UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

MED-TRANS CORPORATION,	)	
Plaintiff,	)	
v.	)	Civil Action No. 3:22-cv-01077-HES-JBT
CAPITAL HEALTH PLAN, INC. and C2C INNOVATIVE SOLUTIONS, INC.,	)	
Defendants.	)	

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The United States of America, by and through undersigned counsel, respectfully submits this Statement of Interest, pursuant to 28 U.S.C. § 517,[1] to provide the Court with its view on whether certified independent dispute resolution entities ("CIDREs") are proper parties to suits challenging arbitral awards under the No Surprises Act ("the Act").

The Act spares patients from an estimated one million surprise medical bills every month. A cornerstone of the Act is the independent dispute resolution ("IDR") process it established for resolving payment disputes between out-of-network providers or facilities, on the one hand, and insurers or health plans, on the other. Specifically, the Act prohibits out-of-network health care providers and facilities, in certain circumstances, from "balance billing" patients, *i.e.*, charging patients the difference between the amount billed by providers and facilities and the sum of the allowed amount covered by patients' health plans or insurers and patients' in-network cost-sharing obligations, for certain items or services. To that end, if the provider or facility and the insurer or health plan cannot agree on a payment amount through negotiation, either party may elect to initiate the IDR

[1] 28 U.S.C. § 517 provides that "any officer of the Department of Justice[] may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States."

process. There, the parties engage in a "baseball-style" arbitration in which each party ultimately submits a payment offer, and an arbitrator determines which offer best represents the value of the item or service. The Act explicitly provides that the arbitrator's determination is binding unless the parties engage in fraud or misrepresentation, with limited judicial review tightly circumscribed under the Federal Arbitration Act ("FAA").

This case stems from one such arbitration. An insurer, Capital Health Plan, Inc., prevailed over an air ambulance services provider, Med-Trans Corp., which seeks to set aside the arbitral award. But Med-Trans names as Defendants in this case not only the insurer, but also the arbitrator, C2C Innovative Solutions, Inc.

Arbitrators are not proper parties to such suits. The No Surprises Act does not create a cause of action against arbitrators, and the courts of appeals have consistently held that, in arbitrations subject to the FAA, arbitrators acting within the scope of their duties and jurisdiction are entitled to immunity. Indeed, if arbitrators were required to repeatedly defend lawsuits such as this one, the viability of the Act's IDR process would be placed at risk, jeopardizing a cornerstone of the congressional design.

BACKGROUND

I. The No Surprises Act and the IDR Process It Established

Congress enacted the No Surprises Act to address a variety of surprise billing practices and to rein in the cost of health care. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182, 2758-2890 (2020). The Act protects certain insured patients from unexpected liabilities arising from the most common forms of surprise billing. If an insured patient receives emergency care, receives non-emergency care related to their visit to certain types of in-network facilities, or receives air ambulance services from an out-of-network provider of air ambulance services, health care providers and facilities are generally prohibited from balance billing the patient for any part of the care furnished by an out-of-network provider or facility. *See* 42 U.S.C. §§ 300gg-131, 300gg-132, 300gg-135.[2] Likewise, the patient's cost-sharing requirement for out-

[2] The Act makes parallel amendments to the Public Health Service Act ("PHSA") (administered by the Department of Health and Human Services ("HHS")), the Employee Retirement Income Security Act ("ERISA") (administered by the Department of Labor), and the Internal Revenue Code (administered by the Department of the Treasury) (collectively "the Departments"). In addition, the Act requires the Office of Personnel Management to ensure that that its contracts with Federal Employees Health Benefits Program carriers require compliance with applicable provisions in the same manner as group health plans and health insurance issuers. 5 U.S.C. § 8902(p). For ease of reference, this brief cites only the Act's amendments to the PHSA.

of-network services may not exceed the cost-sharing requirement "that would apply if such services were provided by a participating provider or a participating emergency facility." *Id.* §§ 300gg-111(a)(1)(C)(ii), 300gg-111(b)(1)(A), 300gg-112(a)(1).[3]

The Act sets out a detailed process for the resolution of payment disputes between an out-of-network provider or facility and a patient's health plan or health insurance issuer concerning an item or service for which surprise billing is prohibited. An insurer or health plan must issue an initial payment, or a notice of a denial of payment, to a provider or facility within 30 calendar days after the provider or facility submits a bill to the insurer or plan for an out-of-network service that falls within the scope of the surprise billing protections. *Id.* §§ 300gg-111(a)(1)(C)(iv), (b)(1)(C), 300gg-112(a)(3)(A). Either party (usually the provider or facility) may initiate a 30-day period of open negotiation with the other party (usually the insurer or plan) over the claim if it is not satisfied with the initial payment or notice of denial of payment. *Id.* §§ 300gg-111(c)(1)(A), 300gg-112(b)(1)(A). If those negotiations do not resolve the dispute, either party may

[3] The provisions of the Act that apply specifically to air ambulance services are codified at 42 U.S.C. § 300gg-112.

then elect to initiate the IDR arbitration process. *Id.* §§ 300gg-111(c)(1)(B), 300gg-112(b)(1)(B).

During the IDR process, an independent, private arbitrator selects between the parties' proposed payment offers. *Id.* § 300gg-111(c). The Act instructs that the Departments "shall establish by regulation one independent dispute resolution process" under which an arbitrator, known in the statute as a "certified IDR entity," or CIDRE, determines "the amount of payment under the plan or coverage for such item or service furnished by such provider or facility." *Id.* §§ 300gg-111(c)(2)(A), 300gg-112(b)(2)(A). The Act establishes a system of "baseball-style" (or "final-offer") arbitration under which both the provider (or facility) and the insurer (or health plan) submit a proposed payment amount, with an explanation and supporting documents, if applicable, and the arbitrator selects one offer or the other as the amount of payment for the item or service in dispute. *Id.* §§ 300gg-111(c)(5)(A)(i), 300gg-112(b)(5)(A)(i). As the Departments have explained, this "baseball-style" format, in which each party submits a last, best offer—much as in Major League Baseball salary arbitrations—is intended to "serve as an incentive to not only submit reasonable offers once the Federal IDR process has been initiated, but also to conduct business in a way to avoid ending up in the

Federal IDR process altogether." *Requirements Related to Surprise Billing: Part II*, 86 Fed. Reg 55,980, 56,050-51 (Oct. 7, 2021).

In selecting between the parties' offers, the arbitrator must take "into account" certain "considerations." *Id.* §§ 300gg-111(c)(5)(A)(i), 300gg-112(b)(5)(A)(i). The arbitrator must consider "the qualifying payment amount" ("QPA"), a statutory term of art generally defined as the median of the contracted rates recognized by the plan or issuer for the same or a similar item or service provided in the geographic region. *Id.* §§ 300gg-111(a)(3)(E), 300gg-111(c)(5)(C)(i)(I), 300gg-112(b)(5)(C)(i)(I). The arbitrator must also consider additional criteria such as the provider's level of experience, the complexity of the rendered service, and the market share held by the provider in the region. *Id.* §§ 300gg-111(c)(5)(A)(i), 300gg-111(c)(5)(C), 300gg-112(b)(5)(A)(i), 300gg-112(b)(5)(C); *see also id.* § 300gg-112(a)(1) (cost sharing responsibilities with respect to air ambulance services); *Requirements Related to Surprise Billing, Part I*, 86 Fed. Reg. 36,872, 36,884 (July 13, 2021) (same).[4]

[4] This process for arbitrators to select the payment amount has changed over time due to litigation challenging implementing regulations. The Departments initially released two sets of interim final rules implementing the Act, *Requirements Related to Surprise Billing: Part I*, 86 Fed. Reg. 36,872 (July 13, 2021), and *Requirements Related to Surprise Billing: Part II*, 86 Fed. Reg. 55,980 (Oct. 7, 2021). Those interim final rules were challenged, and a

Under the Act, the CIDRE's decision is binding. Specifically, the Act states that "[a] determination of a [CIDRE] . . . 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 a claim." 42 U.S.C. § 300gg-111(c)(5)(E)(i)(I). In addition, the Act specifies that such determinations "shall not be subject to judicial review," except under the limited circumstances described in the FAA. *Id.* § 300gg-111(c)(5)(E)(i)(II). Those circumstances include: "where the award was procured by corruption, fraud, or undue means"; "where there was evident partiality or corruption in the arbitrators"; "where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause

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district court vacated portions of the October 2021 interim final rule, including what it described as a "QPA presumption"—a requirement that the offer closest to the QPA be selected unless credible information clearly demonstrated the QPA was materially different from the appropriate out-of-network rate. *See Tex. Med. Ass'n v. U.S. Dep't of Health & Human Servs.*, 587 F. Supp. 3d 528, 549 (E.D. Tex. 2022); *LifeNet Inc. v. U.S. Dep't of Health & Human Servs.*, 617 F. Supp. 3d 547, 560-62 (E.D. Tex. 2022). The Departments then issued a revised final rule removing the so-called QPA presumption. 45 C.F.R. § 149.510(c)(4)(ii)(A). That final rule was also challenged, and the district court determined the rule still "tilt[ed] the arbitration process in favor of the QPA." Opinion and Order 2, *Tex. Med. Ass'n v. U.S. Dep't of Health & Human Servs. (TMA II)*, No. 6:22-cv-0372-JDK, Dkt. No. 99 (E.D. Tex. Feb. 6, 2023). An appeal of that decision is pending before the Fifth Circuit. Notice of Appeal, *id.*, Dkt. 101 (E.D. Tex. Apr. 6, 2023). The same plaintiffs have brought additional challenges to the implementing regulations. *Tex. Med. Ass'n v. U.S. Dep't of Health & Human Servs.* (*TMA III*), No. 6:22-cv-00450-JDK (E.D. Tex.); *Tex. Med. Ass'n v. U.S. Dep't of Health & Human Servs.* (*TMA IV*), No. 6:23-cv-00059-JDK (E.D. Tex.).

shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced"; or "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10. Absent such extraordinary circumstances, arbitration outcomes under the Act are final and cannot be reviewed by a court.

II. This Case

Plaintiff Med-Trans Corp. provided air ambulance services to a patient whose insurer is Defendant Capital Health Plan, Inc. Complaint ¶¶ 4, 7, 14 (Dkt. No. 1) ("Compl."). The parties did not dispute the emergent nature and medical necessity of the air transportation service—only the price to be paid. *Id.* ¶ 3. After Med-Trans and Capital Health could not agree on an amount to be paid for Med-Trans's services, Med-Trans initiated the process. *Id.* ¶¶ 5, 30. The parties could not agree on an arbitrator, so C2C was assigned, consistent with the process established by the Departments. *Id.* ¶ 5; *see* 45 C.F.R. § 149.510(c)(1). During that arbitration, the parties submitted competing payment offers. According to the Complaint, in considering those offers, C2C calculated that Capital Health's offers

of $16,279 and $11,345 (for billing codes A0430 and A0435, respectively) were each 100 percent of the applicable QPAs, while Med-Trans's offers of $24,437.17 and $22,848, were 150 percent and 201 percent of the QPAs, respectively. Compl. ¶ 34. C2C also "consider[ed] related and credible information submitted by the parties to determine the appropriate [out-of-network] rate," but concluded that "the information [Med-Trans] submitted did not support the allowance of payment at a higher [out-of-network] rate." *Id*. Accordingly, C2C issued a determination selecting Capital Health's offer. *Id.* ¶¶ 1, 24.

Med-Trans sued both Capital Health and C2C. *Id.* ¶¶ 7-9. It alleges that Capital Health "undert[ook] a bad faith scheme to minimize" payment on the relevant claim and concealed from Med-Trans information it should have disclosed when it submitted its QPA for the claim, and that Capital Health consequently procured its IDR award through misrepresentation and undue means. *Id.* ¶¶ 4, 20. As to C2C, Med-Trans claims that C2C's determination gave outsized weight to the QPA and did not sufficiently explain why the other evidence that Med-Trans submitted did not justify the selection of its offer. *See id.* ¶¶ 18, 20, 34, 37. Med-Trans requests that the Court vacate the arbitration award in Capital Health's favor and direct C2C to rehear its dispute. *Id.* ¶¶ 42-43.

C2C has moved to dismiss, arguing that it is entitled to arbitrator's immunity, C2C Mem. 6-9, and that there is no case or controversy between the parties to confer Article III standing, *id.* at 9-11.

DISCUSSION

CIDREs are not proper parties to suits challenging arbitral awards under the No Surprises Act, and permitting such suits to proceed against them would threaten the viability of the Act's IDR arbitration process.

I. CIDREs Are Not Proper Parties to Challenges to Arbitral Awards Under the Act.

CIDREs are not proper parties to suits challenging arbitral awards under the No Surprises Act. The Act does not create a cause of action against CIDREs, and the courts of appeals have consistently held that, in arbitrations subject to the Federal Arbitration Act, arbitrators acting within the scope of their duties and jurisdiction are entitled to immunity.

A. The No Surprises Act Does Not Create a Cause of Action Against CIDREs.

The No Surprises Act does not create a cause of action against CIDREs. Rather, the dispute resolution process created in the Act relates only to providers

(or facilities) and insurers (or health plans) who disagree regarding a claim of entitlement to payment—not to arbitrators. *See* 42 U.S.C. §§ 300gg-111(a)-(b).

As described above, the Act sets out a detailed scheme for the resolution of payment disputes between health care providers or facilities, on the one hand, and insurers or health plans, on the other. The Act specifies that an insurer or health plan will issue an initial payment, or a notice of denial of payment, to a provider within 30 days after the provider or facility submits a bill to it for an applicable out-of-network service. *Id.* §§ 300gg-111(a)(1)(C)(iv), (b)(1)(C). If the provider is not satisfied with this amount, it may initiate a 30-day period of open negotiation with the insurer or health plan over the claim. *Id.* §§ 300gg-111(c)(1)(A), 300gg-112(b)(1)(A). And if open negotiation fails, either party may initiate the IDR process. *Id.* §§ 300gg-111(c)(1)(B), 300gg-112(b)(1)(B). Accordingly, the rights and obligations the Act establishes regarding payment for out-of-network services subject to the Act are exclusive to providers and payors. *See Haller v. U.S. Dep't of Health & Hum. Servs.*, No. 21-cv-7208-AMD-AYS, 2022 WL 3228262, at *7 (E.D.N.Y. Aug. 10, 2022) ("When Congress enacted the No Surprises Act, it permitted health care providers to recover payment directly from insurers for out-of-network

services, which is a new public right."), *appeal docketed*, No. 22-3054 (2d Cir. Nov. 30, 2022).

The Act's judicial review provision is accordingly limited. It states that "[a] determination of a certified IDR entity . . . 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"—*i.e.*, the FAA. 42 U.S.C. § 300gg-111(c)(5)(E)(i). Two features about the text of this provision bear particular emphasis. First, it is not an affirmative *grant* of a cause of action, but a *limitation* on any cause of action. The statute makes clear that an arbitrator's determination "shall *not* be subject to judicial review, *except*" where permitted under the FAA. *Id.* (emphasis added). And those exceptions are tightly circumscribed: They are limited to when (1) an award was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption in the arbitrators; (3) there was certain misconduct on the part of arbitrators; or (4) arbitrators exceeded their powers. *See* 9 U.S.C. § 10. Second, even where judicial review under the No Surprises Act is not proscribed, it is limited by the statute's plain text to the "*determination* of a certified IDR entity," 42 U.S.C. § 300gg-111(c)(5)(E)(i) (emphasis added), and does not extend to the CIDRE itself. Thus, contrary to Med-Trans's contention, the Act's judicial review provision is

clearly a *limitation* on judicial review of an arbitrator's *decisions*—not a *grant* of a cause of action to sue the *arbitrator itself*. *See id.* § 300gg-111(c)(5)(E)(i).

B. CIDREs Are Entitled to Arbitrator Immunity When Acting Within the Scope of Their Duties and Jurisdiction.

More broadly, the principles of arbitrator immunity apply to CIDREs arbitrating payment disputes under the No Surprises Act. Neutral arbitrators have no stake in such disputes, just as trial judges have no stake in their decisions on appeal.

Courts have long recognized the doctrine of arbitrator immunity required by the FAA, portions of which are incorporated into the Act. "Because an arbitrator's role is functionally equivalent to a judge's role, courts of appeals have uniformly extended judicial and quasi-judicial immunity to arbitrators. . . . [O]rganizations that sponsor arbitrations, as well as arbitrators themselves, enjoy this immunity from civil liability." *New England Cleaning Servs., Inc. v. Am. Arb. Ass'n*, 199 F.3d 542, 545 (1st Cir. 1999); *see also Wasyl, Inc. v. First Boston Corp.*, 813 F.2d 1579, 1582 (9th Cir. 1987) ("Because federal policy encourages arbitration[,] and arbitrators are essential in furthering that policy, it is appropriate that immunity be extended to arbitrators for acts within the scope of their duties and within their jurisdiction."); *Corey v. N.Y. Stock Exch.*, 691 F.2d 1205, 1211 (6th Cir.

1982) ("To allow a collateral attack against arbitrators and their judgments would also emasculate the appeal provisions of the [F]ederal Arbitration Act."); *Austern v. Chicago Bd. Options Exch., Inc.*, 898 F.2d 882, 887 (2d. Cir. 1990) (explaining that to impose liability upon the arbitrator for claims asserted by appellant would "merely serve to discourage its sponsorship of future arbitrations—a policy that is strongly encouraged by the Federal Arbitration Act"). Indeed, "arbitrators are immune from civil liability for all acts performed in their arbitral capacity." *Precision Mech., Inc. v. Karr*, No. 6:05-CV-1353-ORL-31 KRS, 2005 WL 3277966, at *8 (M.D. Fla. Dec. 2, 2005); *see also, e.g.*, *Austern*, 898 F.2d at 886 (finding arbitrator "absolutely immune from liability in damages for all acts within the scope of the arbitral process," including allegations of defective notice and improper selection of arbitration panel).[5] It should be no different in the context of the No Surprises Act, particularly given that Congress is presumed to have been aware of this backdrop when it incorporated the FAA's judicial review provisions into the Act.

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[5] In a 2002 case, the Eleventh Circuit reserved the question "whether arbitral immunity protects arbitrators from suits seeking only injunctive relief," finding that there was "[n]o need" to answer that question given its dissolution of the injunction on other grounds, but it noted the broad scope of arbitral immunity recognized by other courts. *Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners*, 312 F.3d 1349, 1359 (2002) (per curiam) (describing *Tamari v. Conrad*, 552 F.2d 778 (7th Cir. 1977), as holding that "arbitral immunity protects arbiter from injunctive relief").

Med-Trans errs in arguing that "an IDR proceeding is not an arbitration" to which these principles of arbitrator immunity extend. Pl.'s Mem. 9 (Dkt. No. 39). It asserts that the IDR process lacks features associated with "traditional" arbitration, *id.* 6-10, and that the No Surprises Act does not expressly use the word "arbitration," *id.* at 10-16.[6] But its principal complaint—that the IDR process took place without its "consent," *id*. at 10—not only ignores that it was Med-Trans itself that initiated the proceedings here, Compl. ¶ 30, but also is at odds with its apparent recognition that even where arbitration is mandatory, *see* Pl.'s Mem. 16 (differentiating "voluntary arbitration" and "compulsory arbitration"), it is still an arbitration. Tellingly, Med-Trans points to no case questioning that the "baseball-style" process that Congress adopted in the Act is a common form of arbitration subject to the FAA. *Cf., e.g.*, C2C Reply Mem. 3-4 (Dkt No. 45) (citing cases). Moreover, leaving aside that Med-Trans identifies no source of a "magic words" requirement for arbitrator immunity to apply, it identifies no meaningful distinction between "independent dispute resolution" and "arbitration" in this context. *See Arbitration*, BLACK'S LAW DICTIONARY 125 (10th ed. 2014) ("A dispute-

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[6] While Med-Trans also contends that "[a]nother reason that IDR entities should not be afforded immunity is because the IDR process lacks the due process protections of voluntary arbitration proceedings," Pl.'s Mem. 16-17, it brings no due process claim here.

resolution process in which the disputing parties choose one or more neutral third parties to make a final and binding decision resolving the dispute. The parties to the dispute may choose a third party directly by mutual agreement, or indirectly, such as by agreeing to have an arbitration organization select the third party.").

In addition, the Act's legislative history shows that Congress understood the IDR process to be arbitration. *See, e.g.*, H. COMM. ON EDUC. & LABOR, BAN SURPRISE BILLING ACT, H.R. REP. NO. 116-615 (Part 1), at 56 (2020) (noting, in a section titled "resolving payment disputes between providers and health plans," that "the IDR process" is "*also referred to as arbitration*" (emphasis added)); *Examining Surprise Billing: Protecting Patients from Financial Pain: Hearing Before the Subcomm. on Health, Employment, Labor & Pensions of the H. Comm. on Educ. & Labor*, 116th Cong. 27 (2019) (statement of Christen Linke Young, Fellow, USC-Brookings Schaeffer Initiative on Health Policy) ("Using *Arbitration* to Determine Payment" (emphasis added)); *id.* at 27-29 (recommending baseball style arbitration); *id.* at 174, 191-92, 201-02 (referencing "arbitration" in the questions and responses for the record alike). Indeed, consistent with that legislative history, in the same statutory provision that Med-Trans invokes to obtain judicial review here, Congress expressly incorporated portions of the Federal *Arbitration* Act,

underscoring that it understood the IDR process as arbitration. *See id.* § 300gg-111(c)(5)(E)(i)(II) (incorporating 9 U.S.C. § 10(a), which, in turn, provides for limited review of an "Award of *arbitrators*," 9 U.S.C. § 9 (emphasis added)). Thus, the IDR process under the No Surprises Act is clearly an arbitration to which principles of arbitrator immunity apply.[7]

II. Requiring CIDREs to Defend Lawsuits Such as This One Would Threaten the Viability of the No Surprises Act's IDR System.

The consequences of permitting Med-Trans's claims against C2C to go forward are significant: suits such as this one present a significant threat to the viability of the Act's IDR system. Simply naming a CIDRE as a defendant means forcing them, at the very least, to engage in costly motions practice to seek dismissal as a party. This is particularly cost-prohibitive when measured against

[7] So long as an arbitrator is acting within the scope of its duties and jurisdiction, a party's allegation that the arbitrator committed an error justifying judicial review within the strict limits of the FAA does not alter the immunity analysis, which is a separate question. By analogy, a trial court does not lose immunity to suit when it renders a judgment based on a legal error; instead, that error is typically corrected and the case remanded without the trial court being made a party to the appeal. Moreover, a party that believes that a CIDRE "has a pattern or practice of noncompliance with any of the requirements applicable to certified IDR entities under the Federal IDR process" is not without recourse under the No Surprises Act: it may "petition [the Centers for Medicare & Medicaid Services] to revoke the certification of a current certified IDR entity" on that ground. *See* Ctrs. for Medicare & Medicaid Servs., *Submit a petition to revoke the certification of a current IDR entity providing dispute services*, https://www.cms.gov/nosurprises/help-resolve-payment-disputes/submit-feedback-on-certified-organizations (May 11, 2023).

a CIDRE's compensation for each dispute, which ranges from $350 to $700 for single determinations and from $475 to $938 for batched determinations. Ctrs. for Medicare & Medicaid Servs., *List of Certified Independent Dispute Resolution Entities*, https://www.cms.gov/nosurprises/help-resolve-payment-disputes/certified-idre-list (May 11, 2023). This is not to mention, of course, exposing CIDREs—which are neutral decisionmakers—to the exorbitant costs of potential discovery into any decision they render. *Cf.* Pl.'s Mem. 16-17 (complaining that "Med-Trans also had no opportunity to conduct discovery"). Simply put, if the losing party is able to name a CIDRE as a defendant following every unsuccessful dispute, there will be little incentive for CIDREs to participate in the Act's IDR system in the first place.

Indeed, since the Act's implementation, the IDR system has already been strained, experiencing an unexpected volume of disputes with an insufficient number of CIDREs to cover all of them. The Departments had anticipated certifying 50 IDR entities, 86 Fed. Reg. at 56,002 n.41, but currently only 13 IDR entities have qualified for certification, Ctrs. for Medicare & Medicaid Servs., *List of Certified Independent Dispute Resolution Entities*, https://www.cms.gov/nosurprises/help-resolve-payment-disputes/certified-idre-list (May 11, 2023). At the same time, the Departments had originally estimated that approximately

17,000 disputes would be submitted in the IDR process each *year*. 86 Fed. Reg. at 56,056. Yet, in just the last *quarter* of 2022, between October 1 and December 31, 2022, parties initiated more than 110,000 disputes. U.S. Dep't of Health & Human Servs. et al., Partial Report on the Independent Dispute Resolution (IDR) Process, Oct. 1-Dec. 31, 2022, at 8 https://www.cms.gov/files/document/partial-report-idr-process-octoberdecember-2022.pdf. That high volume shows no signs of slowing. The most recent data shows that in the last year (between April 15, 2022, and March 31, 2023), some 334,828 disputes were initiated—more than *nineteen times* the number that the Departments had initially estimated would be filed over the course of a year. Ctrs. for Medicare & Medicaid Servs., Federal Independent Dispute Resolution Process—Status Update 1 (Apr. 27, 2023), https://www.cms.gov/files/document/federal-idr-processstatus-update-april-2023.pdf.

The IDR program is integral to the No Surprises Act. That program rests on the voluntary participation of CIDREs. Yet, ten of the thirteen CIDREs tasked with deciding this enormous volume of payment disputes have expressed concern with the costs of litigation from cases such as this one and indicated that they are considering withdrawing from the program altogether. The Court should not

enable parties disappointed by the outcome of their arbitrations to destabilize the entire IDR program by suing neutral arbitrators.

CONCLUSION

The Court should hold that CIDREs are not proper parties to suits challenging arbitral awards under the No Surprises Act.

Date: May 12, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May 2023, I caused the foregoing document to be served on all counsel of record electronically by means of the Court's CM/ECF system.

/s/ Giselle Barcia
GISELLE BARCIA