UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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

AETNA HEALTH INC.'S SUPPLEMENTAL BRIEFING

The Court asked why *this* case would "open the floodgates," and the answer is simple—Plaintiff pleads no basis for its conclusory allegation that Aetna procured the subject IDR award through misrepresentations. Indeed, Plaintiff's fraud-based allegation that Aetna misrepresented its QPA is based on nothing more than a supposition that Aetna's QPA calculation "is improbably low." *See* Dkt. 1 at 13. In essence, Plaintiff attacks Aetna's alleged QPA calculation—a complaint that is within the purview of the Department of Health and Human Services (HHS).[1]

Importantly, alleged "misrepresentation of facts" regarding a payer's QPA is not grounds for judicial review under the NSA. As explained below, HHS has extensive regulatory oversight, as it is required to annually audit health plans and perform complaint-based audits to ensure compliance with the NSA's QPA-calculation requirements. Put differently, Plaintiff's conclusory allegation that Aetna miscalculated its QPA falls not only outside the scope of judicial review but squarely within the ambit of what Congress has entrusted HHS to oversee. Thus, if the Court were to find that Plaintiff's[2] allegations survive the motion-to-dismiss stage, it would effectively allow

[1] Aetna has agreed to pay the difference between the award amount and Plaintiff's offer in the arbitration. As discussed at the hearing, Aetna believes this places the dispute outside the Court's jurisdiction, and any opinion—favorable or unfavorable—would be an advisory opinion. Aetna is filing a separate motion to dismiss on this ground.

[2] *See, e.g.,* Dkt. 1 at 2 ("The purported QPA does not reflect market realities and, upon

any disgruntled party, armed with nothing but their own suspicion, to barge into federal court and demand that it scrutinize an IDR award so long as they plead that facts were "misrepresented" to the IDR entity. Such a result would inundate the courts with suits to vacate IDR awards, an outcome that is antithetic to the NSA's purpose: to provide a streamlined and efficient dispute-resolution process for surprise out-of-network medical bills. That cannot be the result here.

A. The Alleged Misrepresentations Are Not Subject to Judicial Review.

Congress clearly set forth very narrow parameters for judicial review of IDR awards:

> A determination of a certified IDR entity under subparagraph (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**, except in a case described in [9 U.S.C. § 10(a)(1)–(4)].

42 U.S.C. § 300gg-111(c)(5)(E) (emphasis added).

At the April 21 hearing, Plaintiff argued that the Court should read subparagraphs (I) and (II) together in an attempt to graft subsection (I)'s mention of "misrepresentation of facts" onto subsection (II)'s grounds for judicial review. But the statute's plain language permits no such result. If Congress intended to incorporate Plaintiff's "broad concept" of undue means[3]—a ground for vacatur under § 10(a)(1)—it would have said so.[4] Congress is obviously familiar with the FAA and that "misrepresentation of facts" is not a ground for vacatur. Further, Congress is well aware

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information and belief, does not comply with the statutory requirements of the NSA."), 13 ("Upon information and belief, Aetna's QPA does not comply with the statutory requirements of the NSA.").

[3] *See* Hearing Transcript, attached as **Exhibit 1** at 54:19–54:23 ("But because of the specific statutory reference to material misstatements of fact, we think that qualifies for undue means. So it includes those misrepresentations.").

[4] Just as Plaintiff argued Congress could have done if it intended IDR to be synonymous with "arbitration."

that courts have repeatedly applied a very narrow understanding of the term "undue means"[5] as it appears in § 10(a)(1).[6] But even if Congress had intended to place "misrepresentation of facts" under the umbrella of "judicial review," Congress's intent cannot trump the text it enacts. *See Merck & Co. v. Reynolds*, 559 U.S. 633, 659 (2010) (Scalia, J., concurring in part and concurring in judgment). In any event, we have no reliable way to ascertain such intent apart from reading the text. Here, the expansive interpretation hawked by Plaintiff finds no support in the statute's text.

Other provisions of the NSA lead to the same conclusion. Indeed, Congress vested the HHS with extensive regulatory oversight. Specifically, § 300gg-111(a)(2)—titled "Audit process and regulations for qualifying payment amounts"—provides that:

> [T]he Secretary,[7] in consultation with the Secretary of Labor and the Secretary of Treasury, shall establish through rulemaking process, in accordance with clause (ii), under which group health plans and health insurance issuers offering group or individual health insurance coverage **are audited by the Secretary or applicable State authority** to ensure that—
>
> (I) such plans and coverage **are in compliance with the requirement of applying a qualifying payment amount under this section**;
>
> (II) such **qualifying payment amount** so applied **satisfies the definition under paragraph (3)(E)** . . . .

42 U.S.C. § 300gg-111(a)(2)(A)(i) (emphasis added). Notably, subparagraph (II)'s mention of "paragraph (3)(E)" refers to § 300gg-111(a)(3)(E), which outlines the NSA's requirements for how

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[5] The FAA does not define fraud or undue means, but courts interpret them together. *Trans Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Corp.*, 978 F. Supp. 266, 304 (S.D. Tex. 1997), *aff'd and adopted* 161 F.3d 314 (5th Cir. 1998). Courts have repeatedly equated "undue means" to conduct that is equal in gravity to corruption, fraud, or physical threats. *See PaineWebber Grp., Inc. v. Zinsmeyer Trs. P'ship*, 187 F.3d 988, 991 (8th Cir. 1999) (collecting cases).

[6] Plaintiff's counsel (correctly so) likened the Fifth Circuit's interpretation of "undue means," as used in the FAA, to mafia-level misconduct. *See* Ex. 1 at 42:24–43:3 ("Now, some of the Fifth Circuit's case law has said: Well, 'undue means' means almost like, you know, the mafia. You sent the mafia after the arbitrator. They tried to kind of raise the level of undue means.").

[7] "Secretary" refers to the Secretary of HHS.

health plans are to calculate their QPAs. In other words, the statute has a built-in audit procedure to ensure health plans are properly calculating their QPAs.

Moreover, the NSA empowers the Secretary to audit any health plan upon receipt of "**any complaint** or other information about [health] plan[s] or coverage . . . that involves the compliance of the plan or coverage, with either of the requirements described in subclauses [§ 300gg-111(a)(2)(A)(i)(I) and (II)]." *Id*. § 300gg-111(a)(2)(A)(ii)(II) (emphasis added); *see id.* § 300gg-111(a)(2)(B)(iv).[8] Put differently, if Plaintiff *believes* Aetna is misrepresenting its QPAs, it can file a complaint with HHS. This is consistent with the notion that "misrepresentation of facts," alone, is not equivalent to procuring an award "by corruption, fraud, or undue means." In addition, this is further evidence of Congress's intent that HHS, not the courts, police *perceived* misconduct by insurers in the IDR process. That is, judicial review of an IDR award allegedly procured by corruption, fraud, or undue means is limited to those rare instances when a party's allegations satisfy Rule 9(b)'s heightened pleading requirement.

B. The Scope of Information Available to a Provider Regarding a Payor's QPA Calculation is Already Provided For by Federal Regulations.

Plaintiff complains that the IDR process is essentially a black box. Thus, according to Plaintiff, the Court *must* allow for *some* discovery so that Plaintiff can figure out how Aetna calculated its QPA.[9] First, this doesn't speak to fraud, corruption, or undue means but instead highlights the speculative nature of Plaintiff's allegations. Moreover, the Code of Federal

[8] *See* CENTERS FOR MEDICARE & MEDICAID SERVICES, *Providers: Submit a Billing Complaint*, https://www.cms.gov/nosurprises/policies-and-resources/providers-submit-a-billing-complaint (portal allowing providers to submit billing complaints if they believe an insurer "is not complying with the Federal [IDR] process" or "want[s] to report a violation of the [NSA]").

[9] *See* Ex. 1 at 56:22–57:2 ("Of course, we can't prove it without discovery. We can't get in their systems and look up which contracts they have in place to come up with this rate in Nebraska. We can't go look and see what contracts they claim they have where the median supports this [QPA].")

Regulations already dictates the scope of information to which a provider is entitled. *See* 45 C.F.R. § 149.140(d)(2). As Exhibit 1 to Aetna's motion to dismiss demonstrates, Aetna sent Plaintiff this very information. *Compare id*., *with* Dkt. 12-1. So, contrary to Plaintiff's representations, Plaintiff is asking the Court to usurp Congress and the authority it has delegated to the Departments (HHS, DOT, and DOL) to allow for expansive discovery in a misguided attempt to find evidence to back up its allegations. Doing so would stand at odds with the norms of judicial review under the FAA.

C. Plaintiff Has Objectively Failed to Demonstrate a Basis for Its Belief.

Undaunted, Plaintiff complains that Aetna sent the above-described information a few days after Plaintiff submitted its proposed out-of-network rate to MET. Even if this were true, it does not change the fact that Plaintiff possessed, **at the time it filed suit**, the information it claims Aetna withheld. *See* Dkt. 1 at 16. Recall, when a plaintiff's claims are grounded in fraud, it is the plaintiff's burden to satisfy the heightened pleading requirements of Rule 9(b). *See Sharifan v. NeoGenis Labs, Inc.*, --- F. Supp. 3d ---, 2022 WL 3567010, at *5 (S.D. Tex. Aug. 18, 2022). And the salient issue when a party attempts to plead fraud based upon information and belief is whether the allegations contain sufficient facts from which such a belief can be reasonably formed—i.e., whether the allegations provide a reasonable basis for the Plaintiff's belief that Aetna's QPA was misleading.[10]

Respectfully submitted,

By: */s/ John B. Shely*
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OF COUNSEL:
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[10] *See Wexner v. First Manhattan Co*., 902 F.2d 169, 172 (2d Cir. 1990) ("Where pleading is permitted on information and belief, a complaint must adduce specific facts supporting a strong inference of fraud or it will not satisfy even a relaxed pleading standard.").

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed electronically on April 28, 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
John B. Shely

EXHIBIT 1

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

THE HONORABLE ALFRED H. BENNETT, JUDGE PRESIDING

GUARDIAN FLIGHT, LLC, Plaintiff, vs. AETNA HEALTH, INC., Defendant.	)	No. 4:22-cv-03805

MOTIONS HEARING

OFFICIAL COURT REPORTER'S CERTIFIED TRANSCRIPT

Houston, Texas

April 21, 2023

APPEARANCES:

For the Plaintiff: Adam T. Schramek, ESq.
Dewey J. Gonsoulin, III, Esq.
Abraham Chang, Esq.

For the Defendant: Mary Katherine Strahan, Esq.
David W. Hughes, Esq.
John B. Shely, Esq.

Reported By: Nichole Forrest, RDR, CRR, CRC
Certified Realtime Reporter
United States District Court
Southern District of Texas

Proceedings recorded by mechanical stenography.
Transcript produced by Reporter on computer.

PROCEEDINGS

(The following proceedings held in open court.)

* * *

THE COURT: Cause No. 4:22-cv-3805, Guardian Flight, LLC versus Aetna Health, Inc., et al.

Counsel for the plaintiff, your appearances for the record.

MR. SCHRAMEK: Adam Schramek, Abraham Chang, and Dewey Gonsoulin on behalf of the plaintiff Guardian Flight.

MS. STRAHAN: Good morning, Your Honor. Katherine Strahan, John Shely and David Hughes for the defendant.

THE COURT: Ms. Strahan, Mr. Hughes. What was the other name?

MS. STRAHAN: Mr. Shely.

THE COURT: Very well.

Counsel, this is a motion hearing. There are multiple motions, including motions to dismiss, motion to seal, and a motion to consolidate that are before the Court.

But the first item that the Court will

turn its attention to is Document Number 8, which is the motion to dismiss plaintiff's complaint and motion to strike demand for attorneys' fees.

The Court also notes that in Document Number 12 there is an additional motion to dismiss. Is that correct?

MS. STRAHAN: Yes, Judge. Aetna's motion to dismiss is Document Number 12. I believe Document Number 8 is MET, our co-defendant's motion to dismiss.

THE COURT: Very well.

Are we read to proceed?

MS. STRAHAN: Yes, Judge. I would point out that I do not see counsel for MET --

THE COURT: Counsel for MET is a party. So we're not waiting.

Counsel, have a seat. You may proceed.

MS. STRAHAN: Thank you, Your Honor.

MR. SCHRAMEK: We did have a courtesy copy for the Court in paper, if you would like it.

THE COURT: You can hand it up to the law clerk.

MS. STRAHAN: Thank you, Your Honor.

Katherine Strahan for the defendant.

Your Honor, I would like to point out one thing to draw to the Court's attention to, the fact

that yesterday Aetna filed a letter with the Court --

THE COURT: I received the two letters. I think you filed them last night. The law clerk brought these letters to my attention. The letters you're referring to was your letter, which was filed by ECF. Then the Court received by ECF a response dated the same day from counsel. So I do have those in front of me right now.

MS. STRAHAN: Thank you, Your Honor.

And what Aetna was making the Court aware of in its letter of yesterday was the fact that this case is over a baseball-style arbitration of the No Surprises Act, where the plaintiff Guardian Flight filed an IDR proceeding against Aetna. There was an award issued by our co-defendant.

And in that arbitration, Aetna's submission was approved and awarded by the arbitrator. Then, of course, MetLife -- excuse me, Guardian Life has filed this seeking to remand to vacate the award and remand it back to the, I guess, arbitrator to reconsider.

With respect to the different amounts that were submitted by Aetna and Guardian Flight, the difference was $25,000. Aetna has offered to pay, wants to pay, is ready to pay that $25,000 because

that very small amount at issue is -- we're trying to not burden the Court further or the parties with further legal fees in connection with this lawsuit.

We believe that moots out the claims here, and there is no longer a case in controversy. Now we're certainly happy to file a motion on that for dismiss of lack of jurisdiction for that additional reason, but I did want to bring that to the Court's attention before we proceeded with the motion to dismiss on the current pleading today.

THE COURT: As I understand it, your offer to pay does not end the dispute unless there is an agreement to receive said payment.

And as I understand it from the letter that was received, they're not agreeing to receive the money to end the dispute. Is that correct?

MS. STRAHAN: Judge, that does appear to be correct from their letter. However, that is their only harm, their only damages, their only -- you know, the only reason they have a case in controversy here is because they have alleged that they were not -- they did not receive that amount that they submitted to the arbitrator. Instead, the arbitrator picked Aetna's amount. So there is no harm. So, therefore, there is no justiciable controversy.

THE COURT: I don't want to put words counsel's mouth as to what they perceive their harm to be. I understand that you believe they have asserted that particular harm and that this payment that you're referencing will solve that problem. They seem to think otherwise.

MS. STRAHAN: Yes, Judge. But that is exactly the definition of an advisory opinion. We have -- we're going to pay the claim. We have the W-9 now from our own resources. We're going to pay the claim.

They're going to be made whole for whatever allegation that they have, which, of course, we dispute the merits of the allegation. But we are simply trying to not burden the Court with a dispute over $25,000.

THE COURT: Too late.

MS. STRAHAN: Well, Your Honor, we also have been trying to resolve this. But it is the case that they are essentially, by their own papers that were filed yesterday, seeking an advisory opinion, which is not appropriate.

It's -- there is no controversy here anymore. There is no -- we are going to pay the claim. Therefore, they have no harm, and they have no

remedy, of course, for other reasons, you know, that we're here to argue, you know, in front of you today.

But even if they, you know, can survive a motion to dismiss, we have made them whole for whatever complaint that they have. And they're otherwise just seeking an inappropriate advisory opinion. There is no jurisdiction.

THE COURT: All right. Let me hear from them on this point, and then I'll return to you on the motion to dismiss.

MS. STRAHAN: Thank you, Your Honor.

MR. SCHRAMEK: Your Honor, if Aetna wants to concede and offer us a full judgment in this case, we'll settle it right here and now. We'll be done. That concession needs to include an acknowledgment that they misrepresented their QPA; that accordingly the award they received was received and that they used undue means to receive that award under the NSA, and accordingly the award should be vacated, and it should be fully paid, and all the other requests we received about what the due process should be going forward in the IDR proceedings.

They do not offer any of that today. In fact, their statement said: This is without any admission of liability. This is not about a $25,000

claim, Your Honor. We wouldn't be here if it was $25,000.

You have another case that was filed against Aetna in your court for over $700,000 in awards they have not paid timely. They have 30 days to pay it. They didn't pay timely. We had to sue. And we're here to ask you on that case for additional compensation because of their violations of the NSA.

We have had, since we filed this case, almost 30 additional lawsuits in which we believe many of them, if not all of them, have the same false QPA allegation at issue in this case.

Their attempt at the last minute to try to buy off this one claim in order to avoid their own wrongdoing, Your Honor, it's not supported by the case law. It's not supported by the Fifth Circuit cases we cite in our letter.

They offered us $25,000 to go away. We said no. The Court got it right. It was an unaccepted settlement offer. This case, if we win at the end of the day, Your Honor, the judgment will not give us one dollar because this case isn't about money. This case is about Aetna's wrongdoing, its violation of the NSA process, our request to have findings to vacate that award.

And by the way, when we file our IDR proceeding going forward, we can provide any evidence we want that we think is relevant to the IDR entity. We fully intend, when we get our judgment in this case, if we prevail, to include that judgment in every IDR filing going forward to show how Aetna abused the system, miscalculated their QPA, made misrepresentations to IDR entities. That is what this case is about. It's not about the money. It's about the violations of the statute and the law.

Your Honor, we're here today to argue why our case should not be dismissed.

THE COURT: Very well. So in regards, just to be clear, which I knew that you would make clear, the rejection of the $25,000 does not -- the offer of the $25,000 is rejected and does not resolve the case to your satisfaction?

MR. SCHRAMEK: Yes, Your Honor.

THE COURT: Very well, counselor.

Counselor, your motion to dismiss.

MS. STRAHAN: Your Honor, I just want to ask that may we file a motion on our request that the case be dismissed for mootness so we can fully brief the issues?

THE COURT: You can 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.

MS. STRAHAN: I understand, Your Honor. But we would like to brief the Court for our record on the advisory --

THE COURT: I thought that is what you did with your letters this morning or last night. Is there going to be anything additional that you're going to provide the Court by way of reasoning?

MS. STRAHAN: Yes, Your Honor. We would like to submit authorities as to why it's an advisory opinion. They're requesting an advisory opinion, and that there is no justiciable case or controversy any longer. So I just would like to submit that portion --

THE COURT: You may.

MS. STRAHAN: I'm sorry, Your Honor?

THE COURT: You may.

MS. STRAHAN: Okay. With respect to Aetna's motion to dismiss, Your Honor, not only is this case about this particular claim -- and I just would like to briefly respond to the references to the other cases that the plaintiff's counsel just made.

There is another lawsuit that they filed

alleging that Aetna has not paid some awards. With respect to that lawsuit, there are several issues with respect to how the payers are receiving the awards from the arbitrators; that it's not like Aetna is just ignoring these awards. I just want to point that out.

Some of the awards we have paid. They don't have an accounting of them. So that is much more complex issue than perhaps it was made by opposing counsel. I just --

THE COURT: That is of no moment to me given the fact this is an outstanding issue that you, yourself, have said that you want additional briefing on.

Let's turn our attention to the motion to dismiss.

MS. STRAHAN: Thank you, Your Honor.

Okay. With respect to the current pleading, the plaintiff is seeking relief from this Court that the Court does not have jurisdiction to provide.

And here is why: They are suing under the No Surprises Act, the remedy for which is the Federal Arbitration Act, which provides the remedy for arbitrations that are performed under the No Surprises Act.

Now I would like to back up for a second as to why we have the No Surprises Act and why Congress was entitled to the remedy that it did provide for the No Surprises Act arbitrations.

There was a big problem in our country with balance billing for emergency providers and other providers, which the patient had no ability to choose a provider for. There were congressional hearings, there was testimony. There was a lot of fact-finding with respect to how out-of-network providers, who did not have contracts with health plans or payers, were charging exorbitant rates. There was no contract to keep those rates reasonable.

And then the patient would be balance billed because they were out of network. Then the patients would be stuck with these exorbitant rates in excess of what the plan would pay.

I want to point out that most of our healthcare is funded by self-plan dollars. The employers and the employees are funding those with these dollars. It's not just an insurance policy in most instances, including in this particular instance, Your Honor.

So it was important that Congress do something about this problem. In doing so, even in

the congressional hearings, they were remarking about how air transport in particular, such as Guardian Flight, that type of provider, was jacking up the rates. They were going up even in Mexico, for example, 300 percent in just a couple of years. So it was a real problem. So it was a balancing act.

So in enacting the No Surprises Act, Congress developed the IDR process, or the internal dispute resolution process, which was supposed to be efficient, which was supposed to be final, and it gave the out-of-network providers, including emergency room providers and air transport providers, such as Guardian, the right to directly pursue payment from the payer; whereas, before they had no contract and so that is why the patients were in the middle.

So in creating this right, the trade-off was that they would have an arbitration baseball-style arbitration as a resolution mechanism, if the payer, the health plan, and the provider did not agree on an appropriate rate.

And so there are procedures for that. There are procedures with respect to what the plan calculates as a qualifying payment. There are procedures with respect to a negotiation period of the No Surprises Act, and there are procedures with

respect to initiating the IDR process, because, as I said before, it's a baseball-style proceeding. There are prescribed considerations that the arbitrators must consider in reaching their decision. So each side, the payer and the provider, submits what they believe is a reasonable rate and then the arbitrator decides. There are thousands and thousands of these IDR arbitrations going on as we speak every day. So the issues here do extend beyond this current dispute.

Now, with respect to how Aetna or any other payer calculates a payment to out-of-network providers that is covered under this act, there is what is called the Qualifying Payment Amount. That qualifying payment amount is defined by regulation 42 U.S.C. 300gg-111, that essentially -- I don't want to misquote the statute, but very simply, it's the median contracted rate that that payer has in that market with contracted providers. Of course, these are out-of-network providers. But it's the median rate of the payer's contract providers, Aetna's contracted providers.

The regulations address how that QPA, or qualifying payment amount, is calculated and what must be provided to a healthcare provider when they request information about the QPA. And that the current

regulation is 45 C.F.R. 149.140(d).

So that is regulated in terms of what that qualifying payment is and what Aetna or any other payer has to provide to their provider if they request information about the QPA. And most importantly, the calculation of the QPA, or the methodology, and how payers are calculating their QPA is regulated by the department -- excuse me, the health and -- excuse me. Health -- I'm blanking out. The CMS is that one that audits it and regulates it. It's health and human services. Excuse me.

So the Department of Health and Human Services is the one that is charged with regulating this QPA. There are provisions for the auditing of a payer's QPA. CMS does audit the payers to make sure that the QPA is accurate. And that is in 42 U.S.C. Section 300gg-111. That is where the CMS audits.

Now I would like to also point out that with respect to the issues here, the plaintiff is complaining that in the baseball-style arbitration one of the factors that the arbitrator can consider under statute is the payer's QPA. I'll give more specifics to this in a moment.

But the plaintiff is alleging that Aetna's misrepresenting its QPA without any basis for that

allegation. But set that aside for a moment.

But the QPA is, again, regulated by CMS. It's audited by CMS for every payer. That is how it works. Even in the plaintiff's own briefing, they on page 8 of their response to Aetna's motion to dismiss, they reference a guidance pamphlet that says that any complaint about a payer's QPA must be made to the Department of Health and Human Services.

So with that background, when the arbitrator in this particular instance was considering the -- you know, whose offer he should select or agree with, he considered the Aetna's QPA, which he's allowed to do under the statutes.

Now, the plaintiff argues that he put too much weight or presumption on Aetna's QPA. And with respect to the law as to what can be reviewed, I will address that in a moment, but that QPA -- I want to be clear -- is something under the statute that the arbitrator can consider. It absolutely is.

So the plaintiff having for many years been paid every high exorbitant out-of-network rates doesn't like Aetna's contracted rates, which is essentially what the QPA is. And they are suing Aetna and all these other health plans, making similar allegations that their QPA is too low. But they have

no basis to allege that, Your Honor. And that QPA is regulated by the federal government. It is audited by the CMS. So Aetna is not out there just making these things up. There is oversight on these issues.

They just allege that in their complaint that it must be -- it must be misrepresenting it because it seems too low. That is essentially what they're arguing, Your Honor.

And under the FAA, which, again, is what the NSA incorporates as the sole remedy that Congress prescribed for these arbitrations, if there is a complaint about the arbitration. Of course, there is very limited jurisdiction for federal courts to review the arbitration awards. It has to be something that the FAA specifically sets out to provide judicial review. Otherwise, the Court doesn't have jurisdiction.

Here, their complaint is they don't like Aetna's QPA. But that is regulated by the Department of Health and Human Services. It is provided for under the statute. And any complaints should be made to the Department of Health and Human Services not the Courts.

So what they have done is to try to wedge themselves, or their claims I should say, into the

FAA's exceptions for a Court to review. The Federal Arbitration Act made this allegation of alleged misrepresentation.

Now, in their complaint they also have some allegations that the arbitrator gave too much emphasis or applied an incorrect presumption that the QPA applied. I will say that there have been regulations in effect at certain times that did allow for the presumption for the QPA. Now there are some cases over that.

But even if that was not an appropriate weight put upon the QPA by the arbitrator, that is exactly the kind of thing -- it would be at most an error of law or an error of fact, depending how you consider that, I suppose, that the cases interpreting the FAA specifically say cannot be reviewed by a Court. That is supposed to be final. These arbitrations are supposed to result in expedient and, you know, speedy resolution of these issues, because there are thousands and thousands of them, Your Honor.

So what is important here is that if a provider is not happy with the outcome of one of the arbitrations, it can't run to the Court and just allege the payer misrepresented something every time they're dissatisfied with that. We would have

thousands and thousands of cases. There would be a flood gate, Your Honor.

So for very good reasons, Congress set up the IDR process for an efficient and speedy resolution of these claims. And it adopted essentially the limited judicial review scope -- the scope of -- limited judicial review from the FAA to provide the only remedies for any complaints about the IDR process. That is, only if the award is essentially procured by fraud or misconduct by the arbitrator. So that is why they have alleged misrepresentations here.

So with respect to their misrepresentations, they have alleged that they got more as an out-of-network provider. Well, that is not necessarily representative of anything, because that was the whole problem, because plans were paying a lot more when these providers were out of network, you know, before the NSA was enacted because they would balance bill the members. Plans were trying to keep the members out of the middle.

So it's no surprise that they would -- that Aetna's contracted rates would be less than perhaps they were paid as an out-of-network provider, even if that were true. And they have alleged that their own networks rates are higher. Well, that

doesn't necessarily mean that Aetna's network rates with other air transport providers are higher.

So they have no basis, Your Honor, to make this allegation of misrepresentation. 9(b) controls here. They have to prove fraud essentially to fall within the ambit of the FAA to try to undue this award. They can't just allege it without any factual basis for doing so.

Now, in their reply to Aetna's motion to dismiss -- excuse me, response to Aetna's motion to dismiss, they attach some letters from another air ambulance provider. They say that as an affiliate, where in the context of a claim, not a final arbitration, in the context of a claim payment they were complaining about Aetna's calculations of a QPA.

Aetna wrote back and said: We did find some errors. Here is how who how we calculated it. We did find errors. We'll correct that payment. Aetna didn't admit that it misrepresented anything as was the allegation in plaintiff's response. But I think that should not be considered. It's not part of the complaint. It came in on their response. It doesn't have to do with these providers or these arbitrations or any arbitration for that matter.

But I would just like to point out that if

Aetna were engaged in some consistent misrepresentation of the QPA, then why would they correct an error when they found it without being forced to do so through a lawsuit?

So I bring all of that up to say they have nothing to support this allegation. And if every time a provider didn't like the outcome of an arbitration, they could go to the court and just allege misrepresentation of the QPA, we would have thousands of lawsuits, Your Honor. That is why this is important.

Congress intended for this to be an efficient process, an inexpensive process, and that is why there are very limited judicial remedies. I keep hearing from opposing counsel, Your Honor, about due process.

In their complaint, in the first page, they say they're not challenging the NSA, and as a private party there are no allegations about due process against Aetna.

And it is absolutely the case that the Supreme Court allows Congress to prescribe arbitration remedies without being a violation of due process with limited judicial review, which is exactly what they did here to try to keep this an efficient and

streamlined process.

So, therefore, their due process claims are misplaced, not pled, and wouldn't apply here anyway, Your Honor. So thank you.

THE COURT: I want to unpack a couple of points you made.

MS. STRAHAN: Sure.

THE COURT: Having now set three cases where the Court was asked to not necessarily from this beginning, as in this case, but confirm arbitration awards, the Court has entertained argument, reviewed factual assertions where awards were obtained through fraud misrepresentation or misconduct. I did not hear you taking issue with those exceptions because you clearly referred to those exceptions; correct?

MS. STRAHAN: Your Honor, I don't believe I quoted the FAA. But, yes, with respect to the exceptions, it's the four exceptions in the FAA. Yeah.

THE COURT: I believe that in this case, they are making the argument that Aetna, in short, misrepresented facts to the arbitrator to obtain the award. Is that correct?

MS. STRAHAN: Your Honor, as I understand their pleading, they are alleging that Aetna did not

give the arbitrator the correct QPA. But they've said that in conclusory fashion without any specific facts.

THE COURT: You're jumping ahead.

But that is an exception that this Court is empowered to hear; correct?

MS. STRAHAN: Your Honor, I don't think so the way they framed it. Here is why --

THE COURT: No. You're getting fact specific. I'm just say saying that the framework of the FAA allows this Court to review awards obtained by misrepresentation; correct?

MS. STRAHAN: If I may, Your Honor. Corruption, fraud or undue means. So I don't believe necessarily --

THE COURT: Let's call it fraud.

MS. STRAHAN: Okay.

THE COURT: If you're more comfortable with that. Fraud. And that is what they're alleging, is that the arbitrator did not have all of the information necessary to make a correct award.

Now, to your point, those allegations are conclusory. They've not put any meat on the bone is your point when it comes to fitting into that exception. Is that correct?

MS. STRAHAN: Yes, Your Honor. But if I

may, there is one other, I guess, aspect to this in this particular circumstance; is that with respect to -- if we're talking about the QPA and how Aetna calculates the QPA, that is regulated by the Department of Health and Human Services.

So I think there is an overlay to this in this particular circumstance. Yes, that is correct, Your Honor. With respect to the allegation of fraud, to try to come within the ambit of the FAA's first exception, if you will, for jurisdiction, they have not been specific at all.

And whether you're reviewing the allegations under Rule 9(b) or under the general pleading standards under Rule 8, they have not pled a claim for relief that is specific factually that should survive a motion to dismiss, Your Honor.

THE COURT: Final unpacking. Something I agree with you on.

Over the last few decades, in various forms there has been a move by parties to reach agreements privately and now through legislative action to move to arbitration.

As you correctly pointed out, some of that relates to efficiency and cost. Parties or governing bodies believe that you can go to arbitration and get

a faster, cheaper result.

Limited appeals, which we've now just talked about, were not intended to create federal district courts as courts of appeal en masse for these arbitration awards or awards coming out of the FAA framework. You've made the argument that there would be thousands of potential appeals if this is allowed to go forward.

Why is this the bellwether that would allow thousands of cases to go forward as opposed to this Court just adjudicating this one case before it?

MS. STRAHAN: Well, because Your Honor, this is why it's so important that they allege factual sufficiency with respect to their claims here. Because otherwise, anyone could just not like their result, say, Aetna, Blue Cross, United, whoever, underestimated the QPA, and therefore, I'm entitled to judicial review, to discovery, all of these things that the NSA was specifically designed to prevent.

And that is exactly what they're doing. They're on a mission to drive up these QPAs. They've sued all over the country. They've sued all the different payers, making these very same allegations by the way. And that is their MO.

If they were allowed just to say, Aetna,

you know, committed fraud, misrepresented, then that's all they would have to say. And then here we are in federal court, spending your time, Your Honor, and all of our parties' time and expense to essentially litigate what Congress specifically wanted to address in the arbitration context and not the federal courts.

THE COURT: Thank you, counsel.

Counselor, do you have an appearance you need to make?

MR. LANZA: I do. Joseph Lanza. I'm Joe Lanza. I represent Medical Evaluators of Texas. I apologize, Your Honor, for arriving late to the hearing. I had it at 10:30, not 10:00. That's my error.

THE COURT: The hearing was scheduled for 10:00 and you were late. And, again, please make sure in the future that you arrive timely.

I'm going to give you the opportunity to present your motion because that will afford counsel the opportunity to address both as opposed to going into piecemeal fashion.

So if there is anything that you specifically need to add by way of legal argument for your client's motion, please do so, counselor.

MR. LANZA: Thank you, Your Honor.

From my client's perspective, M-E-T, the issue for us is very narrow. It's whether we are entitled to immunity similar to that of an arbitrator.

And as the Court is no doubt aware, our mutual immunity is nothing but an extension of the doctrine of judicial immunity, which has been implied in a number of different contexts to persons other than judges and arbitrators.

I would like to direct the Court's attention to a couple of Supreme Court cases that I think may help us. The first case is *Burns versus Reed*. The citation for that is 500 U.S. 478 and 111 Supreme Court 1934.

And in that case, Justice Scalia in a dissent listed the number of instances in which judicial immunity has been extended to non-judicial personnel, included in that list is arbitrators, and also included in that list are military and naval officers exercising their authority to order court-martials, grand and petit juries in the discharge of their duties, assessors upon when one is imposed a duty of valuing property for purposes of the levy of taxes, to commissioners appointed to appraise damages when property is taken under a right of eminent domain, officers empowered to lay out, alter,

or discontinue highways. It has other things.

But what Judge Scalia says is: As is evident from the foregoing catalog, judicial immunity extended not only to public officials but also to private citizens, in particular jurors and arbitrators. And the touchstone for its applicability was the performance of the function of resolving disputes between parties. And that is what independent dispute resolution entities under the No Surprises Act do.

The second Court opinion I would like to direct the Court's attention to is *Butz v. Economou*, 438 U.S. 478 98 Supreme Court 2894. That is a case specifically addressing judicial immunity. And the Court discussed six factors that have since become commonly used to determine whether judicial immunity should apply.

Those facts are: The need to ensure that the individual performing that function can do his job without harassment, or intimidation, or fear of being sued; the presence of safety guards to prevent corruption or the violation of Constitutional and other rights; whether the individual is isolated from political influence; the importance of precedential presence; whether the process is adverse in its

nature; and finally, whether there is an appellate remedy.

All of those factors are present in the structure of the No Surprises Act. Clearly, it's an adversarial process. You've got two entities: An insurer and a healthcare provider, who are in a dispute about how much the healthcare provider should be paid. And that dispute is submitted to a neutral, independent IDR entity to decide.

There are safeguards in the statute. First of all, the statute provides a set of factors or criteria that the IDR entity must consider. Just like if this Court were deciding a Title VII case, you would look to the Civil Rights Act to determine, you know, what you're allowed to consider, what is discrimination, what is not discrimination.

The laws and statutes we follow in a court are essentially a framework of the guidelines that the Courts use to render their decisions. Additionally, health and human services provides additional guidelines for the IDR entities to make their determinations.

IDR entities have to be independent; in other words, they cannot have an interest in the outcome of the arbitral process. And that is also a

safeguard that is present in the act.

Insulation from political influence. One way to insight [sic] from political influence is to have an independent entity making a determination such as a judge. In this case, it's an IDR entity. If it were a hearing officer employed by HHS, there is always the risk that political winds at the time will influence the departmental policy and how that officer makes his determination. So there is insulation here from political influence.

THE COURT: The Court has engaged in numerous cases where I have entertained attacks on arbitrators, attacks on arbitral awards, results. I'm familiar with the framework.

What I'm more concerned with in regards to your motion to dismiss is specifically what is it that you believe on the facts of this case requires dismissal?

MR. LANZA: Sure. The facts of this case, the IDR entity, in this case, MET, is clearly exercising a judicial-like function in making a decision or deciding between two competing interests; the interests of, I believe it is Aetna and Guardian air [sic]. It is making that decision based upon submissions from either side. The act provides --

THE COURT: Is IDR subject to any --

MR. LANZA: The IDR submissions, yes. I'm sorry.

THE COURT: Are they subject to review for their decision?

MR. LANZA: Yes, they are subject to limited review, just as an arbitration award is subject to limited review. I believe counsel who preceded me discussed that.

But there, again, under the arbitration act there are four grounds that a judge can set aside an award; that is, corruption in the arbitration process itself; corruption or evident partiality on the part of the arbitrator. I believe an arbitrator -- conduct by the arbitrator, such as not allowing someone to appear at a hearing. And the other is the arbitrator acts beyond the scope of his authority.

Additionally, the act provides that if one of the two parties submits fraudulent information or a misstatement of facts that is another grounds for setting it aside. So just as with an arbitration award, what they should come and do if they're dissatisfied with the result is file a suit like you would in an arbitration award against their opponent.

Come down and let the Court decide, yes, this award needs to be vacated. Go back and do it again; or no, I'm going to confirm the award is final.

If they're not happy with that decision, they have appeals to the Fifth Circuit or any other circuit, depending what part of the country you're in, and then from there they can go to the Supreme Court.

Now, I know they made a big deal about this not being not at all like arbitration because they don't get a choice in the matter. The ability to select an IDR entity is limited. They don't get to submit evidence, which I disagree with that argument, and they don't get a reasoned award.

But we're not talking commercial arbitration. We're talking statutory arbitration, which has been with us for 90 years, Your Honor. It started with the Railroad Labor Act in 1934 when Congress came in -- and that governs relations between the railroad workers and the railroads -- and said, we're going to have a mandatory arbitral process for certain types of disputes. They don't get a choice. It goes to the National Labor Relations Board.

And the Supreme Court of the United States said on numerous occasions has referred to that as an arbitral process. In 1936, Congress extended that act

to apply to airlines. Few things are as prevalent in everyday life as rail and air travel and freight shipping, Your Honor. And mandatory arbitration has been with us in those fields for 90 years.

There are some other examples under the Magnuson-Moss Warranty Act. Warrantors can provide for an alternate dispute resolution method, and the consumer has to go through that method first before he can file a lawsuit.

Then I believe there is a reference to a NADA case in our briefing, although that citation escapes me at the moment.

So MET is performing all the functions here of a judicial officer. It's considering the submissions put before it, and it's making a decision, and its decisions can be reviewed, but Congress has decided that that review is going to be limited. There is nothing unconstitutional about that, Your Honor.

THE COURT: So noted. Thank you, counsel.

MR. LANZA: Thank you, Your Honor. I appreciate it.

THE COURT: Counsel, the Court has been sitting since 9:00 a.m. this morning. I'm going to take a short break and also give my court reporter a

break. We're going to resume at 11:00.

(Court in recess.)

THE COURT: Counsel, your response?

MR. SCHRAMEK: And, Your Honor, as you noted, during the break we did set up a quick PowerPoint. I think it's helpful because there are cites and things in the statute, the way it's laid out, that is visual, that I wanted to make sure I could show to the Court.

I also wanted to raise -- I know our setting is done at 11:30. I'm going to go as quickly as possible. We do have a motion to consolidate that Mr. Gonsoulin is prepared to argue.

Your Honor, there is a lot to unpack from what you just heard. And I'm going to try to do it as methodically as possible, because there are very important points that I think that this case -- new issues of law that I want to make sure that the Court appreciates. Because from what you just heard, you know, all of that was ignored. All of that was completely overlooked.

We talked about the No Surprises Act. I want to give a little bit of context. Then I'll jump right into the legal issues. But you heard about the IDR process, about how we're trying to resolve these

disputes over out-of-network billings.

When Congress passed the NSA, they said here is the NSA, here is what you consider, here's what you don't consider. Then it goes to be implemented by eventually CMS in the 30 departments.

These proceedings -- you keep hearing about arbitration, arbitration. These proceedings are unlike any arbitration that has ever existed in the history of arbitration. That is why we're here.

The IDR submits we each submit a position statement. We don't get to see the other side's statement. Yet, the statute said if they make a misrepresentation to the IDR entity the award can't be enforced.

I would like to stop right there from a due process issue concern. You don't even get to see the other side's argument? It's like if you kept me outside in the lobby while they argued, and then said, come in and make your case, counselor, without hearing what they just said to you.

No discovery. No exchange of position statements, no hearing. It's not an arbitrator that decides it. It's a federal contractor, who, under the statute doesn't even have to be an attorney. We don't know who they are. We don't know their

qualifications. We don't get to talk to them. The decisions aren't reasoned.

And one of my colleagues the other day said, Wait a minute. Is this a process in America or North Korea? I said, It's America. It's happening right now everyday, but we're going down to the courthouse on Friday to try to argue that we get some meaningful review. That is what this is all about, meaningful review in the context of a process that is not arbitration.

Now, there are 13 federal contractors that can provide these IDR services. The statute never uses the word "arbitration." You won't find it in the statute anywhere. They call them an independent dispute resolution service. Okay. So we made up a new title. We made up a new category. And, yet, they want to slide in under the arbitrator immunity case law. They're an IDR entity. What is that? It's not -- it doesn't quack like a duck. Doesn't look like a duck. It's not an arbitrator.

Now, the evidence that is to be considered. Congress was very clear. They laid out: Here is the evidence you can consider. The air vehicle type, clinical capability, and any information submitted that is relevant. And that is important,

because we can submit any information we think is relevant. And then there is certain things you can't talk about. You can't talk about Medicare rates, government rates. That is the process of what evidence is considered.

And one of those considerations is what you've heard a lot about today, this qualifying payment amount, this QPA. Well, let's take a step back. What is it? I don't feel like they explained it to you. It's supposed to be the median contracted rate that Aetna has for the same services in the same or similar market in the same geographic region.

And this gets to the sufficiency of our allegations. This means we're here today about a Nebraska transport between two Nebraska cities. This means Aetna, if it has a QPA in Nebraska for that transport, had to have three or more network agreements so that they could have a median rate, and that is supposed to be their QPA. That is what the QPA is.

Now, I'm going to get to the evidence in a minute, but that is what they're telling you; that we gave you the median rate of what we actually have a contract with for air ambulance providers to provide that service.

THE COURT: They gave the IDR, not me --

MR. SCHRAMEK: Correct. Sorry, Your Honor.

They told the IDR entity: Oh, yes. We have a QPA. In Nebraska, here is our median rate. Here is the middle rate. We may have some higher, some lower, but this is the 50th percentile rate that we have.

Now, they may be able to say that with emergency room doctors, that they have a bunch of rates. But we're a very small industry, Judge. We know our competitors. There is about three large national air ambulance providers. And beyond that, very view exist.

So when they say: We've got three rates in Nebraska, that is why we're here today. That is the basis of our allegation of a misrepresentation. And if they do have three contracts, the idea of what they paid us was the median rate, that doesn't match up to any of the data or market analysis that we have that we have pled. I'll get to that again in a minute.

But I just want to make sure you have the context of what is a QPA, and why are we saying they misrepresented it. The calculation is, again, I just

told you. That is just the cite.

Now, let's talk about the grounds for vacatur. That is what we are here about; what are the grounds to challenge an award.

You kept hearing about Federal Arbitration Act. Federal Arbitration Act. This statute, 42 U.S.C. Section 300gg, and all those other numbers, we have them in our briefs, Judge. This is the part that talks about judicial review.

The first part I've highlighted says: In the absence of a fraudulent claim or evidence of misrepresentation of facts presented to the IDR entity, the award is binding.

So it's binding unless it's fraudulent or there is evidence of a misrepresentation of facts presented to the IDR entity.

So that is why earlier when I said that we're here about a misrepresentation, and counsel jumped up and said, no, it's only fraud, the statute itself says misrepresentation of facts is sufficient for an award not to be enforceable.

Now we get to the second part here. That is where it says: It shall not be subject to judicial review except in a case described in any of paragraphs 1 through 4 of Section 10(a) of Title IX. That is the

Federal Arbitration Act.

So the only part of the NSA that mentioned the Federal Arbitration Act says: You can get judicial review if you fall into a category that is described in the Federal Arbitration Act -- those four different claims, and we'll talk about those in a minute. That's it.

And notice it says: Shall not be subject to judicial review except.

The statute doesn't describe the scope of the judicial review. It just says: If you fit into one of those categories in the Federal Arbitration Act, you can get into court. You can get judicial review.

What we're here to talk about with you, Your Honor, is the scope of the judicial review. And that is why the details of what we're doing in the IDR proceedings, what we see, what we don't get to see, whether or not we're getting due process, that is going to define the scope of judicial review under the NSA, not the Federal Arbitration Act. It's a brand-new statute. No court has ever said what is the amount of review you should get given these facts.

We don't dispute -- we do not dispute at all that the federal government can mandate

arbitration. You heard a couple of cases; right? A couple of statutes, the Railway Act. But if you just go beyond the surface of that statement, what they're trying to do is equate all of those other acts and arbitrations with this one.

The difference is all of those other acts have a ton of procedural safeguards. You go before hearing officers. You know who your judge is. You get to present evidence. It's a traditional arbitration.

This is the first time that we can find that Congress has ever said -- remember, they didn't use the word "arbitration." They said independent determination, independent dispute resolution. The first time we've ever seen where a process lacked all of the meaningful attributes of arbitration and was implemented by Congress. So this is new. This is something different. Novel case.

What sort of judicial review do you get when it's not arbitration? Yet, the grounds for vacating it are the same grounds as the Federal Arbitration Act.

Now, here are the four grounds in the Federal Arbitration Act that the statute references. No other provision.

Section 6 of the Federal Arbitration Act, Judge, says: You file a motion in court if you want to challenge a Federal Arbitration Act. You file a motion. You don't file a complaint.

The NSA didn't incorporate that provision. It didn't incorporate any of those terms. All it says is if you fit into one of these four, you get judicial review.

So this is what we're talking about: Fraud, corruption, undue means; evident partiality of the arbitrator; misbehavior that prejudices the rights of a party; or the arbitrator exceeded their powers.

Your Honor, the key issue here, the legal issue that we're asking you to rule on -- just deny their motion. But the one reason -- one of the reasons is, remember when I said in that statute, it says: In the absence of misrepresentation of facts, the award is binding?

We think the Court needs to read that together with the Federal Arbitration Act and go, wait a minute, look, number one: The award was procured by corruption, fraud or undue means. Undue means is a broad concept.

Now, some of the Fifth Circuit case law has said: Well, "undue means" means almost like, you

know, the mafia. You sent the mafia after the arbitrator. They tried to kind of raise the level of undue means.

But the reason they did that is because under the Federal Arbitration Act, it only applies if you have a voluntary arbitration agreement; that you've agreed to arbitrate; you've agreed to pick the arbitrator; you've agreed to the procedures. It's all consensual.

What we're arguing, Your Honor, is that by passing the NSA, what Congress did is, it specifically defined undue means, that requirement, because we have to fit into one of these four to get into court, right, that the undue means requirement was liberalized to include -- here we go again with the statute -- evidence of misrepresentation of facts. The NSA says that that is good enough to undue an award.

So they're trying to say: Oh, no, undue means -- it's this high level. And we're saying, look, the statute says all we have to show is misrepresentation of fact.

So we believe the statutes can be read together for the undue means argument. So that is one of the legal points that we're arguing, Your Honor.

We think -- of course, clearly we think that we're right because the statute is very clear on that point.

Now let's get to the allegations. They said, you know, at the end of the day, we're here about allegations; right? It's a motion to dismiss.

There are reasons we say that this award should be vacated, and they fit under those arbitration act requirements, those four categories.

One, MET applied an illegal presumption in favor of the QPA. An illegal presumption. I'm going to get into that and show exactly what I mean by that in a minute.

Two, you've heard about Aetna misrepresenting its QPA. We'll talk about that.

And, finally, Aetna failed to disclose information that it was required to disclose by the statute, and they didn't make that disclosure until about three weeks after we submitted our pleading to the IDR entity. So they gave it to us late when we couldn't even use it in our briefing.

Those are the three arguments that we're here to say together those are sufficient to vacate that award.

Now I mentioned 12(b)(6). You know this case law very well. But it has to appear beyond doubt

that we can prove no set of facts which would entitle us to relief.

Now, I'm going to start with MET's motion to dismiss. It was the most recent one you heard. They're not entitled to arbitral immunity. They're a necessary party, and we have Article III standing. They didn't argue Article III standing today, but they did in their brief. So I'll briefly touch upon it.

The Eastern District of Texas twice, twice, invalidated the regulation that basically the federal government said: Put the thumb on the scale of the QPA. You pick the QPA unless we can overcome a presumption by clear and convincing evidence.

Judge, it was a crazy regulation. Of course, it was immediately challenged. It was overturned twice. First in the *Texas Medical Association* case, TMA, and second in the *Lifenet* case. The *Lifenet* case is one that applied specifically to air ambulances. TMA was more broader. So both of them reached the same conclusion.

And if you see there at the bottom the Court said: Your rule rewrites clear statutory terms. It must be held unlawful and set aside.

Same thing in *Lifenet.* February and July of 2022. CMS respond. In fact, after *Lifenet,* CMS

put all determinations on hold, so that they could redo all of their guidance to the IDR entities because they were just held unlawful. They didn't appeal, I believe, that one.

And so those invalidations were countrywide. There was no it's only applicable in one state or the other. And by the way, we're in the Fifth Circuit. So the Eastern District of Texas, that decision would apply to the circuit anyway. And so they were both held unlawful.

And when you look at the MET award in this case, I've highlighted on the right, that is the award that this federal contractor, who we don't know who it is, decided -- and this is the reasoning we got when they said you lose. They said that we had not clearly demonstrated that the qualifying payment amount is materially different from the appropriate out-of-network rate.

That is verbatim the regulation that was invalidated. They even cited the regulation that was invalidated. I put them side by side, so you could see the cites match up.

The problem is MET made that decision in October of 2022, months after the rule had been invalidated. And after CMS told them not to apply

that rule anymore, they kept applying it. They're acting contrary to law. They're exceeding their powers under the NSA because they're not applying the NSA. They're applying an illegal rule that they were told not to apply.

If this Court does not have jurisdiction to tell a federal contractor that they have to follow the rules and that they have to follow the law of this Court and that they have to redo that decision, then Your Honor, we're working in a system that I'm not familiar with, because I don't see how the Court could have anything but jurisdiction over something like that.

And if we look at the immunity issue, okay, every case they argue to you, every case in their brief was either a federal FAA arbitration case, right, or it was a case in which a specific statutory scheme was held to qualify for immunity.

And the Court analyzed pages and pages of how it works and, you know, how the different people interact, and what the evidence is, and what all the rules are.

The individual cases are kind of irrelevant, right, because we're not under those statutes. The Federal Arbitration Act cases are

irrelevant. Those cases have to do with agreements to arbitrate, private agreements, voluntary, we picked the arbitrator. We had a full -- Judge, I do -- we have a full trial; right? Usually we get court reporters, and we have a transcript that I can appeal, if we want to move to vacate, you see all the evidence that was presented.

That's not this. And so for them to say, well, we're like an arbitrator, Judge, they're nothing like an arbitrator. They don't automatically qualify.

And we're here on motion to dismiss. We're not asking you to make the final decision. We're asking you to allow this case to go forward for us to get discovery and to get the evidence. There is nothing that would prohibit you from later on deciding, okay, I decide there is qualified immunity in this situation. We can have those discussions later.

They're saying: We don't even get into the courthouse. And they have the burden at the motion to dismiss stage to prove that. They've not cited one case to you -- not one case that is dispositive or ever considered the statutory scheme.

And, you know, even though they didn't argue it in their brief, we heard a lot today about

the Scalia dissent apparently in the case. I rarely put very much value on a Scalia dissent, Judge. That being said, all he said is: Wow, we've extended arbitrator immunity to other categories. Great. No one has ever extended it to an IDR entity.

That doesn't support the extension here. The case they cited was a prosecutor-immunity case; right? They talked about the Railway Act. The Railway Act specifically refers to the process as arbitration. They said: You must arbitrate your claim. And it has all the protections and all the normal features of arbitration. That doesn't help them at all.

So they have not carried their burden of establishing as a matter of law that they are immune. And I'll also note this: They argued the factors for immunity today. It wasn't in their briefs. Doesn't matter.

There are two factors that they mentioned that I wrote down: There has to be procedural safeguards to protect Constitutional and other rights. That is exactly what we're saying today. That we do not have the safeguards in the NSA that protect our Constitutional and other rights, including our right for them to actually apply the NSA and not illegal

standards.

They also said that another consideration of immunity is there is an appellate remedy. There is no appellate remedy. The Federal Arbitration Act is not an appeal; right? And even then, there is no way for us to appeal their decision.

And most importantly -- this is really a practical point, Judge. The practical point is there is nothing in the NSA or the regulations that say: If an award is vacated, it shall be returned and the IDR entity shall reconsider it. If that existed, I wouldn't have sued MET. Because we would have a procedure. Okay, Judge, if you vacate it, we'll have a fight with Aetna. But if you vacate it, I get to go back to CMS, and I go, here you go, here is the rule. Make them reconsider it. It doesn't exist.

So if you vacated the decision, and MET is not a party to it, and you said vacate, and you remand like an appellate remand, remand, go reconsider it, they're not under the jurisdiction of this Court. CMS doesn't have to make them do it. There is no rule. The statute doesn't say you have to do it.

That is where the Court fits in. That is the judicial review the NSA is talking about that we started with today under my argument. That is

judicial review. Having them a party, seeing whether or not they violated it. If so, making them comply with your order, and making them comply with the *Lifenet* case, which is the law of the land.

So, Your Honor, that is the practical consideration. If this were a private arbitration, I don't need to include the arbitrator. The AAA will take my money for a new filing any day.

In fact, under the AAA rules, the AHLA rules, they have rules about, is this arbitration pursuant to Court order? Yes. It was vacated. I get another arbitration. They'll open up the case and we'll go. That is different.

This is not arbitration. This is a federal contractor under a federal procedure that does not require them to reconsider and rehear it, even if you wrote it. If they're not a party, they don't have to follow it. That is why they're a party. It's practical as well as legal.

So they're not immune from suit. They haven't proved they're a necessary party. We've established Article III standing. We showed the injury; right? We lost it. They applied an illegal standard. They put it in their decision and a favorable Judge redressed it. So I won't waste time

on Article III standing.

Let's talk about the claim we stated under the NSA against Aetna. You heard a lot about that as well.

We're saying that the award was secured through undue means, the misrepresentations of fact. We're saying that MET was partial to Aetna because it applied the illegal presumption that it had already been held illegal. We're claiming that there has been prejudicial misconduct because of the fact that a legal standard was applied, and that MET exceeded its powers; that it did not have power under the statute to apply in a legal standard, that it had to follow the NSA.

Because that is what *Lifenet* and TMA are saying, the statute is clear. You can't put your thumb on the scale. That's illegal. Yet, months after that decision came out, months after the CMS said that you have to follow that decision, they did it anyway. That is exceeding powers if I've ever heard it.

The other thing I want to note is the NSA judicial review, it has to be broader than the FAA. This is another point of law that we believe this case can make. And if they want to challenge to the Fifth

Circuit, great. It has to be broader under the NSA. That is because the U.S. Supreme Court -- I'm sorry, this is -- the United States Supreme Court has said that the hallmark of arbitration is consent of the parties. So right there that is telling us we're into a land other than that.

Remember, the IDR process is compelled. We don't have a choice. And why are we doing the IDR process, Judge? Because Congress took away our right to sue anyone else. All of our rights to sue are gone. We have to go through this IDR process if we want more money.

So we used to assert unjust enrichment. We used to assert, you know, money hadn't received. All -- restitution. All sorts of theories, common law theories, against the payors, against patients to try to get paid. All of those are gone now. We have this IDR-compelled government process.

That is why we're here. It's not $25,000, one case. This is about a landmark decision to say: We're going to have meaningful judicial review when a misrepresentation of fact has occurred, when an IDR entity exceeds its powers and decides it can apply whatever rules it wants to and doesn't have to follow the statute. That is why we're here, Judge.

And if you look at the New York case, this is from the Southern District of New York in '89, they said: Look, the simple fact is voluntary arbitration and compulsory arbitration are fundamentally different. And that you can agree to anything but when the government compels it and takes away rights, that is something different altogether.

And that is the dichotomy we're talking about. This isn't voluntary arbitration. All those Fifth Circuit cases that talk about the standard of review of how they're going to interpret those four standards under the FAA, that is because you agreed to do it. You agreed to the arbitrator. You agreed to this. We're not going to second-guess your agreements.

We didn't agree to anything, Judge, here. We're asking for meaningful judicial review. Undue means, FAA case law did create a higher standard for undue means than the plain meaning we suggest. But because of the specific statutory reference in the NSA, the specific statutory reference to material misstatements of fact, we think that qualifies for undue means. So it includes those misrepresentations.

Let's talk about the evidence. Because Aetna kept saying, Your Honor, they're just guessing.

They can make this against everyone. No. We're not guessing. We're not making it against everyone.

We have sufficient factual allegations. Your Honor, we have an entire database of all of the awards that have been issued against every payer since this thing began. We have significant knowledge about the market. We have our own network agreements in these markets for rates. We have information from industry groups on which we are familiar with industry rates and practices.

So when we looked at this particular file and this particular Aetna, as opposed to other payors, we concluded that there is a good-faith basis to allege that the QPA was miscalculated. It's improbably low. It doesn't mix up with our industry data, our market data, our own contracted rates.

And, by the way, in the motion to consolidate that Mr. Gonsoulin is going to argue, as part of the consolidation argument, we attached an affidavit from an expert in one of the other cases, one of the other challenges, and what that expert said was -- you're going to be blown away by this, Judge.

He said that Aetna has air ambulance rates with social workers. Social workers. He went through the data. They have to publicly file it. An

optometrist. They have air ambulance rates with optometrists.

Now they're telling me -- their counsel, we get along very well; have pleasant conversations -- oh, well, we don't use those. Well, you know what? I'm glad that is what your client is telling you, but I need the discovery. Because we now know you have air ambulance rates with people who cannot possibly provide this service. Social workers, optometrists makes no sense.

So as far as the sufficiency of the allegations to say you've misrepresented your QPA and we get to go forward in this, Your Honor, we satisfied it. And, by the way, they bring up Rule 9(b). They didn't make much in their argument.

But the Fifth Circuit has said: Look, if the facts of the misrepresentation, if the facts of the fraud are peculiarly within the opposing party's knowledge, fraud pleadings may be based on information and belief. We just have to show the factual basis for our belief.

Of course, we can't prove it without discovery. We can't get in their systems and look at which contracts they have put in place to come up with this rate in Nebraska. We can't go look and see what

contracts they claim they have where the median supports this payment. That's within their knowledge solely. We can't get it.

And so information and belief is sufficient. 9(b) is sufficient. We have made more than adequate allegations to get over the very low threshold of a motion to dismiss.

And the same thing with evident partiality. The standard there is -- you know, is there evidence based on actual bias and that a reasonable person would conclude that the arbitrator was partial to one party.

Well, they applied it in a legal standard to allow the QPA to win when the federal government said, don't do it, and the judge held it unlawful. How is that not evident partiality?

The same thing for prejudicial misbehavior.

Exceeded powers, the last one I'm going to touch upon, then I'll pass the mic.

MET acts like they can't be sued is what they told you; that they're immune from suit. They're just the decisionmaker. Even the Fifth Circuit has said that that is not the case if the arbitrator commits error.

In fact, the *PoolRe Insurance Corporation* is the key case, I think, because it affirmed vacatur where the arbitrator failed to apply the terms of the arbitration agreement. In particular, I believe in that case he applied the wrong rules. They agreed to apply like the AAA rules, and he applied the JAMS rules.

So the Fifth Circuit said: Look, the rules to be applied are very important. And if you apply the wrong rules, arbitrator, over a party's objection, right, we're going to vacate that decision.

So when Aetna gets up here and tells you, oh, well, they're allowed to make errors of law, maybe they made a mistake, you can't overturn it for that. You could overturn it if they applied the wrong rules. That is what the Fifth Circuit said.

And that is exactly what MET did. They applied the wrong rules by applying an illegal standard that had been invalidated months before they applied it.

So they are a proper party here, Your Honor, and they did exceed their powers at least sufficient for purposes of a motion to dismiss.

And with that, Your Honor, I'll take any questions you might have.

THE COURT: Let's proceed to the motion to consolidate.

Counsel, let's proceed to the motion to consolidate.

MR. GONSOULIN: Your Honor, Guardian moves to consolidate a related action filed in this district with this case. These two cases are tailor-made for consolidation because they both raise common, novel questions of law under the recently enacted No Surprises Act. They share common parties, and they share common questions of fact.

Because of this, it is necessary for one court to set the guidepost for challenges brought under the NSA. And without consolidation, that objective will not be achieved.

Rule 42(a) gives a trial Court broad discretion to consolidate actions that involve common questions of law or fact. The Courts in this district typically consider five factors when deciding whether consolidation is appropriate.

Those factors include: Whether the cases are pending in the same court; whether they share common parties; whether there are common questions of law or fact; whether consolidation will cause prejudice or confusion; and whether consolidation will

conserve judicial resources.

Here, all five factors weigh in favor of the consolidation. For the first two factors, both cases are filed here in the Southern District of Texas in the Houston Division. Both cases share common parties. Our client Guardian Flight is a common plaintiff in both cases, and MET is a common defendant in both cases as well.

Both cases also involve common questions of law. If you look at Aetna's motion to dismiss, and you look at Kaiser's motion to dismiss, and the related action, they both raise the same dispositive issues: Whether a federal contractor, such as MET, is entitled to arbitral immunity; whether an application of an illegal presumption is grounds for vacatur under the NSA; and whether misrepresentation of a payer's QPA is grounds for vacatur under the NSA.

Common questions of fact exist also. Both complaints allege that MET applied an illegal presumption and both complaints also allege that the payers, Aetna and Kaiser, miscalculated their QPA not improperly under the NSA, and they misrepresented it to the IDR entity.

Further, consolidation for the fourth factor will not cause prejudice or confusion. If

anything, failure to consolidate these two actions will cause prejudice. As stated, the NSA is a recently enacted statute, and there is very little case law interpreting it.

And it's possible that two different judges could come to a reasonable but different conclusions that could lead to inconsistent rulings in the same district. And that would only cause prejudice to the parties and potentially put them at risk of inconsistent obligations.

As to the last factor, consolidation will cause -- will help judicial efficiency and will conserve judicial resources. Bringing these actions together will cut down in duplicative briefing, parallel discovery, and parallel discovery disputes.

We also believe that consolidation should take place before the motions to dismiss are decided. It is our position that it is unnecessary and inefficient to wait until the motions to dismiss are decided before consolidating, because it will only increase the risk of inconsistent rulings in this district.

For these reasons, Guardian believes consolidation is appropriate. And I welcome any questions the Court may have.

THE COURT: How far along is Judge Hanen in his case?

MR. GONSOULIN: Both cases have been fully briefed on the motions to dismiss. Kaiser in the related action has filed a motion to disallow or alternatively to stay discovery. But, otherwise, both this case and the case in Judge Hanen's court are at the same stage.

THE COURT: Has Judge Hanen been made aware that this motion to consolidate has been filed before me?

MR. GONSOULIN: Yes, sir. We followed Local Rule 7.6 when we filed this motion to consolidate. We sent over a courtesy copy to his chambers.

THE COURT: Very well. Thank you, counsel.

Counsel, you may now respond to your reply on the motion to dismiss, as well as your response to the motion to consolidate.

MS. STRAHAN: Thank you, Your Honor.

With respect to Aetna's reply to the motion to dismiss, I want to, I guess, start with the fact that I did hear my esteemed opposing counsel say that this is not North Korea. It is not North Korea.

North Korea does not have a Congress.

The United States of America has a Congress. And they prescribe the rights here, which is that the air ambulance transports now can pursue payment directly from the payers, whereas they could not before.

And in connection with that right, they were very specific about what remedies they provided with those rights. The remedy is limited to -- judicial review is limited to the four circumstances set out in the FAA. It is not based upon Section 42 U.S.C. 300gg-111(c)(5)(E)(i) that the plaintiff was referring to. That is about the finality and what is binding of the award.

But it specifically says next under subparagraph (a)(2): That shall not be subject to judicial review except in a case described in any other paragraphs 1 through 4 -- essentially the provisions of the FAA we've been talking about.

Congress prescribed that right. And even though the plaintiff was very clear in their response to Aetna's motion to dismiss that it was not challenging the IDR process, or the NSA itself, that is basically all we've heard today, Your Honor; is a challenge to the NSA and the remedies that Congress

prescribed, when it knew how the FAA was being interpreted for almost one hundred years, Judge. The FAA goes back almost one hundred years.

THE COURT: Well, let me help you address some issues that I'm concerned about. I'm not going to second-guess Congress regarding their No Surprises Act. It appears that is a statutory scheme that they have set out. There is no Constitutional questions that have been raised whether or not they have the ability to do so.

My question is more nuts and bolts. If two parties go through the process of the independent dispute resolution, and if one of the parties provides fraudulent information, misrepresentations to the -- from, let's call it the hearing officer for purposes of our discussion, because there has been discussion as to calling them arbitrator or not calling them arbitrator. The hearing officer. The hearing officer has been provided with false information, fraudulent information. An award issues.

Tell me what you believe the remedy is at that point for the aggrieved party.

MS. STRAHAN: Your Honor, with respect to if there was actually fraud that resulted in the -- in the award, right -- so it has to be -- it has to meet

the circumstances that are set --

THE COURT: Let's assume it is fraud.

I'm just asking you: At that point, what is the remedy for the aggrieved party?

MS. STRAHAN: Well, the remedy would be -- well, in terms of what the aggrieved party would do, it would be to vacate and remand, I assume, back to the IDR entity.

THE COURT: Who vacates it?

MS. STRAHAN: If the requirements of the FAA were MET, then the Court, I believe, could vacate the award and remand it back.

THE COURT: What I'm trying to understand is: You do see a situation where if an award from a hearing officer is the result of fraud, the aggrieved party has the right to go to court, have that award vacated and sent back to the hearing officer for additional determinations. That's what I'm trying to get at.

I understand that motions to dismiss as closing the courthouse doors on Guardian, saying that they don't have the right to be here at this time. I want to make sure you're saying it's because they don't have proof of the fraud. They haven't proven that, or they cannot prove that, versus, even if they

had that, they don't have the right to be here.

That is what I'm trying to get the distinction clear with you.

MS. STRAHAN: Your Honor, again, another overlay to this is to the extent that they are complaining about the miscalculation of the QPA, that is regulated by the Department of Health and Human Services in 42 U.S.C. 300gg-111, it lays out the regulations that, you know, for the calculation of the QPAs. The Department of Health and Human Services lays out -- it has the jurisdiction essentially to address the calculation of the QPA.

And for this reason, we believe what they're complaining about, their remedy is to complain to the Department of Health and Human Services if it's about the calculations of the QPA --

THE COURT: Let me stop you there. I'm not taking -- you're arguing a weeds issue with me right now.

And I'm just trying to get to the point of: Do you see a scenario where they get a result from a hearing officer that they can walk into a federal district court and complain about that?

MS. STRAHAN: I mean, assuming it's, you know, there is a case in controversy, and it meets the

requirements of the FAA, that is subject to judicial review.

THE COURT: Okay. So the question then -- now we turn back to the weeds issue that you're arguing.

You suggest that on these facts that they should go to the --

MS. STRAHAN: Department of Health and Human Services, Your Honor.

THE COURT: Why that remedy as opposed to the remedy of walking into a federal district court and pursuing a remedy?

MS. STRAHAN: Because what we hear them say, Your Honor, is that they don't like the way Aetna calculates the QPA. I disagree with their contentions about how Aetna has calculated the QPA.

But you saw, Your Honor, that reference to social workers. Let me just back up for a second. There was nothing about social workers in their pleading whatsoever, but that was in their PowerPoint.

So what they're referring to is that they believe in a forum that Aetna has not had an opportunity to address whatsoever, that Aetna is using rates of social workers for the calculation for air transport QPAs. That is not true. Aetna is not doing

that. But that's their allegation.

Now, today, as of today, it's not in their complaint. I just want to be clear about that. They have not amended their complaint to make that allegation. That's not true. But even if it were, Your Honor, that is not a misrepresentation of the QPA. That is a calculation of the QPA.

And under the federal regulation, the Department of Health and Human Services does have authority to review what the payers are doing, how they're calculating their QPAs.

THE COURT: In this statutory scheme of the No Surprises Act, is that specifically prescribed in the No Surprises Act? And if so, point my attention to it.

MS. STRAHAN: Yes, Judge. There are a few provisions here.

What I'm specifically referring to is 42 U.S.C. 300gg-111. And in that provision, it has the audit process that CMS conducts to make sure payers are complying. It has regulations toward -- let me make sure I stay on the correct provision here.

It has regulations regarding what the qualifying payment amount is, and it has regulations regarding what the Department of Health and Human

Services can do if there are some complaints about how the provider -- excuse me, how the payer is calculating the QPA.

Your Honor, I don't believe this specifically was in our briefing. If I may submit the statute following the hearing.

And I would also like to point out, Judge, that in the plaintiff's own briefing they cite a pamphlet that is published by the federal government that says that the providers, if they have a problem with how the QPA is being calculated by a payer, they should complain to the Department of Health and Human Services. And that reference to that website in that pamphlet is on page 8 of their brief, Your Honor, filed by Guardian in response to Aetna's motion to dismiss.

THE COURT: You have said some magic words, "that's not true," which, in my mind, I hear factual disputes as to what has been alleged and what you are accepting as true --

Just a moment.

Assuming that there is a factual dispute about what Aetna actually did, even in those circumstances it is your contention that that factual dispute is not resolved here. It is resolved

elsewhere.

MS. STRAHAN: Yes, Judge. That is correct.

So if one were to look at the plaintiff's pleading, as I stated before, there is no factual specificity about what Aetna allegedly did fraudulently. There is not.

And for the reasons that I discussed earlier, that is why this would open the flood gates, if they could plead it like that, and pursue discovery, which is, of course, what they really want, to get into all of Aetna's rates with other payers, which is confidential.

And the federal government has prescribed exactly the kind of information that they are entitled to in this statute. But they want to allege Aetna committed fraud. By the way, that is what they've alleged against all the other payers as well.

So they've alleged they committed fraud just to get into federal court, and then try to take, you know, issue with the NSA itself. But then later we heard -- so for that reason, Judge, they have not met the pleading requirements of 9(b), and I would say not even (a).

But the consideration here is: What kind

of precedent would this set for the future of claims in this court and others?

But now if you go fast-forward to what we heard about that affidavit, and what I heard my esteemed opposing counsel say, they don't -- they suspect Aetna is using, you know, rates of providers who are not air ambulance providers in their calculation.

Okay. That -- I want to be clear. That was not in their complaint. That allegation does not show up until their reply brief to the motion to consolidate.

THE COURT: Let me walk back to something you said. I want to get clarification on it, because that is a concern of mine, too.

"Open the flood gates." You and counsel have pointed my attention to specific language in the NSA that says: Not subject to judicial review except.

So the NSA itself does foresee potential judicial reviews in certain circumstances. I think the disconnect here is whether or not one of those triggers has been met.

Counsel takes the position that the trigger has been met. You're taking the position, that is why I started you with the point I started

with. You do see a potential, a possibility that an aggrieved party could take issue with a hearing officer's finding and go to federal court.

Your contention, however, is: Even though the NSA says judicial review is available on the facts of this case, the trigger for that has not occurred; correct?

MS. STRAHAN: Yes, that is correct. Yes --

THE COURT: So hold on.

This issue of the trigger being met is key as to whether or not you can end up here. In my review of making that determination, what standard am I to apply in looking at that, and who has the burden of proof on that particular issue?

Does the plaintiff have to plead and put in front of this Court sufficient facts, such that I can say it has been properly pled and evidence exists that a trigger has been met such that the judicial review specifically prescribed in the NSA has been met, or is it on your motion to dismiss, your burden of proof to carry, that although the NSA says that judicial review is available, the aggrieved party, Guardian, in this case, has not proven that that trigger, those facts, have been met?

So who has the burden of proof on that?

MS. STRAHAN: Your Honor, I think it's a jurisdictional issue. So, therefore, the plaintiff has the burden of proof, because the Court does not have jurisdiction but for the jurisdiction that the NSA authorizes.

So that is why I do believe it's plaintiff's burden of proof. That is also why they need to show -- if they're going to make this allegation of fraud, they need to be specific --

THE COURT: Let me stop you there.

Let's assume your argument is correct; the plaintiff has the burden of proof. What level of proof -- is it just a jurisdictional level of proof? Is that it? Or is there something else -- since we're talking about the NSA, is there something else specific that they must carry by way of this burden of proof that you believe that they have?

MS. STRAHAN: Well, Your Honor, I believe that because the NSA provides judicial review, you know, with the exceptions in the FAA, that it would be plaintiff's burden of proof to show that they meet by preponderance of the evidence that they are one of those exceptions that do allow for judicial review.

THE COURT: At this stage?

MS. STRAHAN: At this stage. Yes, Your Honor. They've got to show jurisdiction.

THE COURT: Right.

MS. STRAHAN: So, therefore, it is ultimately a jurisdictional issue.

THE COURT: Excellent. Thank you. I understand that particular argument.

So, in the essence of time, I do want to give you a chance to address this motion to consolidate. You seem to have some strong thoughts on it.

MS. STRAHAN: Thank you, Your Honor.

I think I'll just focus -- in the interest of brevity. It is not appropriate to consolidate when individual issues predominate and not common issues.

And here, the sole basis for the allegations against both Aetna and Kaiser to try to get into federal court is that they did something wrong with respect to their QPA. But they are different entities. They are -- they're not -- there is no connection, if you will, between necessarily what Kaiser does on its QPA and what Aetna does on its QPA.

THE COURT: I agree with you wholeheartedly on that.

The question is, I thought: What if I reached the very issue that you state; I don't believe that Guardian should be here because they have not proven that they have standing to be here. I have no jurisdiction.

Judge Hanen, reviewing his case, looks at Kaiser and says, this is not an issue of jurisdiction. This is a simple case of whether or not factually the aggrieved party has the right to come here to seek a remedy from what they believe to be a bad ruling by the hearing officer.

So, technically, potentially, two judges sitting on the same bench, in the same division, could reach two separate results, looking at the threshold issue of whether or not Guardian should even be in this courthouse.

Would you agree with that?

MS. STRAHAN: Yes, Your Honor. However, I do believe that the standards as to whether Guardian should be in the courthouse are very well settled under the jurisprudence of the FAA.

THE COURT: It's never happened that two judges have disagreed on that.

MS. STRAHAN: So I will say this -- so in the sense that with respect to the particular -- the

factual circumstances, if you will, as to the underlying issues, they are different with different histories, different arbitrators, different awards, different QPA calculations.

THE COURT: I agree with all of that.

You, yourself, standing there, you do not see the potential that Judge Hanen could reach one result in his case, and I could reach a different result in my case, thereby potentially setting up any conflict?

MS. STRAHAN: But, Your Honor, I believe in every case there is precedent, and in every case there is, you know, the possibility different facts will lead to different results.

But I view it personally as no different than someone suing under ERISA. Just because you've got one defendant in one court and another defendant in another court, you got the same plaintiff. The defendants are probably going to raise the same issues, but it doesn't mean that they need to be consolidated.

THE COURT: Understood.

MS. STRAHAN: For this reason, I think the individual issues predominating in this case.

THE COURT: Thank you, counselor.

MS. STRAHAN: Thank you, Your Honor.

THE COURT: Counselor.

I can tell you we do not need to replow well-plowed ground.

MR. LANZA: I promise not to replow old ground, Your Honor. Let me just address just a couple of points they raised.

They say they've never seen this type of arbitration before where they have blind submissions to someone who makes a decision. Well, you ever wonder why they call this style of arbitration "baseball-style arbitration"?

It comes from the Major League Baseball player salary arbitration process. That is exactly what they do. The players, the owners, they submit their positions to a neutral party --

THE COURT: But they call it arbitration. I think counsel --

MR. LANZA: They do call it --

THE COURT: -- made the point that the NSA doesn't even use the word "arbitration."

MR. LANZA: You're right. It doesn't use the term arbitration --

(Telephonic interference.)

THE COURT: I'm sorry. Go ahead.

MR. LANZA: Just because we label it or don't label it arbitration doesn't mean it isn't effectively arbitration. We're still missing what is the fundamental point here, Your Honor. They're making a decision in an adversarial process.

THE COURT: I know what it looks like. Like you, I can read through that. But it's not telling to you that Congress, knowing what they were doing in their power, did not use the word "arbitration" when arbitration is a well-known practice from the FAA to private aggrievements?

I mean, to the extent that Congress intended this to be arbitration, quasi-arbitration, arbitration-like, anything? They could have used those words to signal to the Court that the statutory scheme that they were talking about, it seems that by deliberately not using that word that they were setting up something separate and distinct.

Am I incorrect in viewing it that way?

MR. LANZA: You know, I understand that they could have used the word arbitration, but they chose to use a different phrase. What was that specific term? IDR, independent dispute resolution.

I think what Congress wanted to do when they intended to use that specific language wanted to

make it clear that this is an independent process independent of the federal government. Okay?

And it's a dispute resolution process. That is why they chose those terms. It doesn't mean it's not similar to arbitration, or that the IDR entity should be -- not be entitled to judicial immunity.

THE COURT: If they wanted this hearing officer to have judicial immunity, that is something they could have spoken to as well. But they did not. Is that correct?

MR. LANZA: Could you repeat that, please?

THE COURT: Yes. You said that this hearing officer, quasi-arbitrator, has judicial immunity. The NSA could have said that. Congress could have said that. The hearing officer -- they could have described the immunities that they were prescribing to him or her. They didn't do that.

So you want me to read into the NSA something that appears in other statutory constructions when Congress failed to do it in this particular statutory scheme?

MR. LANZA: I don't believe that in the American Arbitration Act, Your Honor, they provided for judicial immunity for arbitrators. That was --

THE COURT: Well, the way they described the review of the decision -- corruption, bias, things of that nature, they didn't speak to any of that, did they, to this particular hearing officer?

I think -- maybe I'm misunderstanding your point. Maybe I misheard you. So I thought you were making the point that this is similar to arbitration because the hearing officer is cloaked with these particular privileges. Did I --

MR. LANZA: Yes, that is essentially my argument, yes. Because it's similar to arbitration, the hearing officer performs a similar function to an arbitrator --

THE COURT: That's my point. But you say it's similar to arbitration. But Congress, when it set out writing the NSA, they didn't describe the hearing officer like an arbitrator; correct?

MR. LANZA: If you'll give me just a moment, Your Honor. Let me look at --

There is a description of what the IDR entities are in the act. I'm not sure quite at what point it is except under that subsection (c), with the material discussing what shall be submitted to the IDR. But it does provide that they shall appoint or certify IDR entities, and it provides the

qualifications for the IDR entities. And then it describes what the IDR entities must do in the context of the dispute.

THE COURT: Very specific instruction. I agree with you. That is kind of my point.

In the NSA they got very specific as to what this is, what it looks like, certain procedures. And in being very specific about all of that, they never used the word "arbitration" at all; correct?

MR. LANZA: Correct.

THE COURT: All right. There is a fight that you definitely have some interest in, and that is this motion to consolidate. Is that correct?

MR. LANZA: I don't have really -- on the motion to consolidate, I sort of agree with counsel for -- I believe I'm in agreement with counsel for the carrier. I do believe that it would be judicially economical for the Court to -- one judge to decide the motions to dismiss in both cases.

But after that, the cases diverge on different facts and different things. And I don't see any impediment to one judge making the decision on both 12(b)(6) motions, and then the Courts proceeding independently on the factual issues and final adjudication.

THE COURT: Thank you, counselor.

MR. LANZA: Thank you, Your Honor.

THE COURT: Setting aside the motion to consolidate for a moment, I do feel that -- I don't want to call it a case of first impression, but we have some novel legal issues here.

I think, based upon the arguments today, counsel, I think I've heard it from both of you, that that is not in the briefing. That is not in their briefing, the sum of the arguments that were raised today.

I'm going to afford you an opportunity to submit to the Court some additional briefing. No more than five pages due by close of business next Friday. This is not: See the other side respond.

This is: You've heard some new arguments today, I believe, based on what you've said, that that wasn't in their briefing. That will give you the opportunity to address that, and by way of questions that I may have posed to you, if there's additional points you want to make about those questions, and, again, if there is any additional Court guidance, that may be helpful to me.

The way that I'm looking at this, Congress in its infinite wisdom has passed the NSA, setting up

a resolution scheme. I do not think Congress intended -- I'm using this term not by way of any prejudice.

Congress did not intend that particular hearing officer to be the final word. The NSA itself, as both counsel pointed out, says: Not subject to judicial review except. So even in the NSA itself, it was anticipated that there could be judicial review.

Counsel for Guardian has suggested the freeway on to this judicial review is not only the arbitration from the FAA statutory language, but also I believe misrepresentation. You pointed that out.

Counsel, you seem to suggest that on the facts of this case that if Guardian is taking issue with Aetna's calculation that they need to go to the Department of Health and Human Services. Is that correct?

MS. STRAHAN: Yes, Your Honor.

THE COURT: So I'm trying to figure out, how does this land on my desk appropriately based upon the language from the NSA? And obviously, given the fact that there is a lack of reported cases on that, I'm trying to figure that out.

Do I apply the statutory arbitration with this additional language that you pointed out about

misrepresentation, which does not appear in the arbitration statutory scheme, or is your interpretation correct; that if they're complaining about that specific thing, which they are doing, there is another review. The hearing officer is not the final word, but the aggrieved party does in fact have another place to go to raise that very issue. It's just not here.

I need you -- if you could walk me through that, based upon the argument and the questions that I've heard today, what I've just outlined, that would be helpful to my analysis.

MS. STRAHAN: Yes, Your Honor.

THE COURT: Thank you. Five pages.

This is a sigh. I laughed because when I was in private practice, we worked around the clock and came up with a 25-page brief. And we came down here, and we were in front of Judge Werlein. And Judge Werlein held it up, both sides, and said: Come back tomorrow with your five best pages.

We had a long night, but our arguments were much sharper based upon that. So I thought about that since I said five pages.

So I'm giving you a week. So if you could, based upon what I've told you I'm looking for

and the guidance I need, and in addition, if you heard something that you think you need to devote a paragraph to, you can do that. So that is off the table.

Now, in regards to the consolidation, I intend to, as I always do, when the Judges in this courthouse -- I'll reach out to Judge Hanen, have a conversation with him about today's hearing and see, you know, where he's at and what he believes -- how he feels about his case.

Because I believe I have the lower number case, and so it would be taking a case off of his docket and bringing it here; you know, if he has any particular feeling about that, and I'll consult with him before making a decision.

So as to the motion to consolidate, you have a young lawyer to argue that. I very much appreciate that. You did a fine job. Counselor, I always like to see when young lawyers get involved, because as we well know, it's hard for young lawyers to get opportunities these days. So I appreciate when they do get that opportunity. So thank you. It hurts a little bit, but I went to law school with his father.

So counsel for the plaintiff, anything

else, sir?

MR. SCHRAMEK: Your Honor, I'll put it in the five pages.

THE COURT: Counsel, anything else?

MS. STRAHAN: No, Your Honor.

THE COURT: Very well. Counsel, enjoy your weekend. You're excused.

(Court adjourned.)

C E R T I F I C A T E

I hereby certify that pursuant to Title 28, Section 753 United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings in the above matter.

Certified on April 23, 2023.

/s/ Nichole Forrest
Nichole Forrest, RDR, CRR, CRC

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