UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

REACH AIR MEDICAL SERVICES LLC, CALSTAR AIR MEDICAL SERVICES, LLC and GUARDIAN FLIGHT, LLC	§ § §	
Plaintiffs	§ §	
	§	**Civil Action No. 4:22-CV-03979**
vs.	§ § §	
KAISER FOUNDATION HEALTH PLAN INC., and MEDICAL EVALUATORS OF TEXAS ASO, LLC	§ § § §	
Defendant	§ §	

DEFENDANT MEDICAL EVALUATORS OF TEXAS ASO, LLC'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND MOTION TO STRIKE DEMAND FOR ATTORNEY'S FEES

Pursuant to Fed. R. Civ. P. 12(b)(6), Defendant Medical Evaluators of Texas ASO, LLC (hereinafter "MET" or "Defendant"), by and through their undersigned counsel, files this Motion to Dismiss Plaintiff's Complaint, based on arbitrator's immunity and lack of Article III standing. Additionally, MET moves to strike Plaintiff's demand for attorney's fees, pursuant to Fed. R. Civ. P. 12(f).

SUMMARY

1. The "No Surprises Act" provides that a determination by an Independent Dispute Resolution ("IDR") award "shall be binding on the parties" and "shall not be subject to judicial review" except in certain circumstances. It allows for two exceptions to this rule. First, where a claim is fraudulent or there is evidence of misrepresentation of facts presented to the IDR entity involved in determining the claim. Second, an award may be set aside in any case that falls within

the scope of any of the paragraphs (1) through (4) of section 10(a) of Title 9—which is the Federal Arbitration Act. Significantly, there is no provision in the Act that permits a party unhappy with the result to sue the entity that makes the IDR determination. Yet that is precisely what is happening to IDR entities nationwide. Unhappy health care providers or insurers are suing IDR entities (along with the prevailing insurer or health care provider) seeking to redo the determination as well as an award of attorney's fees and costs. Needless to say, the pool of qualified IDR entities will rapidly shrink if this Court and the other courts facing this issue allow disappointed IDR participants to burden IDR entities with the cost of defending litigation,, ultimately undermining Congress' intent. The claims against Medical Evaluators of Texas, LLC ("MET") should be dismissed because (a) the Act does not permit such claims and (b) as an arbitrator, MET is immune from suit.

FACTUAL BACKGROUND

2. Plaintiffs filed this case to vacate six IDR awards made by Defendant MET pursuant to the No Surprises Act ("NSA"). 42 U.S.C. § 300gg-111(c)(5)(A). Defendant MET selected Defendant Kaiser Foundation Health Plan Inc.'s Qualifying Payment Amounts ("QPA") as the appropriate out-of-network payment for air ambulance transport.

Requirements of the No Surprises Act

3. The NSA became effective on January 1, 2022. It was implemented and is enforced by the U.S. Departments of Labor, Health and Human Services, and the Treasury (the "Departments"). Together, they issued interim and final rules to create an unprecedented, mandatory federal arbitration process to determine pricing for all out-of-network emergency air ambulance transports of patients who are covered by commercial insurance. As part of that federal arbitration process, the Departments created a list of approved IDR entities. MET is an approved

IDR entity headquartered in Houston, Texas. MET accepts IDR disputes under the NSA.

Requirements of the NSA

4. The NSA became effective on January 1, 2022. It was implemented and enforced by the U.S. Departments of Labor, Health and Human Services, and the Treasury (the "Departments"). Together, they issued interim and final rules to create an unprecedented, mandatory federal arbitration process to determine pricing for all out-of-network emergency air ambulance transports of patients who are covered by commercial insurance. As part of that federal arbitration process, the Departments created a list of approved IDR entities. MET is an approved IDR entity headquartered in Houston, Texas. MET accepts IDR disputes under the NSA.

Requirements of the QPA

5. The QPA represents the median rate for contracted in-network services. The QPA is defined in the NSA. The Departments published an Interim Rule that compelled IDR entities to apply a rebuttable presumption that the QPA was the appropriate out-of-network rate. Arbitrators were required to select the offer closest to QPA unless a provider overcame the presumption with credible evidence.

The Underlying case

6. Plaintiffs' claims stem from six different instances where Plaintiffs provided emergency transport to various facilities where Kaiser would cover the costs of said instances.

7. On January 17, 2022, an adult suffered a stroke while on a treadmill (the "Stroke Claim," DISP-27514). The patient was taken to a Kaiser hospital, where doctors found evidence of intracranial bleeding. Guardian provided critical emergency air transport, moving the patient from that hospital to a specialty Kaiser location that was equipped to provide a higher level of neurological care.

8. On February 6, 2022, three incidents occurred that involved transportation to Kaiser: A child fell from a ski lift, breaking a leg (the "Ski Lift Claim," DISP-27486). The child was flown seventy miles by a specialty transport team experienced in pediatric intensive care in a helicopter specially equipped for the journey.

9. An adult suffered serious injuries, including fractured ribs, from a rollover accident on an all-terrain vehicle (the "ATV Claim," DISP-29872). The patient was provided critical emergency air transport from one hospital to another, providing higher care.

10. Finally, an adult was injured on a motocross dirt bike in a remote part of a canyon (the "Motocross Claim," DISP-27490). The patient was picked up at the bottom of the canyon and transported seventy-seven miles by air to a Kaiser hospital for emergency care.

11. On February 8, 2022, an elderly patient was driving a tractor when it rolled over on its side, severely injuring the patient (the "Tractor Claim," DISP-29936). The patient was provided emergency air transport to a Kaiser hospital for treatment.

12. On February 22, 2022, a patient suffered a brain hemorrhage and was transported by ground to a hospital not equipped to provide the neurosurgical services needed (the "Hemorrhage Claim," DISP-32104). The patient was then transported by air two hundred and eight miles to a facility where the needed surgery was available.

13. Plaintiffs claim that in each one of the above instances that MET applied an illegal presumption in favor of Kaiser where Kaiser either failed to make disclosures or made disclosures that were inaccurate or that was not previously submitted.

14. MET is required to consider all the facts and circumstances of the payment dispute and select the offer that best represents the value of the services provided. MET has applied and complied with all rules and regulations outlined by the Departments and rendered each decision

as an impartial and neutral party.

ARGUMENT AND CITATION TO AUTHORITY
A. STANDARD FOR MOTION TO DISMISS

15. Rule 12(b)(6) authorizes dismissal of an action for "failure to state a claim upon which relief can be granted" if the plaintiff's complaint lacks "direct allegations on every material point necessary to sustain a recovery" or fails to "contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." FED.R.CIV. P. 12(b)(6); *Campbell v. San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995). Although a court is required to accept all well-pleaded facts as true, a court does not accept as true conclusory allegations, "unwarranted deductions of fact," or "legal conclusions masquerading as factual conclusions." *See, e.g.*, *Tuchman v. DSC Communications*, 14 F.3d 1061, 1067 (5th Cir. 1994). A claim must be dismissed if the claimant can prove no set of facts that would entitle it to relief. *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995). "The court is not required to 'conjure up unpled allegations or construe elaborately arcane scripts to' save a complaint." *Id.* For the reasons set forth in more detail below, Plaintiffs' claims should be dismissed because Plaintiffs have failed to state a claim upon which relief may be granted.

16. A court may grant a Motion to Dismiss for Failure to State a Claim without allowing the plaintiff an opportunity to amend if the defect cannot be cured by amendment or the plaintiff cannot prevail based on the facts alleged in the Complaint. *Clorox Co. P.R. v. Proctor & Gamble Commercial Co.,* 228 F.3d 24, 30-31 (1st Cir. 2000); *Smith v. Boyd,* 945 F.2d 1041, 1043 (8th Cir. 1991). The issue is not whether the plaintiff will ultimately prevail but whether the complaint contains enough factual material to raise a right to relief above the speculative level. *Renfro v. Unisys Corp.,* 671 F.3d 314, 320 (3d Cir. 2011); *see Skinner v. Switzer*, 562 U.S. 521, 529-30 (2011).

17. In deciding a motion to dismiss for a failure to state a claim, the court accepts as true all well-pled factual allegations in the complaint and views them in a light most favorable to the plaintiff. *Miccosukee Tribe of Indians of Fla. v. S. Everglades Restoration All.*, 304 F.3d 1076, 1084 (11th Cir. 2002). While a complaint does not need detailed factual allegations to survive a Rule 12(b)(6) motion to dismiss, a complaint must provide more than labels and conclusions. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007). A court is not required to accept legal conclusions on a motion to dismiss. *New England Cleaning Services, Inc. v. Am. Arbitration Ass'n,* 199 F.3d 542, 545 (1st Cir. 1999) (dismissing claim based or arbitral immunity); *Jason v. Am. Arbitration Ass'n, Inc.*, 62 Fed. Appx. 557 (5th Cir. 2003) (unpublished opinion) (dismissing case based on arbitral immunity for failure to state a claim).

18. A claim for lack of Article III standing implicates the court's subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). *Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc.,* 524 F.3d 1229, 1232 (11th Cir. 2008). Such motions can be facial attacks, looking only at the allegations of the complaint, or factual attacks based on material outside of the four corners of the complaint. *Id.* at 1233 – 34.

B. LEGISLATIVE HISTORY INTENDED FOR THE IDR ENTITIES TO ACT AS ARBITRATORS

19. The No Surprises Act (NSA) was designed to prohibit surprise billing in certain circumstances. Surprise billing occurs when an individual receives an unexpected bill after obtaining items or services from an out-of-network (OON) provider, facility, or provider of air ambulance services where the individual did not have the opportunity to select a provider, facility, or provider of air ambulance services covered by their health insurance network. The NSA achieves that goal by establishing an independent dispute resolution process under which disputing parties submit their claims to an Independent Dispute Resolution entity. 42 U.S. Code

§ 300gg-111(c)(5)(A).

20. Despite Plaintiffs' argument to the contrary, that process is arbitration. This conclusion is supported by the plain language of the NSA, legislative history of the NSA, the implementing agencies' own interpretation of the NSA, and case law interpreting the NSA.

21. The plain language of the NSA shows that the IDR process is arbitration. The NSA provides that an independent neutral entity shall, after submission from the insurer and provider, decide on the final payment amount. 42 U.S. Code § 300gg-111(c)(5). It further provides that the IDR determination is binding on the parties and may only be overturned where fraudulent or misrepresented claims was submitted to the IDR, or under the four circumstances in the Federal Arbitration Act where an arbitrator's award may be vacated. 42 U.S. Code § 300gg-111(c)(5)(e). It also provides for no judicial review. *Id*. These are all classic hallmarks of arbitration.

22. The legislative history supports the conclusion that the IDR process is arbitration. The Labor and Education Committee report on the No Surprises Act favorably compares the IDR process to arbitration:

> A key element of any solution to address surprise billing comprehensively is the payment rate, which is the amount that payers must remit to providers for out-of-network items and services. Two payment rate options have emerged as the predominant contenders to correct the market failure associated with surprise billing: (1) the benchmark rate model, and (2) the IDR process, also referred to as arbitration. Under a benchmark rate model, payments to providers for out-of-network items and services default to a pre-determined amount, such as a percentage of the Medicare rate (typically percent of Medicare) or the median contracted (in-network) rate in the geographic area where the service took place. In contrast, the IDR process is mediated by a third-party arbitrator, and legislation typically specifies guidance or criteria for the arbitrator to consider. A common approach is to use "baseball-style" arbitration, under which each side submits a price, and the arbitrator chooses one, with both sides bound by the decision.

H.R. REP. 116-615, 56 (Dec. 2, 2020), p. 56-57.

23. The implementing agencies also consider the IDR process to be "arbitration" as shown by the Rules they implemented. For example, the Rules require IDR's to provide documentation that their personnel have received arbitration training from the American Arbitration Association, American Health Law Association, or a similar entity. Requirements Related to Surprise Billing; Part II, 86 Fed. Reg. 55,980, 56,050 (Oct. 7, 2021), at pg. 55985. To be certified, entities must also demonstrate that they possess sufficient arbitral and health care claims experience. *Id*. at 56002. The implementing agencies, like Congress, state the Federal IDR process relies on "baseball style arbitration" and explain how it differs from other forms of arbitration. *Id*. at 56050. Discussing conflicts of interest, the agencies state, "Under these interim final rules, the party that initiates the Federal IDR process is suspended from taking the same party to arbitration for an item or service that is the same or similar item or service as the qualified IDR item or service already subject to a certified IDR entity's determination for 90 calendar days following a payment determination." *Id*. at 56053-56054. Finally, the implementing agencies state, "By prohibiting conflicts of interest, these interim final rules will help ensure that the selected certified IDR entity will take both parties into full consideration during arbitration and ensure that the resolution of the dispute is conducted fairly." *Id*. at 56054.

24. The U.S. District Courts for the Eastern District of Texas have twice referred to the IDR process as "arbitration." *See Texas Med. Ass'n v. United States Dep't of Health & Hum. Servs.*, 587 F. Supp. 3d 528 (E.D. Tex. 2022), appeal dismissed, No. 22-40264, 2022 WL 15174345 (5th Cir. Oct. 24, 2022); *LifeNet, Inc. v. United States Dep't of Health & Hum. Servs.*, No. 6:22-CV-162-JDK, 2022 WL 2959715 (E.D. Tex. July 26, 2022). For example, in *Texas Med. Ass'n*, the Court, discussing the NSA, stated, "The Rule governs the *arbitration process* for

resolving payment disputes between certain out-of-network providers and group health plans and health insurance issuers." *Texas Med. Ass'n*, 587 F. Supp. 3d at 533. Further discussing the NSA, the Court stated, "The *arbitrator's* selection of a payment amount is binding on the parties, and is not subject to judicial review, except under the circumstances described in the Federal Arbitration Act." *Id*. at 534. That Court further explained, "If Congress had wanted to restrict arbitrators' discretion and limit how they could consider the other factors, it would have said so—especially here, where Congress described the arbitration process in meticulous detail."

25. Likewise, in *LifeNet*, the Court said that the NSA "requires the provider and insurer each to submit a proposed payment amount and explanation to an arbitrator in a 'baseball-style' arbitration." *LifeNet*, No. 6:22-CV-162-JDK, 2022 WL 2959715 at *2. And, as in *Texas Med. Ass'n*, the Court held that "The arbitrator's selection of a payment amount is binding on the parties and is not subject to judicial review, except under the circumstances described in the Federal Arbitration Act." *Id*. at *3.

26. The overwhelming weight of these authorities shows the IDR process is arbitration. Plaintiffs' contention that Congress did not intend for the IDR entities to be considered as arbitrators is wholly erroneous. The No Surprises Act is a particular piece of legislation that focuses on the payment of air ambulance companies who cannot get paid because they are out-of-network. [W]here Congress creates a new statutory right, Congress has the authority to decide the method for the protection of that right. *In re Motors Liquidation Co.,* No. M-47 RPP, 2010 WL 4449425, at *5–6 (S.D.N.Y. Oct. 29, 2010). It is MET's contention that, based on the above, Congress intended for IDR entities such as MET to be arbitrators for this particular niche in the medical billing and payment process.

C. MET IS ENTITLED TO ARBITRATOR'S IMMUNITY

27. Plaintiffs' claims fail as to Defendant MET because it has long been accepted across most jurisdictions that arbitrators have immunity.

28. In recognition of the role of an arbitrator, federal common law has created arbitrator immunity to protect the judicial-like functions of an arbitrator. *See Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith*, 477 F.3d 1155, 1158 (10th Cir. 2007) (noting that every circuit that has considered arbitral immunity has recognized the doctrine); *Hawkins v. National Ass'n of Securities Dealers Inc.*, 149 F.3d 330, 332 (5th Cir.1998); *E. C. Ernst, Inc. v. Manhattan Const. Co. of Texas*, 551 F.2d 1026, 1033 (5th Cir. 1977) (The scope of his immunity should be no broader than this resemblance. The arbitrator "should be immune from liability only to the extent that his [or her] action is functionally judge-like."); *Hudnall v. Texas*, 2022 WL 3219423, *10 (W.D. Tex. Aug. 9, 2022); *Singleton v. Pittsburgh Bd. of Educ.*, 2012 WL 4069560, *7 (W.D. Pa. Aug. 13, 2012) (recommending the dismissal with prejudice of the claim against an arbitrator).

29. The rationale for arbitral immunity stems from sound policy considerations and the similarities of the role of an arbitrator and that of a judge. Decision-makers, such as arbitrators, should be free from bias or intimidation from a potential lawsuit by a disgruntled litigant. *See Pfannenstiel*, 477 F.3d at 1159 (citing *Butz v. Economou*, 438 U.S. 478, 508-511 (1978)); *New England Cleaning Serv.,* 199 F.3d 542, 545 (1st Cir. 1999) (holding that arbitral immunity "is essential to protect decision-makers from undue influence and the process from reprisals by dissatisfied litigants."). "If [arbitrators'] decisions can thereafter be questioned in suits brought against them by either party, there is a real possibility that their decisions will be governed more by the fear of such suits than by their own unfettered judgment as to the merits of the matter they must decide." *Lundgren v. Freeman,* 307 F.2d 104, 117 (9th Cir. 1962).

30. With these policy decisions in mind, the courts have crafted a simple test to

determine if the decision-maker is cloaked with immunity: does the plaintiff seek to challenge the "decisional act of an arbitrator?" If so, then immunity applies. *See Pfannenstiel*, 477 F.3d at 1159. *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435-36 (1993) ("the 'touchstone' for the doctrine's applicability has been performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights.").

31. Here, Plaintiffs seek to vacate the arbitration award based on MET's consideration of the QPAs submitted by Kaiser, which Plaintiffs contend should have been rejected. There is no evidence outlined in Plaintiffs' complaint that suggests that the arbitrator acted outside the scope of its duties. It was provided with a QPA from all parties; it evaluated said QPAs based on the factors determined by the Departments and rendered a decision based on those factors. There was no way for the arbitrator to know whether the information provided by Kaiser was incorrect, misconstrued, or skewed in any way. The process for determining the QPA is very straight forward and although there may be room for human error, Plaintiffs have not shown where the process used by MET was flawed or how the misrepresentations outlined in Plaintiffs' Complaint can be attributed to MET. Based upon the above case law, immunity applies and thus the Court should dismiss this case as to MET based on its immunity.

32. Plaintiffs cite a case out of the Eastern District of Texas which states: "Accordingly, [...] the Court holds that the Rule conflicts with the Act and must be set aside under the APA. The Act unambiguously provides that arbitrators in an air ambulance IDR "shall consider" the QPA and several additional "circumstances." Nothing in the Act instructs arbitrators to weigh any one factor or circumstance more heavily than the others. Yet, the Rule requires arbitrators to "select the offer closest to the [QPA]" unless "credible" information, including information supporting the "additional factors," "clearly demonstrate[s] that the [QPA] is materially different

from the appropriate out-of-network rate." The Rule thus "places its thumb on the scale for the QPA, requiring arbitrators to presume the correctness of the QPA and then imposing a heightened burden on the remaining statutory factors to overcome that presumption." Because the Rule "rewrites clear statutory terms," it must be "h[e]ld unlawful and set aside" for this reason alone." *See Lifenet Inc. v. U.S. Dept. of Health & Human Servs., et al.,* No. 6:22-cv00162-JDK, 2022 WL 2959715 at *10 (E.D. Tex., June 26, 2022).

33. However, a problem with the *Lifenet* case is that it ignores the fact that since the Plaintiff is challenging the arbitrator's decision, the arbitrator has immunity. The Fifth Circuit has held that arbitrators have immunity and has defined the scope of that immunity. *See E. C. Ernst, Inc. v. Manhattan Const. Co. of Texas*, 551 F.2d 1026, 1033 (5th Cir. 1977) (The scope of his immunity should be no broader than this resemblance. The arbitrator "should be immune from liability only to the extent that his [or her] action is functionally judge-like."). This is an extremely broad immunity standard and absent any act by the arbitrator that exceeds their "judge-like" function, arbitrator immunity should be upheld.

34. Additionally, arbitrators are not required to form an opinion as to whether the QPA is accurate. The Departments have outlined in the Federal Independent Dispute Process Guidance for Certified IDR Entities that "It is not the role of the certified IDR entity to determine whether the QPA has been calculated correctly by the plan, make determinations of medical necessity, or to review denials of coverage." Remember, the arbitrator's role is to remain neutral. Defendant MET had no way of knowing whether Kaiser's QPA was skewed in their favor. They are obligated to choose the closest QPA out of the parties involved.

35. An additional issue with the *Lifenet* case is that it is not binding on this district. This Court is not required to take the *Lifenet* case under advisement when determining the QPA. Based

on the foregoing arguments, Plaintiffs' case should be dismissed as to Defendant MET based on its true nature, a challenge of the decision and the arbitrator's immunity.

D. FAILS TO MEET ONE OF THE STANDARDS TO SET ASIDE ARBITRAION UNDER 9 USC 10.

36. Plaintiffs allege that the arbitration award rendered by MET should be vacated; however, Plaintiffs fail to meet any of the requirements to set aside arbitration.

37. Under 9 USC 10 concerning arbitration: (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause 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
>
> (4) 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.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

See Burchell v. Marsh, 58 U.S. 344, 351 (1854); *Karthaus v. Ferrer*, 26 U.S. 222, 228 (1858); *Carnochan v. Christie*, 24 U.S. 446, 460-67 (1826).

38. In the instant case, Plaintiffs have not specifically alleged any corruption, fraud, or

undue means because Plaintiffs failed to plead fraud in their Complaint. Plaintiffs have failed to allege that the arbitrator's conduct was not impartial in using the QPA from Kaiser. Plaintiffs have not alleged any facts that suggest that either party involved wanted to postpone or delay the proceeding due to the QPA presented by Kaiser. Additionally, Plaintiffs have not alleged any facts that the arbitrator exceeded its powers such that a mutual, final, and definite award could not be made.. Therefore, there are no facts alleged by Plaintiffs that would lead anyone to believe that Defendant MET committed any act prohibited by the statute that would warrant the setting aside of the arbitration award.

D. FRAUD MUST BE PLEADED WITH SPECIFICITY UNDER RULE 9

39. The Court should dismiss Plaintiffs' Complaint because their Complaint fails to plead any cause of action with specificity, much less the cause of action for fraud. FED. R. CIV. P. Rule 9(b)'s heightened requirement of pleading with particularity is the default standard for fraud-based claims. *Alpert v. Riley,* 2009 U.S. Dist. LEXIS 36615, *9 (N.D. Tex. 2009).

40. Most of Plaintiffs' predicate acts are, at their core, allegations of fraudulent behavior by Defendants. Because all of these allegations are fundamentally grounded in fraud, "rule 9(b) applies and the predicate acts alleged must be plead with particularity." *Walsh v. America's Tele-Network Corp.,* 195 F. Supp. 2d 840, 846 (E.D. Tex. 2002) (citing *Williams v. WMX Techs., Inc.,* 112 F.3d 175, 177 (5th Cir. 1997)); FED.R.CIV. P. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."). Underpinning the heightened pleading requirement for fraud claims is the federal courts' determination that "defendants are not required to guess what statements were made in connection with a plaintiff's claim and how and why they are fraudulent." *Allstate Insurance Company v. Benhamou,* 190 F. Supp. 3d 631, 658 (S.D. Tex. 2016). Thus, Plaintiffs' fraud

allegations must specifically refer to the "time, place, and contents of the false representations, as well as the identity of the person making the representation and what the person obtained thereby." *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.,* 975 F.2d 1134, 1138 (5th Cir. 1992); *Skidmore Energy, Inc. v. KPMG LLP,* No. 3:03-CV-2138-B, 2004 WL 3019097, at *3 (N.D. Tex. Dec. 28, 2004).

41. Under the Federal Arbitration Association, a party who alleges that an arbitration award was procured through fraud or undue means must demonstrate that the improper behavior was (1) not discoverable by due diligence before or during the arbitration hearing, (2) materially related to an issue in the arbitration, and (3) established by clear and convincing evidence. *See Matter of Arbitration between Trans Chemical Ltd. And China Nat. Machinery Import and Export Corp.,* 978 F. Supp. 266, 304 (S.D. Tex. 1997). (citing *Gingiss Int'l, Inc. V. Bormet*, 58 F.3d 328, 333 (7th Cir. 1995); *A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1404 (9th Cir. 1992). Fraud requires a showing of bad faith during the arbitration proceedings, such as bribery, undisclosed bias of the arbitrator, or willfully destroying or withholding evidence. *See United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 597 (1960).

42. Here, Plaintiffs have alleged there were misrepresentations made by Kaiser that led to Defendant MET's use of Kaiser's application of the QPA. Plaintiffs' contentions suggest a claim for fraud; however, Plaintiffs have failed to specify fraud as a cause of action in their complaint. Plaintiffs are required to show that Defendant MET could have discovered the fraud by due diligence and failed to employ that due diligence out of a bad faith profit motive. As previously mentioned, Defendant MET had no way of knowing that the QPA submitted was done in bad faith. Plaintiffs have alleged no facts in their Complaint that Defendant MET acted in bad faith by using the QPA received from Defendant Kaiser.

III. **PRAYER**

WHEREFORE PREMISES CONSIDERED, MET respectfully prays the Court to dismiss all of Plaintiffs' claims asserted against it with prejudice; or, alternatively, that the Court strike Plaintiffs' claims and award Defendant MET attorney's fees and any and all other relief that Defendant MET may be entitled to.

Respectfully submitted,

THE VETHAN LAW FIRM, PC

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ATTORNEYS FOR DEFENDANT
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed electronically on January 26, 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/ *Joseph L. Lanza*
Joseph L. Lanza