UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GUARDIAN FLIGHT, LLC, Plaintiff, v. AETNA HEALTH, INC., and MEDICAL EVALUATORS OF TEXAS ASO, LLC, Defendants.	§ § § § § § § § § §	CIVIL ACTION NO. 4:22-cv-03805 Hon. Alfred H. Bennett

PLAINTIFF GUARDIAN FLIGHT, LLC'S
SUPPLEMENTAL BRIEFING ON MOTIONS TO DISMISS

Dated: April 28, 2023

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CERTIFICATE OF SERVICE

I certify that on the 28th day of April, a true and correct copy of the following was served via the Court's ECF system on all counsel of record.

/s/ Adam Schramek
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Plaintiff Guardian Flight, LLC ("Guardian") submits the following briefing and supplemental authorities pursuant to this Court's request following oral argument on Defendants' motions to dismiss (Dkt. Nos. 8, 12) on April 21, 2023.

I. Judicial review of IDR disputes, which is expressly contemplated under the NSA, will not open the floodgates to litigation.

At oral argument, Aetna raised the specter of a "flood" of litigation involving "thousands and thousands" of cases should judicial review of the IDR award at issue herein occur. Dkt. 40 at 19:1. Aetna's straw man argument fails for at least two reasons.

First, plaintiffs—and those representing them—may not simply "run to the Court and just allege the payer misrepresented something every time they're dissatisfied," as they still must meet the pleading standards under the Federal Rules of Civil Procedure. *Id.* at 18:23-25. Attorneys, who serve as officers of the court, are bound by rules of professional conduct such that they may not treat these obligations lightly. The IDR process is about a year old and, to date, only a handful of challenges to awards have been made. Courts will not be flooded by litigation under the NSA for the same reasons they have not been flooded by any other type of litigation, including ERISA claims disputes.

Second, Aetna represents nearly twenty-five percent of all IDR awards received to date by Plaintiff and its affiliates. As reported by the federal government, from April 15 to September 20, 2022, the "top party, Aetna, represented 17% of all disputes for OON air ambulance services."[1] That means that this lawsuit will resolve the issue of Plaintiffs' challenge to Aetna's QPA calculation for nearly one-quarter of its entire IDR docket. Aetna is a major player in this space and its "floodgates" argument is nothing more than an attempt to avoid judicial review of its

[1] *See* Initial Report on the Independent Dispute Resolution (IDR) Process April 15 – September 30, 2022, available at https://www.cms.gov/files/document/initial-report-idr-april-15-september-30-2022.pdf.

misconduct. As conceded by Aetna, the NSA expressly contemplates judicial review of IDR awards, and this case should proceed on the merits. 42 U.S. Code § 300gg–111(c)(5)(E)(i).[2]

II. The No Surprises Act requires Courts to review challenges to IDR awards and provides no means for any administrative review.

During oral argument, Defendant Aetna claimed that "the Court doesn't have jurisdiction" over this dispute because Guardian's "complaint is they don't like Aetna's QPA" and "any complaint [about the QPA] should be made to the Department of Health and Human Services not the Courts." *Id.* at 17:16-19, 21-22.[3] Setting aside that Guardian asserts other grounds for vacatur, Aetna is wrong on the law. The No Surprises Act ("NSA") does not require Guardian to pursue relief from the Departments for misrepresentations made to IDR entities before seeking judicial review, regardless of the factual basis for such misrepresentation.

Although not articulated clearly, Aetna appears to argue that Guardian has some sort of administrative remedy it must pursue before challenging an IDR award such as the one at issue here. This is wrong on numerous fronts. First and foremost, the IDR process itself is the administrative process that must take place before judicial review is possible. That unquestionably has occurred here. Once the IDR process, overseen by CMS, is completed, an out-of-network medical provider's administrative remedy has been exhausted. There is nothing in the statute that permits the Departments or CMS to review awards. Congress gave that power exclusively to the federal courts.

Aetna suggests that the applicable administrative remedy is complaining to CMS because it has a right to audit Aetna's compliance with the NSA. That argument likewise misses the mark.

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[2] As another example, Aetna makes the extraordinary argument—without a shred of support—that the ***burden of proof*** at the ***motion to dismiss stage*** lies with the plaintiff by a preponderance of the evidence. Dkt. 40 at 73:3-4. Few plaintiffs could meet this burden absent discovery.

[3] The Departments of Health and Human Services (HHS), Labor, and the Treasury (collectively, the "Departments") jointly implement the IDR process through the Centers for Medicare & Medicaid Services ("CMS").

There is nothing in the NSA that provides medical providers or patients a mechanism to assert a claim against Aetna and seek compensation for NSA violations. And even when an administrative remedy exists, exhaustion of that remedy is not automatic. "[T]o mandate exhaustion, a statute must contain '[s]weeping and direct' statutory language indicating that there is no federal jurisdiction prior to exhaustion, or the exhaustion requirement is treated as an element of the underlying claim." *Avocado Plus Inc. v. Veneman*, 370 F.3d 1243, 1248 (D.C. Cir. 2004) (quoting *Weinberger v. Salfi*, 422 U.S. 749, 757 (1975)). Even where exhaustion is required, it may be excused under several circumstances, including where the "unexhausted administrative remedy would be plainly inadequate." *Taylor v. U.S. Treasury Dep't*, 127 F.3d 470, 477 (5th Cir. 1997).

Aetna's argument attempts to turn a statutory provision granting CMS the ***power to audit*** its QPA into one creating an administrative remedy ***for parties harmed*** by an improperly calculated QPA (such as patients who paid the wrong amount of cost-sharing due to the QPA not being properly calculated). But no such administrative process exists. Furthermore, despite the fact that more than 600 payors participated in IDR proceedings within the first six months of the program,[4] DHHS has stated that it "expects to conduct ***no more than*** 9 audits annually." *See* 86 Fed. Reg. 36935 (July 13, 2021) (emphasis added). Setting aside the fact this is not an administrative remedy provision at all, nine audits per year of hundreds of payors is "plainly inadequate" and does not strip this Court of jurisdiction to adjudicate whether an IDR award was secured through undue means as alleged.

III. The Departments do not have primary jurisdiction over IDR award challenges.

Primary jurisdiction is a doctrine whereby a court "defers to an administrative agency for an initial decision on questions of fact or law within the peculiar competence of the agency."

[4] *See* Initial Report on the Independent Dispute Resolution (IDR) Process April 15 – September 30, 2022 at pp.16, 26, available at https://www.cms.gov/files/document/initial-report-idr-april-15-september-30-2022.pdf.

Occidental Chemical Corp. v. Louisiana Public Service Com'n, 810 F.3d 299, 309 (5th Cir. 2016) (quotation omitted). As the Fifth Circuit has warned, "courts should be reluctant to invoke the doctrine of primary jurisdiction, which often, but not always, results in added expense and delay to the litigants where the nature of the action deems the application of the doctrine inappropriate." *Mississippi Power & Light Co. v. United Gas Pipeline Co.*, 532 F.2d 412, 419 (5th Cir. 1976). As noted above, there is no administrative process to review IDR awards.

Congress clearly directed federal courts to provide judicial review of IDR awards. Aetna's attempt to close the courthouse door by arguing this Court lacks "jurisdiction" lacks any legal support. This Court should conduct the judicial review Congress required.

IV. Misrepresentations are undue means under the NSA.

Guardian argued at the motion to dismiss hearing that misrepresentations qualify as undue means under the NSA. Dkt. 40 at 54:1-23. This issue is further briefed at Doc. 16 at 7-9. The NSA provides:

> A determination of a certified IDR entity under subparagraph (A)—
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> (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 any of paragraphs (1) through (4) of section 10(a) of title 9.

42 U.S. Code § 300gg–111(c)(5)(E)(i) (emphasis added). Courts in this Circuit "construe statutes so as to give meaning to all terms, and simultaneously to avoid interpretations that create internal inconsistencies or contradictions." *In re McBryde*, 120 F.3d 519, 525 (5th Cir. 1997). Judicial review of IDR awards is allowed where "undue means" has been used to secure them. *See* 9 U.S.C. § 10(a)(1) (awards procured through "corruption, fraud or undue means"). Guardian merely asks this Court to conclude that an award that is not binding because it was secured through

misrepresentation of facts to an IDR entity is likewise subject to judicial review because it qualifies as an award secured through "undue means." This brings logical consistency to both provisions of subparagraph (i). Accordingly, pleading that an award was secured by misrepresentation of facts to an IDR entity is sufficient for judicial review of the award.

V. MET has not established it is entitled to arbitral immunity.

At the hearing, MET cited *Burns v. Reed*, 500 U.S. 478 (1991) and *Butz v. Economou*, 438 U.S. 478 (1978) to support its claim of arbitral immunity. Neither case is compelling; one is a Justice Scalia concurrence, while the other lists public policy reasons for judicial immunity that do not apply to MET. As this Court recognizes, the NSA does not describe MET as an arbitrator or grant it immunity. And here, the only way that MET can be required to rehear Guardian's claim and apply the required standard of review is by being a party and subject to this Court's orders. MET has not established as a matter of law that it is entitled to arbitral immunity.

VI. Plaintiffs have met the applicable pleading standard.

Aetna and MET have filed motions to dismiss *on the pleadings.* They are trying to bar the courthouse door so that Guardian never has its day in Court *on the merits*. Such motions are "viewed with disfavor and [are] rarely granted." *Tanglewood E. Homeowners v. Charles—Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988) (internal citations and quotations omitted). Plaintiff is only required to provide a "short and plain statement of the claims showing that the pleader is entitled to relief." *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994) (quoting Fed. R. Civ. P. 8(a)(2)). And where fraud is involved and the facts are within the other party's knowledge and control, factual allegations may be made on information and belief,. *Id.* at 1068. Plaintiff has met these low bars and the motions to dismiss filed by Aetna and MET should be denied.