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By ECF

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The Honorable Alfred H. Bennett
Bob Casey United States Courthouse
515 Rusk, room 8624
Houston, Texas 77002

Re: *Guardian Flight, LLC v. Aetna Health, Inc. et al.*, Civil Action No. 4:22-cv-03805; Response to Notice of Aetna's Attempts to Pay the Claim

Dear Judge Bennett:

Guardian Flight, LLC ('Guardian") writes to inform the Court that, contrary to Aetna's eleventh-hour filing, Guardian's claim is ***not***, "for all intents and purposes, resolved." Doc. 36 at 2. Aetna may not avoid judicial review of its misconduct under the No Surprises Act or avoid the discovery that has been served and will soon be due by attempting to force Guardian to accept a remedy it does not seek in this lawsuit. Simply, Guardian seeks declaratory relief and rehearing of the underlying dispute—not monetary damages—and this Court should disregard Aetna's misguided attempt to render this case moot.

Aetna's "attempts to pay the claim" are simply an effort to coerce settlement.

As an initial matter, Aetna's "attempts to pay the claim" are perplexing because it claims it needs Guardian's W-9 "to issue the payment." Doc. 36 at 1. But Aetna and Guardian have an ongoing business relationship pursuant to which Aetna regularly pays Guardian for air ambulance services. In fact, Aetna acknowledges that it has already paid Guardian before on the underlying claim in the amount of $31,965.53, so it is unclear why Aetna would be unable to render an additional payment to Guardian on this transport if it wishes to.

More to the point, Aetna's attempt to "pay the claim" is nothing more than a settlement offer—one that Guardian is not required to accept and has rejected. As this Circuit has acknowledged, parties cannot be coerced into settling. *Dawson v. United States*, 68 F.3d 886, 897 (5th Cir. 1995). In the same manner, it is well-settled in this Circuit that "an unaccepted settlement offer or offer of judgment does not [deprive a plaintiff of standing to sue]." *Naranjo v. Nick's Mgmt., Inc.*, No. 3:21-CV-2883-B, 2023 WL 416313, at *4 (N.D. Tex. Jan. 25, 2023)(citing *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 165, (2016), as revised (Feb. 9, 2016)); *see also A.O. v. El Paso Indep. Sch. Dist.*, 368 Fed. Appx. 539, 540 (5th Cir. 2010)(affirming denial of 12(b)(1) motion following school district's argument that "its settlement offer rendered the case moot and deprived [plaintiff] of standing").

Aetna's attempted payment does not moot Guardian Flight's claim, as Guardian does not seek damages.

Guardian naturally rejected Aetna's last-minute settlement offer, as it fails to include any remedy that Guardian seeks in the Complaint. As the Complaint states, Guardian

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

Doc. 1 at ¶ 41. Aetna's offer of $24,776.67, which encompasses none of the above, plainly misses the mark.

In addition, Aetna's assertion that Guardian's IDR offer is "locked in" is simply wrong. Doc. 36 at 2. There is no basis for Aetna's claim that Guardian "would submit the same proposed out-of-network rate" that "it did on the first go-round." *Id.* at 1. That is why Guardian, in the Complaint, specifically seeks a declaration that it can revise its offer in light of Aetna's wrongdoing. As explained in the Complaint, Guardian's prior submission was hamstrung by Aetna's violation of the NSA. If the award at issue is vacated, nothing in the NSA prohibits Guardian from revising its offer, which would now be made with the benefit of a judicial declaration of Aetna's misconduct.

Further, under the NSA, an IDR entity is entitled to consider any further information related to an offer and submitted by a party. 42 U.S.C. § 300gg-112(b)(5)(B)(ii). Certainly, a court's declaratory judgement that Aetna misrepresented its QPA would be relevant to an IDR entity's determination, and would be valuable to Guardian in this and future IDR proceedings. Guardian's requests for declaratory relief cannot be rendered moot through an offer of monetary payment.

Even if Aetna's attempted payment would moot Guardian's claim, an exception to mootness would apply.

Even if payment were to moot Guardian's claim (which it does not), this case falls squarely within the bounds of the exception to mootness for "the class of controversies capable of repetition, yet evading review." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 774 (1978). While the lack of actual controversy after the start of a lawsuit generally renders that action moot, this exception prevents parties such as Aetna from wielding mootness as a shield to their illegal conduct.

The "capable of repetition, yet evading review" exception "can be invoked if two elements are met: '(1) [T]he challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would

be subjected to the same action again.'" *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 661 (5th Cir. 2006) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

This case satisfies both elements. First, if Aetna were allowed to render any IDR challenge moot by paying money after its misconduct was challenged and a medical provider like Plaintiff spent tens of thousands of dollars on litigation, Aetna could always avoid judicial review of its misconduct. Second, since the filing of this lawsuit, Guardian has lost over twenty-five IDR disputes against Aetna, a number of them involving improbably low QPAs. As repeat players in the IDR process, Guardian and Aetna represent the types of parties interested in judicial clarity under the No Surprises Act. This type of case is capable of repeating, yet evading review, and so the exception to mootness applies here.

For the above reasons, this Court should disregard Aetna's last-minute attempt to avoid tomorrow morning's hearing and the discovery that has been issued and will soon be due..

Very truly yours,

Adam T. Schramek

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cc: Counsel of record