UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

REACH AIR MEDICAL SERVICES LLC,

Plaintiff,

v.

KAISER FOUNDATION HEALTH PLAN INC. and C2C INNOVATIVE SOLUTIONS, INC.,

Defendants.

Civil Action No. 3:22-cv-01153-TJC-JBT

–

PLAINTIFF'S SUPPLEMENTAL BRIEF

At the May 16, 2023 hearing on Defendants' motions to dismiss, this Court granted Plaintiff leave to file supplemental briefing on: (1) the status of IDR challenges in Houston federal court; (2) the *Cheminova* case cited in Kaiser's reply brief; and (3) the Statement of Interest filed by the Department of Justice.

I. STATUS OF OTHER IDR CHALLENGES

Plaintiff and its affiliates have sued in the Southern District of Texas challenging seven IDR awards issued by IDR entity Medical Evaluators of Texas ASO, LLC ("MET"). Those cases are: (1) *Guardian Flight, LLC v. Aetna Health, Inc. et al.*, Civil Action No. 4:22-cv-03805 (challenging one IDR award), and (2) *REACH Air Med. Services, LLC, et al. v. Kaiser Foundation Health Plan*

Inc., et al., Civil Action No. 4:22-cv-03979 (challenging six IDR awards where Kaiser provided MET with lower QPAs than those provided with the initial claim payment). Defendants moved to dismiss each case and the motions are fully briefed. Oral argument was heard on Aetna's motion to dismiss on April 21, 2023. The cases were thereafter consolidated on May 10, 2023 in the first-filed case before Judge Alfred H. Bennett. Judge Bennett allowed discovery from Aetna, but not MET, to proceed. Nevertheless, neither Aetna nor Kaiser will participate in discovery, instead filing motions to disallow or stay it.

II. THE *CHEMINOVA* CASE DOES NOT SUPPORT APPLYING THE FAA TO THIS NSA PROCEEDING

Kaiser argues in its reply brief that "[t]he FAA in its entirety applies to IDR arbitrations"—even the provisions not expressly incorporated—and that the appropriate standard of review is strictly what is available under FAA precedent. Doc. 45 at 5. It contends that Plaintiffs can only challenge IDR awards by "motion, submit[ting] admissible evidence, [and] follow[ing] [the] FAA's other requirements." *Id.* at 6. It claims this position is supported by a D.C. federal court's decision in *Cheminova A/S v. Griffin LLC,* 182 F. Supp. 2d 68 (D.D.C. 2002) (hereafter *Cheminova*). However, Kaiser's reliance on *Cheminova* is misplaced and the case provides it no support here.

At the outset, it is important to note that Kaiser relies on *Cheminova* because none of the procedures it prefers are in the NSA. The only reference

to the FAA is to the grounds *to challenge* an IDR award. *See* 42 U.S.C. § 300gg-lll(c)(5)(E)(i)(I-II). As noted in prior briefing, the rules of statutory construction require the Court to conclude that Congress *did not* incorporate any of the other parts of the FAA. *See, e.g., Skinner v. Brown*, 27 F.3d 1571, 1574 (Fed. Cir. 1994) ("The express reference to 42 U.S.C. § 402(d) shows that Congress well knew how to incorporate the provisions of the Social Security Act into [the Restored Entitlement Program for Survivors]. . . . If it had similarly intended to incorporate section 202(j), we presume it would have done so expressly.").

Cheminova does not support Kaiser's arguments for numerous reasons. First, *Cheminova* concerned the ***enforcement*** of an arbitration award obtained pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). As the Court explains in its opening paragraph:

> Applicant Cheminova A/S has requested ***judicial confirmation*** of a final arbitration order issued pursuant to the data-sharing provisions of the [FIFRA]. Respondent Griffin L.L.C. has countered by moving to dismiss on the grounds that neither FIFRA, the Federal Arbitration Act, 9 U.S.C. § 1 et seq. ("FAA"), nor the Administrative Dispute Resolution Act, 5 U.S.C. § 571 et seq. ("ADRA"), ***provides authority for judicial enforcement*** of FIFRA arbitration awards;

Chimanova, 182 F. Supp. 2d at 70. This proceeding has nothing to do with the enforcement of IDR awards. Indeed, Plaintiffs do not dispute that IDR awards are enforceable *under the NSA* in federal court and have been forced to file suit against two insurers (Cigna and Aetna) for failing to pay millions of dollars in

awards.[1] The *Cheminova* case has nothing to do with procedures or standards for ***challenging*** awards, even under FIFRA.

Second, FIFRA arbitration are vastly different from the IDR proceedings at issue in this case. As the *Cheminova* court explained:

> The arbitration proceedings, in which both Griffin and Cheminova participated fully, ***lasted for approximately eighteen months.*** Initial statements were filed at the end of 1999 and the beginning of 2000, and both parties participated in the ***disclosure and discovery process***, as well as pre-hearing proceedings to resolve discovery disputes. After ***six months of discovery***, the ***three-member arbitration panel*** conducted a ***full evidentiary hearing*** in Washington, D.C. The ***hearings spanned a total of 11 days*** in September and December 2000. Both parties presented evidence and a total of ***16 witnesses testified***. Post-hearing briefs were filed, and ***closing arguments were held*** before the arbitration panel on March 20, 2001. On March 25, 2001, the panel issued a Provisional Arbitration Award and ***invited comment from the parties.***

Cheminova, 182 F. Supp. 2d at 71. The contrast between FIFRA arbitrations and IDR proceedings is indeed stark. Certainly parties who arbitrated for eighteen months with full discovery and an eleven day hearing before a panel of three arbitrators are in a very different position than IDR participants who do not even get to see the opposing side's submission and receive "cookie cutter"

[1] *See REACH Air Medical Servs., LLC et al. v. Aetna Health, Inc. et al.*, Case No. 4:23-cv-00805 in the United States District Court for the Southern District of Texas (suit against Aetna for nonpayment of over $1M in IDR awards); *REACH Air Medical Servs., LLC et al. v. Cigna Health and Life Ins. Co.*, Case No. 4:23-cv-00826 in the United States District Court for the Southern District of Texas (suit against Cigna for nonpayment of over $2.5M in IDR awards).

awards. Regardless, as mentioned above, the standard or procedures relating to judicial review of FIFRA awards was not at issue in that case.

Finally, and most importantly, the *Cheminova* case ***did not apply the FAA*** in deciding it had jurisdiction to enforce the FIFRA arbitration award. Instead, the court concluded that because FIFRA allowed parties to initiate "binding arbitration proceedings," 7 U.S.C. § 136a(c)(1)(F)(iii), and further "mandates that the arbitrator's findings and determinations are "final and conclusive," the court had jurisdiction ***under FIFRA itself*** to enforce FIFRA arbitration awards. In fact, it specifically noted it was ***not*** applying the FAA or its procedures. The court stated:

> Given the Court's decision that it has jurisdiction pursuant to Section 3(c)(1)(F) of FIFRA to confirm the arbitration award, ***it need not determine whether jurisdiction is also available under*** FIFRA Section 16(c), ***the FAA***, or the ADRA."

Cheminova, 182 F. Supp. 2d at 77.

Simply stated, *Cheminova* does not support Kaiser's position at all. To the contrary, the best conclusion to be drawn from the *Cheminova* court supports Plaintiffs here. If a federal court can enforce arbitration awards under federal statutes without reference to the FAA, it likewise can provide judicial review of IDR awards without reference to the FAA and instead apply its typical procedures under the Federal Rules of Civil Procedure.

III. THE GOVERNMENT'S ARGUMENTS LACK MERIT

The United States, through the Department of Justice, submitted a brief arguing that IDR entities are not proper parties to suits challenging awards under the NSA, and claiming that allowing suits to proceed against them would threaten the viability of the IDR process.[2] The Government's position lacks merit and is unsupported by any evidence.

A. IDREs are proper parties to challenges to awards they issued under the NSA.

The Government first argues that IDR entities are not proper parties to challenges to their awards under the NSA because the statute does not create a cause of action against IDR entities. Doc. 58 at 15. However, Plaintiff has never claimed otherwise. Rather than address the merits and reasoning of the equitable and declaratory relief Plaintiff actually seeks, the Government instead sets up a straw man that it can easily knock down.

The Government further ignores that neither the NSA nor its regulations have any procedures for a rehearing or a requirement that IDR entities perform them. Judicial review of an IDR award is meaningless if the IDR entity is not a party to the suit and compelled to follow the relief ordered by the Court. This is vastly different than private arbitrations conducted

[2] All cites to the docket in this section of the brief are to Civil Action No. 3:22-cv-1077.

under rules such as those promulgated by the AAA, which specifically provide procedure for court-ordered arbitrations.

The Government next rehashes the same argument presented by C2C: that IDR entities are arbitrators entitled to arbitral immunity. It points to the NSA's legislative history for support. But the Eleventh Circuit has stated unambiguously that "[w]hen the import of words Congress has used is clear . . . we need not resort to legislative history, and we certainly should not do so to undermine the plain meaning of the statutory language." *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1222 (11th Cir. 2001). Even where "[t]here are ... contrary indications in the statute's legislative history ... we do not resort to legislative history to cloud a statutory text that is clear." *Id.* (citing *Ratzlaf v. United States*, 510 U.S. 135, 147 (1994). Further, "where Congress demonstrates awareness of an issue by expressly addressing it in one provision, silence on the issue in a similar provision is presumed to be intentional." *MSPA Claims 1, LLC v. Tenet Florida, Inc.*, 918 F.3d 1312, 1321 (11th Cir. 2019) (citations omitted).

It is undisputed that the text of the NSA does not mention arbitration, arbitrators, or arbitral immunity even once. Congress understands the term, having instituted mandatory arbitration elsewhere, including under FIFRA. The mandatory arbitration regimes cited by Defendants, including the Railway Act, FIFRA, and the Dealer Arbitration Act, all explicitly use the term

arbitration. And as Judge Bennett noted at the hearing on the motion to dismiss filed by the IDR entity in the Houston case, Congress was very specific in the NSA in defining IDR entities and their duties and *could have* called them arbitrators and granted them arbitrator immunity *but did not do so*. *See* Ex. A (excerpts from hearing transcript).

Nobody in this proceeding asserts that any of the NSA's terms are ambiguous. Congress created a new category, an "IDR Entity," and the statute states what that entity does and how it does it (leaving the specifics to rule making). It does not call them arbitrators or grant them immunity. This Court should disregard the legislative history of the NSA.

Further, Congress or the Executive Branch (with appropriate notice and comment periods under the Administrative Procedures Act) could have provided additional protections to IDR entities, but declined to do so here. As an example, under the FIFRA Arbitration Rules, Congress stipulated that "[n]either the AAA nor FMCS is a necessary party in judicial proceedings relating to the arbitration." 29 C.F.R. § Pt. 1440, App. This Court should apply the rules that exist, not create ones the Government wishes had been enacted.

B. Requiring IDREs to be subject to judicial review in limited circumstances will not jeopardize the IDR system.

With its legal arguments lacking heft, the Government next resorts to scare tactics, claiming that "suits such as this one present a significant threat

to the viability of the Act's IDR system." Doc. 58 at 22. The Government provides no evidence in support of this argument.

The Government—and Defendants—claim that allowing IDR entities to be sued at all in any circumstance under the NSA will cause the whole system to collapse. The Government asserts that lawsuits are "particularly cost-prohibitive when measured against an [IDR entity's] compensation for each dispute." *Id.* at 22-23. But given that IDR entities adjudicate tens of thousands of these disputes, resulting in tens of millions of dollars of revenue, it is reasonable to hold them accountable for particularly egregious conduct. The Government touts the specter of "exorbitant costs of potential discovery" yet cases like these will require nothing of the sort (and discovery is available from them whether IDR entities are a party or a nonparty). As the discovery requests previously submitted to this Court reflect, the scope of discovery for disputes such as these is relatively narrow. And given the fact Congress expressly permitted judicial review, discovery is appropriate here as it is in any other case.

That the IDR system is under strain, as the Government points out, is primarily because of its own misguided rules. For example, air ambulance pricing has two components – a base rate and a mileage charge. Rather than allowing an air ambulance provider to contest the payment made for a transport in one proceeding, the Government enacted a rule that mileage and

base rates must be filed as two separate proceedings (which could go to two different IDR entities for inconsistent decisions). This irrational rule doubled overnight the number of air ambulance disputes being filed. Of course, it also doubled the compensation of IDR entities for each transport.

As Plaintiffs shared with this Court during oral argument, Envision Healthcare filed for bankruptcy recently, citing as a reason for its financial distress the NSA and payors' abuse of the new system. As Envision explains:

> While the legislative policy behind the No Surprises Act is sound, the ***regulatory implementation of the No Surprises Act has been highly flawed***, ultimately shifting the power dynamic in payment disputes too far in the favor of insurance companies (referred to as "payors").

See Ex. B at 3-4 (excerpts from declaration, emphasis added). One of the regulatory flaws is failing to provide rules and requirements for rehearings when payors make misrepresentations to IDR entities and secure awards through undue means. The Government is silent on the practical problems created by the system it designed.

Holding IDR entities accountable in circumstances where they exceed their powers or issue an award premised on a misrepresentation will not break the system. Allowing participants in the system to remain above the law and evade judicial review, however, will.

Dated: May 26, 2023

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 26, 2023, a true and correct copy of the foregoing was served via the Court's ECF system on all counsel of record.

/s/ Adam Schramek
Adam Schramek

EXHIBIT A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

- - -

THE HONORABLE ALFRED H. BENNETT, JUDGE PRESIDING

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

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.

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.

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

EXHIBIT B

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	)	Chapter 11
	)	
ENVISION HEALTHCARE CORPORATION, *et al.*,[1]	)	Case No. 23-90342 (CML)
	)	
Debtors.	)	(Joint Administration Requested)

DECLARATION
OF PAUL KEGLEVIC,
CHIEF RESTRUCTURING OFFICER
OF ENVISION HEALTHCARE CORPORATION,
IN SUPPORT OF THE DEBTORS' CHAPTER 11 PETITIONS

I, Paul Keglevic, declare as follows under penalty of perjury that if called to testify, I would testify competently to the facts and opinions set forth in this declaration:

1. I am over the age of 18 and I am authorized to submit this declaration on behalf of the Debtors.

2. As a leading national medical group, Envision's core mission and focus is helping physicians deliver critical clinical care to patients in need.[2] Envision provides physician services to hospitals and health systems and serves as an operator of ambulatory surgical centers in partnership with physicians and other healthcare providers across the United States. Envision employs or partners with more than 21,000 clinicians, providing care to patients with nearly 30

[1] A complete list of each of the Debtors in these chapter 11 cases and the last four digits of their federal tax identification numbers may be obtained on the website of the Debtors' proposed claims and noticing agent at https://restructuring.ra.kroll.com/Envision. The Debtor's service address is 1A Burton Hills Boulevard, Nashville, Tennessee 37215.

[2] Envision Healthcare Corporation, a corporation organized under the laws of Delaware, is the parent company of the above-captioned debtors and debtors in possession (collectively, the "Debtors" and, together with Envision Healthcare Corporation's direct and indirect non-Debtor subsidiaries, the "Company" or "Envision").

risk, all putting incredible stress on the clinical teams. Simultaneously, outside of emergency medicine, Envision lost 65 to 70% of patient visits—and associated revenue—as the country moved to variations of shelter-in-place policies over several months. In 2020, the COVID-19 pandemic had a negative impact on revenues of approximately $1.1 billion and reduced EBITDA by approximately $415 million. COVID-19 continued to impact revenue in 2021, with a negative impact of approximately $380 million. Envision's need to focus on a response to the COVID-19 pandemic also delayed other operational initiatives, including the transformation and integration of operational infrastructure and other cost rationalization measures.

5. ***No Surprises Act, Regulatory implementation, and payor response.*** Envision has faced strong and unique regulatory headwinds. At the end of 2020, just as vaccines were being rolled out and the response to the pandemic became more controlled, Congress passed the No Surprises Act. The No Surprises Act ended the practice of "balance billing"—sometimes referred to as "surprise medical billing"—which is the practice of billing patients directly when health insurers underpay or refuse to pay the full cost of delivering care. Envision supported the patient protections in the No Surprises Act legislation and had previously ceased the practice of balance billing (before Congress passed the No Surprises Act). While the legislative policy behind the No Surprises Act is sound, the regulatory implementation of the No Surprises Act has been highly flawed, ultimately shifting the power dynamic in payment disputes too far in the favor of insurance companies (referred to as "payors"). In fact, some payors (including Envision's single largest payor) have used the No Surprises Act and its implementing regulations as an excuse to avoid payment to medical groups like Envision and affiliated entities. Moreover, payors have aggressively denied, delayed, and reduced payment terms, often below the direct cost of delivering care. This has left Envision, other medical groups, and healthcare providers to deal with the

negative financial consequences. Although the legislation included an arbitration process intended to provide a forum for providers and payors to settle disputes, the process has proved highly ineffective. Envision has taken steps to mitigate the effects of the flawed implementation of the No Surprises Act on its business—including by negotiating new contracts with certain payors and pursuing various arbitration and litigation-focused strategies—but like other similarly situated providers, Envision continues to suffer from payor tactics and activism in response to the No Surprises Act.

6. ***Payor Activism.*** Envision's largest payor has been uniquely aggressive in its behavior, reducing their total reimbursement by nearly 60% over the past five years, resulting in a revenue decline of more than $400 million. This payor's behavior is an outlier in the industry and has had a disproportionate impact on the business. They have reduced reimbursement by: (a) arbitrarily and unilaterally changing the terms of a contract by approximately $100 million in 2018; (b) leveraging their market power to extract approximately $100 million in additional rate reductions in 2019; (c) refusing to renew the in-network agreement at commercially reasonable rates and systematically denying payment on more than 35% of emergency medicine claims, resulting in approximately $50 million per year in denied payments since the beginning of 2021; and (d) underpaying on those claims they choose to pay by more than $200 million. Their payments are on average 40-50% below third-party benchmarks and well below the direct cost of delivering care. As evidence of their behavior, Envision was awarded $91 million by an independent arbitration panel for their underpayments in 2018 and is currently winning more than 80% of cases submitted to the federal arbitration panel. The payor is the only health insurer systematically underpaying to this degree, and their behavior impacts not only Envision but the entire healthcare industry.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: May 15, 2023

/s/ Paul Keglevic

Paul Keglevic
Chief Restructuring Officer
Envision Healthcare Corporation