IN THE UNITED STATES COURT
FOR THE SOUTH DISTRICT OF TEXAS

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

DEFENDANT MEDICAL EVALUATORS OF TEXAS ASO, LLC'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND MOTION TO STRIKE DEMAND FOR ATTORNEY'S FEES

Pursuant to Fed. R. Civ. P. 12(b)(6), Defendant Medical Evaluators of Texas ASO, LLC (hereinafter "MET" or "Defendant"), by and through their undersigned counsel, files this Motion to Dismiss Plaintiff's Complaint, based on arbitrator's immunity and lack of Article III standing. Additionally, MET moves to strike Plaintiff's demand for attorney's fees, pursuant to Fed. R. Civ. P. 12(f).

I. FACTUAL BACKGROUND

1. Plaintiff filed this case to vacate an Independent Dispute Resolution ("IDR") arbitration award made by Defendant MET pursuant to the No Surprises Act ("NSA"), which selected Defendant Aetna's Qualifying Payment Amount ("QPA") as the appropriate out-of-network payment for a 225-mile air ambulance transport.

The requirements of the NSA

2. The NSA became effective on January 1, 2022. It was implemented and enforced by the U.S. Departments of Labor, Health and Human Services, and the Treasury (the "Departments"). Together, they issued interim and final rules to create an unprecedented, mandatory federal arbitration process to determine pricing for all out-of-network emergency air ambulance transports of patients who are covered by commercial insurance. As part of that federal arbitration process, the Departments created a list of approved IDR entities. MET is an approved IDR entity headquartered in Houston, Texas. MET accepts IDR disputes under the NSA.

Requirements for the QPA

3. The QPA represents the median rate for contracted in-network services. The QPA is defined in the NSA. The Departments published an Interim Rule that compelled IDR entities to apply a rebuttable presumption that the QPA was the appropriate out-of-network rate. Arbitrators were required to select the offer closest to QPA unless a provider overcame the presumption with credible evidence.

The Underlying case

4. On February 18, 2022, a patient who had post hip-replacement complications suffered hypoxia and potential cardiac complications. At the time, the patient was in Alliance, Nebraska, a sparsely populated part of Nebraska. Because adequate medical facilities were not available locally, emergency transport was requested to move the patient to a hospital in Kearney, Nebraska. Plaintiff transported the patient on a medically equipped fixed wing aircraft and administered continuous medical care throughout the 225-mile trip. The issue was the price to be paid for the transport.

5. The patient was insured through Aetna. Plaintiff and Aetna agreed on MET as the selected IDR arbitrator. The parties each submitted what it claimed to be their QPA to MET. MET reviewed the parties' submissions and applied the QPA in Aetna's favor. Plaintiff believes that the QPA Aetna submitted was improperly calculated.

6. The claim was decided on October 12, 2022. MET is required to consider all the facts and circumstances of the payment dispute and select the offer that best represents the value of the services provided. MET has applied and complied with all rules and regulations outlined by the Departments and has rendered a decision as an impartial and neutral party.

II. ARGUMENT AND CITATION TO AUTHORITY

A. STANDARD FOR MOTION TO DISMISS

7. Rule 12(b)(6) authorizes dismissal of an action for "failure to state a claim upon which relief can be granted" if the plaintiff's complaint lacks "direct allegations on every material point necessary to sustain a recovery" or fails to "contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." FED.R.CIV. P. 12(b)(6); *Campbell v. San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995). Although a court is required to accept all well-pleaded facts as true, a court does not accept as true conclusory allegations, "unwarranted deductions of fact," or "legal conclusions masquerading as factual conclusions." *See, e.g.*, *Tuchman v. DSC Communications*, 14 F.3d 1061, 1067 (5th Cir. 1994). A claim must be dismissed if the claimant can prove no set of facts that would entitle it to relief. *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995). "The court is not required to 'conjure up unpled allegations or construe elaborately arcane scripts to' save a complaint." *Id.* For the reasons set forth in more detail below, Plaintiff's claims should be dismissed because Plaintiff has failed to state a claim upon which relief may be granted.

8. A court may grant a Motion for Failure to State a Claim without opportunity to amend if the defect cannot be cured by amendment or the plaintiff cannot prevail based on the facts alleged in the Complaint. *Clorox Co. P.R. v. Proctor & Gamble Commercial Co.,* 228 F.3d 24, 30-31 (1st Cir. 2000); *Smith v. Boyd,* 945 F.2d 1041, 1043 (8th Cir. 1991). The issue is not whether the plaintiff will ultimately prevail but whether the complaint contains enough factual material to raise a right to relief above the speculative level. *Renfro v. Unisys Corp.,* 671 F.3d 314, 320 (3d Cir. 2011); *see Skinner v. Switzer*, 562 U.S. 521, 529-30 (2011).

9. In deciding a motion to dismiss for a failure to state a claim, the court accepts as true all well-pled factual allegations in the complaint and views them in a light most favorable to the plaintiff. *Miccosukee Tribe of Indians of Fla. v. S. Everglades Restoration All.*, 304 F.3d 1076, 1084 (11th Cir. 2002). While a complaint does not need detailed factual allegations to survive a Rule 12(b)(6) motion to dismiss, a complaint must provide more than labels and conclusions. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007). A court is not required to accept legal conclusions on a motion to dismiss. *New England Cleaning Services, Inc. v. Am. Arbitration Ass'n,* 199 F.3d 542, 545 (1st Cir. 1999) (dismissing claim based or arbitral immunity); *Jason v. Am. Arbitration Ass'n, Inc.*, 62 Fed. Appx. 557 (5th Cir. 2003) (unpublished opinion) (dismissing case based on arbitral immunity for failure to state a claim).

10. A claim for lack of Article III standing implicates the court's subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). *Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc.,* 524 F.3d 1229, 1232 (11th Cir. 2008). Such motions can be facial attacks, looking only at the allegations of the complaint, or factual attacks based on material outside of the four corners of the complaint. *Id.* at 1233 – 34.

B. MET IS ENTITLED TO ARBITRATOR'S IMMUNITY

11. Plaintiff's claims fail as to Defendant MET because it has long been accepted across most jurisdictions that arbitrators have immunity.

12. In recognition of the rule of an arbitrator, federal common law has created arbitrator immunity to protect the judicial-like functions of an arbitrator. *See Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith*, 477 F.3d 1155, 1158 (10th Cir. 2007) (noting that every circuit that has considered arbitral immunity has recognized the doctrine); *Hawkins v. National Ass'n of Securities Dealers Inc.*, 149 F.3d 330, 332 (5th Cir.1998); *E. C. Ernst, Inc. v. Manhattan Const. Co. of Texas*, 551 F.2d 1026, 1033 (5th Cir. 1977) (The scope of his immunity should be no broader than this resemblance. The arbitrator "should be immune from liability only to the extent that his [or her] action is functionally judge-like."); *Hudnall v. Texas*, 2022 WL 3219423, *10 (W.D. Tex. Aug. 9, 2022); *Singleton v. Pittsburgh Bd. of Educ.,* 2012 WL 4069560, *7 (W.D. Pa. Aug. 13, 2012) (recommending the dismissal with prejudice of the claim against an arbitrator).

13. The rationale for arbitral immunity stems from sound policy considerations and the similarities of the role of an arbitrator and a judge. Decision-makers, such as arbitrators, should be free from bias or intimidation from a potential lawsuit by a disgruntled litigant. *See Pfannenstiel*, 477 F.3d at 1159 (citing *Butz v. Economou*, 438 U.S. 478, 508-511 (1978)); *New England Cleaning Serv.,* 199 F.3d 542, 545 (1st Cir. 1999) (holding that arbitral immunity "is essential to protect decision-makers from undue influence and the process from reprisals by dissatisfied litigants."). "If [arbitrators'] decisions can thereafter be questioned in suits brought against them by either party, there is a real possibility that their decisions will be governed more by the fear of such suits than by their own unfettered judgment as to the merits of the matter they must decide." *Lundgren v. Freeman,* 307 F.2d 104, 117 (9th Cir. 1962).

14. With these policy decisions in mind, the courts have crafted a simple test to determine if the decision-maker is cloaked with immunity: does the plaintiff seek to challenge the "decisional act of an arbitrator?" If so, then immunity applies. *See Pfannenstiel*, 477 F.3d at 1159. *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435-36 (1993) ("the 'touchstone' for the doctrine's applicability has been performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights.").

15. Here, Plaintiff seeks to vacate the arbitration award based on the act committed by the arbitrator with MET. There is no evidence outlined in Plaintiff's complaint that suggests that the arbitrator acted outside the scope of his duties. He was provided a QPA from Aetna, He evaluated said QPA based on the factors determined by the Departments and rendered a decision based on those factors. There was no way for the arbitrator to know whether the information provided by Aetna was correct, construed or skewed in any way. The process in determining the QPA is very straight forward and although there may be room for human error, plaintiff has not shown where the process used by MET is flawed and thereby creating the misrepresentations outlined in its complaint. Based upon the above case law, immunity applies and thus the court should dismiss this case as to MET based on its immunity.

16. Plaintiff cites a case out of the Eastern District of Texas which states: "Accordingly, [...] the Court holds that the Rule conflicts with the Act and must be set aside under the APA. The Act unambiguously provides that arbitrators in an air ambulance IDR "shall consider" the QPA and several additional "circumstances." Nothing in the Act instructs arbitrators to weigh any one factor or circumstance more heavily than the others. Yet, the Rule requires arbitrators to "select the offer closest to the [QPA" unless "credible" information, including information supporting the "additional factors," "clearly demonstrate[s] that the [QPA is materially different from the

appropriate out-of-network rate." The Rule thus "places its thumb on the scale for the QPA, requiring arbitrators to presume the correctness of the QPA and then imposing a heightened burden on the remaining statutory factors to overcome that presumption." Because the Rule "rewrites clear statutory terms," it must be "h[e]ld unlawful and set aside" for this reason alone." *See Lifenet Inc. v. U.S. Dept. of Health & Human Servs., et al.,* No. 6:22-cv00162-JDK, 2022 WL 2959715 at *10 (E.D. Tex., June 26, 2022).

17. However, a problem with the *Lifenet* case is that it ignores the fact that since the Plaintiff is challenging the arbitrator's decision, the arbitrator has immunity. The fifth circuit has held that arbitrators have immunity and has defined the scope of that immunity. *See E. C. Ernst, Inc. v. Manhattan Const. Co. of Texas*, 551 F.2d 1026, 1033 (5th Cir. 1977) (The scope of his immunity should be no broader than this resemblance. The arbitrator "should be immune from liability only to the extent that his [or her] action is functionally judge-like."). This is an extremely broad immunity standard and absent any act by the arbitrator that presents as "judge-like," arbitrator immunity should be upheld.

18. Additionally, arbitrators are not required to form an opinion as to whether the QPA is accurate. The departments have outlined in the Federal Independent Dispute Process Guidance for Certified IDR Entities that "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." Remember, the arbitrator's role is to remain neutral. Defendant MET had no way of knowing whether Aetna's QPA was skewed in their favor. They are obligated to choose the closest QPA out of the parties involved.

19. An additional issue with the *Lifenet* case is that it is not binding on this district. This court is not required to take the *Lifenet* case under advisement when determining the QPA. Based

on the foregoing arguments, Plaintiff's case should be dismissed as to Defendant MET based on its challenge of the decision and the arbitrator's immunity.

C.FAILS TO MEET ONE OF THE STANDARDS TO SET ASIDE ARBITRAION UNDER 9 USC 10.

20. Plaintiff alleges that the arbitration award rendered by MET should be vacated; however, Plaintiff fails to meet any of the requirements to set aside arbitration.

21. Under 9 USC 10 concerning arbitration: (a) 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) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the

award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5. *See Burchell v. Marsh*, 58 U.S. 344, 351 (1854); *Karthaus v. Ferrer*, 26 U.S. 222, 228 (1858); *Carnochan v. Christie*, 24 U.S. 446, 460-67 (1826).

22. In the instant case, Plaintiff has not specifically alleged any corruption, fraud, or undue means because Plaintiff failed to plead fraud in its petition. Plaintiff has failed to allege that the arbitrator's conduct was not impartial in using the QPA from Aetna. Plaintiff has not alleged any facts that suggest that either party involved wanted to postpone or delay the proceeding due to the QPA presented by Aetna. Additionally, Plaintiff has not alleged any facts that the arbitrator exceeded its powers so that a mutual, final, and definite award could not be made. Furthermore, Plaintiff has not stated any facts that allege or suggest that either party involved wanted to postpone or delay the proceeding due to the QPA presented by Aetna. Therefore, there are no facts alleged by Plaintiff that would lead anyone to believe that Defendant MET committed any wrong according to the statute that would warrant the setting aside of the arbitration award.

D.FRAUD MUST BE PLEADED WITH SPECIFICITY UNDER RULE 9

23. The court should dismiss the Plaintiff's complaint because its complaint fails to plead any cause of action with specificity, specifically fraud. FED.R.CIV.P. Rule 9(b)'s heightened requirement of pleading with particularity is the default standard for fraud-based claims. *Alpert v. Riley,* 2009 U.S. Dist. LEXIS 36615, *9 (N.D. Tex. 2009).

24. Most of Plaintiffs' predicate acts are, at their core, allegations of fraudulent behavior by Defendants. Because all of these allegations are fundamentally grounded in fraud, "rule 9(b) applies and the predicate acts alleged must be plead with particularity." *Walsh v. America's Tele-Network Corp.,* 195 F. Supp. 2d 840, 846 (E.D. Tex. 2002) (citing *Williams v. WMX Techs., Inc.,* 112 F.3d 175, 177 (5th Cir. 1997)); FED.R.CIV. P. 9(b) ("In all averments of fraud or mistake, the

circumstances constituting fraud or mistake shall be stated with particularity."). Underpinning the heightened pleading requirement for fraud claims is the federal courts' determination that "defendants are not required to guess what statements were made in connection with a plaintiff's claim and how and why they are fraudulent." *Allstate Insurance Company v. Benhamou,* 190 F. Supp. 3d 631, 658 (S.D. Tex. 2016). Thus, Plaintiffs' fraud allegations must specifically refer to the "time, place, and contents of the false representations, as well as the identity of the person making the representation and what the person obtained thereby." *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.,* 975 F.2d 1134, 1138 (5th Cir. 1992); *Skidmore Energy, Inc. v. KPMG LLP,* No. 3:03-CV-2138-B, 2004 WL 3019097, at *3 (N.D. Tex. Dec. 28, 2004).

25. Under the Federal Arbitration Association, a party who alleges that an arbitration was procured through fraud or undue means must demonstrate that the improper behavior was (1) not discoverable by due diligence before or during the arbitration hearing, (2) materially related to an issue in the arbitration, and (3) established by clear and convincing evidence. *See Matter of Arbitration between Trans Chemical Ltd. And China Nat. Machinery Import and Export Corp.,* 978 F. Supp. 266, 304 (S.D. Tex. 1997). (citing *Gingiss Int'l, Inc. V. Bormet*, 58 F.3d 328, 333 (7th Cir. 1995); *A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1404 (9th Cir. 1992). Fraud requires a showing of bad faith during the arbitration proceedings, such as bribery, undisclosed bias of the arbitrator, or willfully, destroying or withholding evidence. *See United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 597 (1960).

26. Here, Plaintiff has alleged there were misrepresentations made by Aetna that led to Defendant MET's use of Aetna's application of the QPA. Plaintiff's contentions suggest a claim for fraud; however, Plaintiff has failed to specify fraud as a cause of action in its complaint. Plaintiff is required to show that Defendant MET discovered the fraud by due diligence under bad

faith. AS previously mentioned, Defendant MET had no way of knowing that the QPA submitted was done in bad faith. Plaintiff has alleged no such facts in its complaint that Defendant MET acted in bad faith by using the QPA received from Defendant Aetna.

III. PRAYER

WHEREFORE PREMISES CONSIDERED, MET respectfully prays the Court to dismiss all of Plaintiff's claims asserted against it with prejudice; or alternatively strike Plaintiff's claims and award Defendant MET attorney's fees and any and all other relief that Defendant MET may be entitled to.

Respectfully submitted,

THE VETHAN LAW FIRM, PC

By: /s/ Charles Vethan

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CERTIFICATE OF SERVICE

I certify that on the 6th 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 herein.

By: /s/ Charles Vethan

Charles M.R. Vethan