standard that violates federal law by a reviewer at MET. In particular, MET applied an illegal presumption in favor Aetna's QPA months after the regulation requiring the presumption had been ruled illegal and vacated by the Eastern District of Texas. Defendant Aetna improperly concealed from Guardian in the IDR process information it was required under federal law to disclose as well as additional information requested by Guardian on how the purported QPA for the trip was calculated. It also misrepresented its QPA, which under the NSA invalidates the award.

***Aetna's contention*:** The NSA incorporates a "baseball style" arbitration process, meaning the provider and insurer each submit a QPA and explanation of their calculation to the arbitrator, who then selects one of the two proposed amounts as the appropriate out-of-network rate for the medical services at issue. Here, the arbitrator selected Aetna's QPA, awarding Guardian Flight $31,965.53.

Guardian Flight seeks to vacate the arbitration award based on vague mentions of fraud. However, its allegations—which are largely pleaded upon information and belief—do not fall within the ambit of one of the four narrow grounds for vacatur of an arbitration award under the Federal Arbitration Act (which the NSA incorporates). Moreover, Guardian Flight's fraud-based allegations—that Aetna QPA contained misleading or otherwise

inaccurate factual information—do not rise to the requisite level of particularity demanded by Rule 9(b)'s heightened pleading requirement.

MET's contention: The NSA provides that a determination by an IDR entity shall be binding on the parties and shall not be subject to judicial review except in certain circumstances. It allows for two exceptions to this rule. First, where a claim is fraudulent or there is evidence of misrepresentation of facts presented to the IDR entity involved in determining the claim. Second, an award may be set aside in any case that falls within the scope of any of the paragraphs (1) through (4) of section 10(a) of Title 9—which is the Federal Arbitration Act.

Guardian Flight seeks to vacate the arbitration award based on acts it believes were due to the IDR arbitrator who presided over the process. MET's position is that it is an arbitration entity who are considered arbitrators under the NSA and because of arbitrator immunity it cannot be sued. Additionally, Guardian Flight believes that Aetna's QPA was obtained by fraudulent means. They have not pleaded fraud with particularity nor provided any evidence to suggest fraud on the part of the MET arbitrator.

4. Specify the allegation of federal jurisdiction.

The Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question). Specifically, the NSA and its implementing regulations authorize judicial review under the same limited circumstances allowed under the Federal Arbitration Act ("FAA"). *See* 42 U.S.C. § 300gg-111(c)(5)(E)(i)(II).

Guardian Flight's position: Additionally, the Court has jurisdiction under the Declaratory Judgment Act ("DJA"), 28 U.S.C. §§ 2201-2202, because this matter requires the Court to interpret and apply the NSA, and the NSA expressly authorizes judicial review of an IDR determination under the same limited circumstances allowed under the FAA. *See* 42 U.S.C. § 300gg-111(c)(5)(E)(i)(II).

Aetna's position: The DJA applies only to cases and actual controversies within a federal district court's jurisdiction. In other words, the DJA is not an independent ground for subject-matter jurisdiction but, instead, piggybacks on the NSA/FAA.

5. Name the parties who disagree and the reasons.

None.

6. List anticipated additional parties that should be included, when they can be added, and by whom they are wanted.

None.

7. List anticipated interventions.

None.

8. Describe class-action issues.

None.

9. State whether each party represents that it has made the initial disclosures required by Rule 26(a). If not, describe the arrangements that have been made to complete the disclosures.

The parties agree to serve their initial disclosures on or before Friday, March 17, 2023.

10. Describe the proposed agreed discovery plan, including:

A. Responses to all the matters raised in Rule 26(f).

A.1. What changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made.

None.

A.2. The subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues.

The defendants believe discovery should be stayed until the Court decides their pending motions to dismiss. *See* Dkt. 8 and Dkt. 12. Guardian Flight disagrees and believes discovery should proceed as normal.

Guardian Flight's position: Discovery may be needed on position statements and evidence submitted to IDR Entity MET, qualifying payment amount ("QPA") calculations made by Aetna, qualifications and background of the MET representative who issued the decision at issue, training materials, policies and procedures for IDR Entity MET reviewers; and the air ambulance services provided to the patient on this claim.

Aetna's position: Alternatively, discovery in this matter should be narrowly tailored, given the extremely limited scope of judicial review of arbitration awards. If the Court decides against staying discovery pending resolution of the defendants' motions to dismiss, Aetna anticipates that discovery can reasonably be completed by Friday, December 8, 2023.

MET's position: Alternatively, should discovery move forward, its scope should be limited to the judicial review of arbitration award and any information related to the healthcare of private citizens.

A.3. Any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced.

The parties will conduct discovery of ESI as provided under Fed. R. Civ. P. 34. The parties agree to preserve all electronically stored information and do not anticipate any issues. If any issues should arise, the parties will propose a control plan to address those issues at that time.

A.4. Any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502.

The parties believe that a protective order is necessary to protect any confidential information which might be disclosed in this lawsuit. Before the parties initial pre-trial conference on Friday, March 3, Aetna intends to circulate a proposed qualified protective order using the template available on the Court's website.

The parties agree to serve any objections or claims of privilege in response to a party propounding discovery in accordance with the Federal Rules of Civil Procedure. The parties agree that a privilege log need not be provided until the party claiming privilege receives a written request for one. Once a written request for a privilege log is received, the responding party has twenty-one (21) days to provide a privilege log; provided, however, that if a written request for a privilege log is served prior to the responding party's deadline to serve objections and responses to written discovery, the twenty-one day period shall begin to run from the responding party's deadline to object or otherwise respond, unless the parties agree otherwise in writing

A.5. What changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed.

The defendants believe discovery should be stayed until the Court decides their pending motions to dismiss. *See* Dkt. 8 and Dkt. 12. Guardian Flight disagrees and believes discovery should proceed as normal.

Subject to the above, the parties agree that the presumptive limits on discovery under the Federal Rules of Civil Procedure and Local Civil Rules should not be altered. The parties agree that this representation is without prejudice to the right of any party to later seek relief from those limitations.

A.6. Any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

The parties request that the Court enter the Joint Proposed Scheduling Order attached as Exhibit 1.

B. When and to whom the plaintiff anticipates it may send interrogatories.

Guardian Flight is prepared to send a first set of interrogatories to both Defendants after the initial case conference.

C. When and to whom the defendants anticipates it may send interrogatories.

The defendants' position: The defendants anticipate sending interrogatories to Guardian Flight after reviewing Guardian Flight's initial disclosures.

D. Of whom and by when the plaintiff anticipates taking oral depositions.

Guardian Flight believes that depositions will be appropriate after Defendants answer written discovery and produce all responsive documents. It believes depositions will be ripe by early summer and expects to take a corporate representative deposition of each Defendant. Whether additional depositions are required will depend on the results of written discovery and the documents produced.

E. Of whom and by when the defendant anticipates taking oral depositions.

The defendants' position: To the extent the case is not dismissed, the defendants anticipate they may depose Guardian Flight's appropriate corporate representative, as well as other witnesses who may be identified in the parties' initial disclosures or discovery responses.

F. When the plaintiff (or the party with the burden of proof on an issue) will be able to designate experts and provide the reports required by Rule 26(a)(2)(B), and when the opposing party will be able to designate responsive experts and provide their reports.

Guardian Flight (party with burden of proof): Friday, September 29, 2023.

Aetna and MET (opposing parties): Tuesday, October 31, 2023.

G. List expert depositions the plaintiff (or the party with the burden of proof on an issue) anticipates taking and their anticipated completion date. See Rule 26(a)(2)(B) (expert report).

Guardian Flight anticipates taking the deposition of all designated experts by the proposed discovery deadline.

H. List expert depositions the opposing party anticipates taking and their anticipated completion date. See Rule 26(a)(2)(B) (expert report).

The defendants' position: The defendants anticipate deposing any experts Guardian Flight designates by the proposed discovery deadline.

11. If the parties are not agreed on a part of the discovery plan, describe the separate views and proposals of each party.

The parties generally agree on the discovery plan.

12. Specify the discovery beyond initial disclosures that has been undertaken to date.

None.

13. State the date the planned discovery can reasonably be completed.

It is currently anticipated that discovery can reasonably be completed by Friday, December 8, 2023.

14. Describe the possibilities for a prompt settlement or resolution of the case that were discussed in your Rule 26(f) meeting.

During the Rule 26(f) meeting, the parties discussed speaking with their respective client(s) about the possibility of a prompt settlement or resolution

15. Describe what each party has done or agreed to do to bring about a prompt resolution.

The parties agreed to speak with their respective client(s) about mediating the dispute.

16. From the attorneys' discussion with the client, state the alternative dispute resolution techniques that are reasonably suitable, and state when such a technique may be effectively used in this case.

The parties believe that mediation may be appropriate at a later date, as the case progresses.

17. Magistrate judges may now hear jury and non-jury trials. Indicate the parties' joint position on a trial before a magistrate judge.

The parties do not consent to proceed before a magistrate judge.

18. State whether a jury demand has been made and if it was made on time.

No jury demand has been made.

19. Specify the number of hours it will take to present the evidence in this case.

Guardian Flight's position: The trial should last approximately 1-2 days.

The defendants' position: The only question in this case is whether to vacate the arbitration award, which is a question of law for the Court to decide.

20. List pending motions that could be ruled on at the initial pretrial and scheduling conference.

Aetna and Guardian Flight's contention: Defendants' motions to dismiss are fully briefed and ripe for adjudication. *See* Dkt. 8 and Dkt. 12. If the Court believes that oral argument is appropriate, the hearing can be scheduled at the conference.

21. List other motions pending.

The defendants' motions to dismiss. *See* Dkt. 8 and Dkt. 12.

22. Indicate other matters peculiar to this case, including discovery, that deserve the special attention of the court at the conference.

Guardian Flight's contention: There are several issues of first impression raised by this lawsuit and Constitutional due process requires greater review of IDR determinations than arbitration awards since IDR proceedings are compelled by the federal government and lack the procedural safeguards of arbitration proceedings, which are premised on the agreement of the parties. While the NSA adopted the circumstances under which judicial review is available from the Federal Arbitration Act, it did not adopt any of its other provisions. Moreover, the NSA broadened the standard for invalidating IDR determinations to include misrepresentations made to an IDR Entity.

The defendants' contention: Given the deference courts owe to matters decided at arbitration, discovery should be stayed until the Court decides the defendants' pending motions to dismiss. *See* Dkt. 8 and Dkt. 12.

23. List the names, bar numbers, addresses and telephone numbers of all counsel.

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