**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

| | | |
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| REACH AIR MEDICAL SERVICES LLC, CALSTAR AIR MEDICAL SERVICES, LLC and GUARDIAN FLIGHT, LLC, | § | |
| Plaintiffs, | § | |
| v. | § | CIVIL ACTION NO. 4:22-cv-03979 |
| KAISER FOUNDATION HEALTH PLAN INC., and MEDICAL EVALUATORS OF TEXAS ASO, LLC, | § | |
| Defendants. | § | |

**PLAINTIFFS' RESPONSE TO DEFENDANT**
**KAISER FOUNDATION HEALTH PLAN, INC.'S**
**MOTION TO DISALLOW DISCOVERY, OR FOR A STAY**
**OF DISCOVERY PENDING RESOLUTION OF THE MOTIONS TO DISMISS**

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## STATEMENT OF THE NATURE OF THE CASE AND STAGE OF THE PROCEEDINGS

Plaintiffs REACH Air Medical Services LLC ("REACH"), CALSTAR Air Medical Services, LLC ("CALSTAR"), and Guardian Flight, LLC ("Guardian") (collectively "Plaintiffs") filed a complaint to vacate six IDR awards and request rehearings. Doc. 1.

Defendants Kaiser Foundation Health Plan Inc. ("Kaiser") and Medical Evaluators of Texas, ASO LLC ("MET") moved to dismiss. Docs. 24, 25. Plaintiffs filed response briefing to those motions. Docs. 27, 28. The parties submitted their 26(f) Joint Discovery Order and Case Management Plan on January 5, 2023. Doc. 13. On January 17, 2023, Magistrate Judge Sam Sheldon conducted the initial pretrial and scheduling conference, during which the Defendants failed to mention staying discovery. That same day, Magistrate Judge Sheldon entered a scheduling order containing expert and discovery deadlines. Doc. 22. On January 25, 2023, Plaintiffs served their first set of discovery requests. Chang Decl., Exhibits A, B. On February 24, 2023, hours before their objections and responses to Plaintiffs' first set of discovery were due, Kaiser filed this Motion to Disallow, or Alternatively, Stay Discovery. Doc. 29. On that same day, it served its responses and objections to Plaintiffs' discovery. Chang Decl., Exhibits. C, D.

## PLAINTIFFS' STATEMENT OF THE ISSUES

Whether Kaiser has shown good cause to disallow or stay discovery?

## SUMMARY OF ARGUMENT

Kaiser could have asked this Court to stay discovery at the parties' initial pretrial and scheduling conference. It failed to do so, and Magistrate Judge Sheldon entered a scheduling order after considering the parties' positions in the Joint Discovery Order and Case Management Plan, opening discovery. Having failed to raise the issue in the first instance, Kaiser now seeks to avoid producing the information and documents central to this suit, including by filing this Motion and

by asserting boilerplate, meritless discovery responses and objections to Plaintiffs' narrow requests.

Kaiser's discovery games reflect its stated tactic that discovery—and judicial review—are not allowed under the No Surprises Act. In the name of "efficiency" and "finality," Kaiser claims that this Court has no right to see the evidence—or even review Kaiser's conduct. In support, Kaiser offers a flawed reading of the NSA, mischaracterizes parallel proceedings in the Middle District of Florida, and misstates the law. Simply, Kaiser's extraordinary request to disallow discovery has no basis in law or fact.

Kaiser starts by attempting to reverse the burden of proof by stating the wrong legal standard. Under the Federal Rules of Civil Procedure, it is not Plaintiffs' burden to establish that discovery is warranted, but the Defendant's burden to show good cause to justify a stay. Without good cause, the default is for discovery to proceed. Kaiser also argues that discovery should be disallowed because the information sought is both nondiscoverable and would contravene the limits of the Federal Arbitration Act ("FAA"). But the NSA incorporates only a small piece of the FAA, and confidentiality concerns can be addressed through a protective order.

Kaiser asks in the alternative that this Court stay discovery, but fails to establish particular and specific facts amounting to good cause. First, Kaiser makes much of Plaintiffs' efforts to redact confidential information from public disclosure, equating it to Kaiser's attempt to entirely evade discovery. But Plaintiffs' motion to redact only prevents the information from being disclosed to the public, and parties and this court are still privy to that information. Second, Kaiser raises exaggerated fears of wasting party and judicial resources. Had Kaiser truly wished to prioritize judicial economy, it would not have waited until the eleventh hour to file this Motion,

nor would it have asserted objectively baseless, boilerplate responses and objections to Plaintiffs' narrowly tailored requests.

Kaiser has stated its intent to evade discovery and judicial review under the NSA. This Court should not allow it to do so, and this Motion should be denied.

## LEGAL STANDARD

A party seeking to disallow or stay discovery bears the burden of showing good cause. FED. R. CIV. P. 26(c). While discovery may be stayed pending the outcome of a motion to dismiss, "the issuance of [a] stay is by no means automatic." *Mcpeters v. Lexisnexis*, 2011 WL 13253446, at *1 (S.D. Tex. Oct. 5, 2011) (internal quotations omitted). "'The burden is upon the movant to show the necessity of [a stay], which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements.'" *In re Terra Int'l, Inc.*, 134 F.3d 302, 306 (5th Cir. 1998) (quoting *United States v. Garrett*, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978)). Three factors are considered when determining whether good cause exists for a stay of discovery: 1) the strength of the dispositive motion; 2) the breadth of the discovery sought; (3) the burden of responding to such discovery. *See Mcpeters*, 2011 WL 13253446, at *1.

## ARGUMENT AND AUTHORITIES

### I. The Information Plaintiffs Seek is Relevant, Discoverable, and Narrowly Tailored.

Kaiser first argues that discovery should be completely disallowed because "discovery is not proper because the documents and information Plaintiffs seek are not discoverable in IDR proceedings." Doc. 29 at 11. But discovery in litigation is broader than under IDR proceedings, and the information Plaintiffs seek is relevant, discoverable, and narrowly tailored.

Kaiser's asks this Court to disallow discovery entirely because the information Plaintiffs seek is confidential, and because such information is "nondiscoverable" in the IDR process, it should also be undiscoverable here. *Id*. But this is not an IDR proceeding. Plaintiffs were forced

to file suit to seek judicial review of IDR awards ***because*** it had no forum to do so under the NSA and no avenue through which to obtain discovery. Common sense dictates that discovery in a case seeking judicial review of an IDR award must be broader than what is permitted as part of the IDR process—otherwise, judicial review under the NSA would be meaningless. 42 U.S.C. § 300gg-lll(c)(5)(E)(i)(I-II). When a plaintiff alleges that an IDR award was procured through the fraudulent calculation of a statutorily mandated amount—the Qualifying Payment Amount ("QPA"), in this case—a court must be able to determine whether that amount was calculated correctly. And when a plaintiff alleges that an IDR award was granted as the result of applying an illegal standard, the court must know basic facts about the determination, such as who made the IDR determination, and what their qualifications are.

That is the type of information Plaintiffs seek in discovery. For instance, Plaintiffs wish to know the identities of the MET individuals who made the IDR determinations here, as well as their qualifications. Chang Decl., Ex. B at 5. Plaintiffs also wish to know how Kaiser calculated its purported QPA. Chang Decl., Ex. at A at 5. As alleged, for each of the IDR disputes at issue, Kaiser submitted a QPA to MET, and a different QPA to Plaintiffs. This alone is grounds for vacatur, as the QPAs submitted should have been identical. The discovery Plaintiffs seek would present minimal burden, as nearly all of the documents sought can be easily located in email exchanges between MET and Kaiser. Plaintiffs' requests were specifically drafted such that Defendants could collect and produce documents on a go-get basis, and would not need to conduct a lengthy review of documents.

In response to Plaintiffs' requests, Kaiser has wholesale refused to produce any documents, instead repeating the same baseless objections to each request, including that Plaintiffs' requests seek "documents that are not relevant to any parties' claims or defenses, nor proportional to the

needs of the case," and that Plaintiffs "seek[] to impose on Kaiser the burden of proving Plaintiffs' claims and defenses." Chang Dec., Ex. C at 4, 6; Ex. D at 7, 8, 10.[1]

To justify its refusal, Kaiser also tries to recast Plaintiffs' efforts to redact its confidential IDR win-rate ***from the public*** as grounds to disallow discovery. Kaiser claims that Plaintiffs "***admit*** that IDRs involve "'confidential and proprietary internal business information' that is 'competitively sensitive' and 'commercially valuable when negotiating network agreements or making investment decisions in their IDR processes'—which Plaintiffs' affiliates liken to a 'trade secret.'" Doc. 29 at 6. Not so.

First, to address the obvious, a motion to redact simply prevents the public from seeing confidential information. The parties are still privy to what has been redacted. Second, the information Plaintiffs sought to redact—specifically its calendar year 2022 results of all IDR proceedings across the country—is not relevant to this lawsuit, has nothing to do with the specific IDR disputes at issue, and is competitively sensitive. Here, some of the information Plaintiffs seek in discovery is plainly not competitively sensitive, such as the identities of MET individuals and their qualifications. Other information, such as how Kaiser calculates its purported QPAs, would be covered by protective order.

And Kaiser cannot articulate why a protective order would not adequately preserve confidentiality here the same way protective orders do in nearly all litigation requiring the disclosure of sensitive commercial information. Its sole argument is that "a protective order limiting discovery to attorney's eyes only will not safeguard this confidential information, because

[1] To further highlight Kaiser's discovery games, Kaiser filed this Motion on the very same day it served its objections and responses. Had Kaiser truly been concerned about the disclosure of confidential information as it claims, it could have (1) raised the issue of a stay at the initial pre-trial conference; (2) filed a motion to stay discovery at any point before discovery was served; or (3) filed a motion to stay at any point before its discovery responses and objections were due, instead of waiting the full thirty days.

Plaintiffs' counsel—who represents Plaintiffs and their affiliates in all five of the parallel lawsuit filed by Plaintiffs and their affiliates—participates in the IDR submission process," which somehow would "enable Plaintiffs to gain an unfair advantage in IDRs." Doc. 29 at 6. To be clear—one of the key allegations is that Kaiser fraudulently calculated its QPA, because under the NSA, payors are required to follow a statutorily mandated calculation. In other words, Kaiser argues that Plaintiffs are gaining "an unfair advantage in IDRs" ***by attempting to verify whether Kaiser is following the rules***.

This logic simply does not hold up. Payors such as Kaiser are statutorily required to disclose the QPA as part of the Open Negotiation Period between the parties. That same QPA is supposed to be submitted to the IDR entity should negotiations fail. ***How*** a payor calculates the QPA should not affect negotiation strategy, which largely depends on ***what*** amount the QPA is, particularly when the calculation should be consistent with federal law. Kaiser does not explain how ensuring that the QPA is calculated correctly would "add significant value to Plaintiffs' own confidential IDR submissions." *Id.* at 12. Perhaps more importantly, Kaiser's argument does not make any sense given the fact both parties' IDR submissions will be subject to confidential discovery. Any theoretical "advantage" Plaintiffs could obtain from seeing Kaiser's submission is neutralized because Kaiser will see Plaintiff's submission.

Case law and practice in federal courts across the country make plain that disclosure of potentially sensitive information is addressed through protective orders and not through a blanket prohibition on discovery. *See Baxter v. Louisiana*, 2022 WL 1509118, at *2 (M.D. La. May 12, 2022) (denying defendant's motion to stay, and rejecting its argument that the "information sought is of a sensitive nature that should not be subject to disclosure" because it could not "expand on

the burden such disclosure would actually impose."). For these reasons, this Court should deny Kaiser's motion and the extraordinary remedy it seeks.

## II. No Authority Supports Disallowing Discovery In a Proceeding Challenging an IDR Award Under the NSA

Kaiser asks this Court for extraordinary relief, but cannot point to any authority in support. Simply, there is no case law disallowing discovery in a challenge to an IDR award under the NSA. Kaisers' request is unwarranted and unsupported, and this Court should deny the Motion.

Kaiser argues that "disallowing discovery is consistent with the strict limits that apply when a party challenges an arbitration award under the FAA." Doc. 29 at 12. But Plaintiffs do not seek judicial review under the FAA. Rather, Plaintiffs seek review under the NSA, which incorporates only the grounds for vacatur under the FAA, and nothing else. As more extensively briefed in its Response to Kaiser's Motion to Dismiss, Doc. 28 at 12, the policy rationale for voluntary arbitrations under the FAA does not apply to IDR proceedings. The FAA only applies to agreements between parties that involve interstate commerce or maritime activities. 9 U.S.C. § 2; *see also Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 273-274 (1995). There is no such agreement here. And as Judge Corrigan recognized, challenges to IDR awards are very different from challenges to typical private-party arbitrations. At the parties' initial pretrial conference, Judge Corrigan reviewed one of the contested IDR decisions, noting that its lack of reasoning or citation to evidence would make it impossible for him to conduct a review under the FAA. Chang Decl., Ex. E at 18:20-25, 19:1-15 and 21-24. In other words, to determine whether illegal or improper conduct occurred or not, discovery would be required.

Even under FAA motion practice, this Court may allow discovery to support a plaintiff's claims, including arbitrator depositions, where the facts warrant it. *See, e.g., University Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1339 (11th Cir. 2002); *Hoeft v. MVL*

*Grp., Inc.*, 343 F.3d 57, 66-67 (2d Cir. 2003). *Vantage Deepwater Co.*, which Kaiser cites as "instructive," expressly acknowledges this.[2] *Vantage Deepwater Company v. Petrobras Am., Inc.*, 966 F.3d 361, 372 (5th Cir. 2020) ("District Courts occasionally allow discovery in vacatur and confirmation proceedings.").

To date, Plaintiffs have not been allowed any of the discovery that parties are routinely allowed in voluntary arbitration proceedings. *See* AHLA Rule 5.5 (Arbitrators "should permit discovery that is relevant to the claims and defenses at issue and is necessary for the fair resolution of a claim"). And Plaintiffs only learned of Kaiser's misrepresentations by sheer chance because MET quoted different QPAs to Plaintiffs than the ones they were provided. Plaintiffs should be allowed discovery in support of their challenge before the Court rules on it.

As a separate consideration, allowing Kaiser to wholly escape discovery would present dire consequences from a due process perspective. Without discovery, Kaiser and other payors could continue to make misrepresentations in IDR proceedings, leaving courts powerless to provide meaningful judicial review, as is required by the NSA. Payors like Kaiser would be empowered to continue submitting different QPAs to IDR entities than the QPAs it submits to providers, perverting the intended purpose of the NSA, which relies on the exchange of correctly calculated, truthful offers of payment.

Finally, Kaiser's case citations do not support the proposition of disallowing discovery completely in NSA proceedings. In fact, the cases cited by Kaiser all acknowledge that discovery may be allowed under the FAA. *See also* FED. R. CIV. P. 81(a)(6)(B) ("(6) These rules, to the extent applicable, govern proceedings under the following laws[]. . . (B) 9. U.S.C., relating to

[2] As explained above and in Plaintiffs' motion to dismiss briefing, FAA case law does not control because the NSA incorporates only the FAA's grounds for vacatur, and judicial review under the NSA must be broader than what is allowed under the FAA.

arbitration"). Further, the Fifth Circuit has not instituted "strict limits" to discovery in FAA proceedings as Kaiser suggests. Doc. 29 at 12. Rather, the Fifth Circuit has advised courts to take a flexible and practical approach to allowing discovery in challenges under the statute. *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 305 (5th Cir. 2004) (in assessing discovery requests in actions under the FAA "the court must weigh the asserted need for hitherto undisclosed information and assess the impact of granting such discovery on the arbitral process. The inquiry is an entirely practical one. . . " (internal quotations and citations omitted)); *see also Hoeft v. MVL Grp., Inc*., 343 F.3d 57, 66-67 (2d Cir. 2003); *Salzgitter Mannesmann International (USA) Inc. v. Sun Steel Co. LLC*, 2022 WL 3041134, at *1 (S.D. Tex. Aug. 2, 2022). Even if Kaiser were correct that some of its information warrants protection or that other information is not relevant, the appropriate remedy would not be to disallow discovery completely, but to provide for appropriate protections and limit the scope of discovery accordingly.

## III. Kaiser Has Failed to Meet Its Burden Showing Good Cause to Warrant a Stay.

In its haste to avoid Plaintiffs' narrow discovery requests, Kaiser proclaims that "[t]he party seeking the discovery bears the burden of demonstrating its necessity." Doc. 29 at 11. Not so. As the party seeking a stay of discovery, Kaiser bears the burden of proof. *In re Terra Int'l, Inc.*, 134 F.3d at 306. A stay of discovery is the exception and not the rule. *Ford Motor Co. v. U.S. Auto Club, Motoring Div., Inc.*, 2008 WL 2038887, at *1 (N.D. Tex. Apr. 24, 2008). Contrary to Kaiser's assertions, the default is for discovery to proceed. *See* FED. R. CIV. P. 26(c). Kaiser fails to meet its burden to show good cause, and so discovery should proceed as normal.

Kaiser first argues that judicial resources can be conserved by staying discovery until after the pending motions to dismiss are resolved. Doc. 29 at 14. But if that were paramount, the Federal Rules would provide that discovery be stayed automatically whenever a motion to

dismissed is filed. That is obviously not the case. *See Yeti Coolers, LLC v. Magnum Solace, LLC*, 2016 WL 10571903, at *1 (W.D. Tex. Oct. 19, 2016) ("[h]ad the Federal Rules contemplated that a motion to dismiss under Fed. R. Civ. Pro. 12(b)(6) would stay discovery, the Rules would contain a provision to that effect. In fact, such a notion is directly at odds with the need for expeditious resolution of litigation") (internal citations and quotations omitted); *see also Ford Motor Co.*, 2008 WL 2038887, at *1 (declining to stay discovery "merely because defendant ***believe[d]*** it [would] prevail on its motion to dismiss.") (emphasis added); *Glazer's Wholesale Drug Co., Inc. v. Klein Foods, Inc.*, 2008 WL 2930482, at *2 (N.D. Tex. Jul. 23, 2008) (declining to stay discovery when the parties "are more sophisticated and the grounds for dismissal less clear cut.").

But more to the point, had Kaiser cared so much about "judicial economy" and conserving resources, it would have raised staying discovery at the parties' initial pretrial conference, rather than waiting until the very last day of a discovery deadline to file this Motion. And it would not have asserted objectively baseless, boilerplate objections and responses to Plaintiffs' discovery requests, as it has. Chang Decl., Ex. C, Ex. D. Instead, the parties are now engaged in the very slog of discovery that Plaintiffs' narrowly tailored discovery requests were designed to avoid. Kaiser's appeal to judicial economy and efficiency rings hollow, and it has not shown good cause to stay discovery.

Kaiser's other argument in support of staying discovery relies on Judge Corrigan's order in a similar proceeding in the Middle District of Florida. Doc. 29 at 14-15. That Judge Corrigan decided to stay discovery pending his decision on a motion to dismiss bears no relevance to this proceeding. In Florida, defendants—***including Kaiser***—objected to discovery at the initial case conference, the court considered the parties' arguments, and then decided not to enter a scheduling order while it considered the motions to dismiss. Here, Kaiser participated in the initial case

conference and failed to object to the scheduling order entered, including expert and discovery deadlines.

While the Florida lawsuits are unrelated to this case, another case in this District is related, however. On March 3, 2023, Judge Alfred Bennett conducted an initial pretrial conference for *Guardian Flight, LLC v. Aetna Health, Inc.* and *Medical Evaluators of Texas ASO, LLC*, 4:22-CV-3805, filed in the Southern District of Texas as a related case.[3] At the end of the hearing, in response to Defendant Aetna's request for clarification regarding whether discovery was to move forward, he clarified that "[t]here will be no discovery as to Medical Evaluators of Texas, or information submitted to Medical Evaluators of Texas. ***Other discovery may go forward.***" Chang Decl., Ex. F at 19:19-22 (emphasis added). As Judge Bennett correctly observed, "[t]he default is that discovery is allowed," with courts granting a stay of discovery only where facts "make the Rules of Federal Procedure inoperative . . . such that discovery should not be allowed." *Id.* at 13:20-24. Evidently, the facts in that case did not merit a stay, nor do they warrant one here.

Ultimately, in assessing whether Kaiser has shown good cause to stay discovery, this Court is not bound by either Judge Corrigan's ruling in the Middle District of Florida or Judge Bennett's decision in this District. But the Court should consider 1) the strength of the dispositive motion; 2) the breadth of the discovery sought; (3) the burden of responding to such discovery. As explained above, the discovery that Plaintiffs seek is narrow, discrete, and would not impose a significant burden on Kaiser. And as explained in Plaintiffs' response in opposition to Kaiser's motion to dismiss, Kaiser's motion to dismiss is weak, as Plaintiffs have properly stated a claim under the Federal Rules of Civil Procedure.

[3] Plaintiff Guardian Flight moved to consolidate this case with *Guardian v. Aetna* on March 13, 2023. A courtesy copy of the filing was provided to the Court on the same day.

Having failed to raise the issue at the initial pretrial conference, Kaiser now seeks to evade discovery altogether. It cannot be allowed to do so. *See Datskow v. Teledyne*, 899 F.2d 1298, 1303 (2d Cir. 1990) (finding that, even though faulty service-of process defense was asserted in timely answer, the defendant ***waived objection*** by participating in scheduling discovery and motion practice and attending conference with the magistrate). Indeed, under the schedule to which Kaiser agreed, Plaintiffs have a four-month period to conduct discovery before its expert witness disclosures are due. To carry its burden of proof that Kaiser misrepresented its QPA, Plaintiffs anticipate having an expert witness calculate its real QPA for the transports. Plaintiffs clearly will be unable to do that without discovery. As explained in response to Defendants Motions to Dismiss, the detailed factual information relating to Kaiser's fraudulent representation is solely within Kaiser's possession—a fact Kaiser knows well. Without the limited discovery Plaintiffs have served on Defendants, this Court will be unable to assess whether Kaiser has, in fact, fraudulently calculated its QPA, and Kaiser will be, as it hopes, effectively immune from any attempts to stop it from doing so on any or all of its future QPA calculations. This Court can address Kaiser's confidentiality concerns with a protective order, and should deny Kaiser's motion so that this case can be effectively adjudicated on its merits.

## CONCLUSION

For these reasons, Plaintiffs ask that this Court deny Kaiser's Motion to Disallow Discovery, or Alternatively, Stay Discovery Pending the Resolution of Defendants' Motion to Dismiss.

Dated: March 17, 2023

Respectfully submitted,

NORTON ROSE FULBRIGHT US LLP

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*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

I certify that on March 17, 2023, a true and correct copy of the foregoing was served via the Court's ECF system on all counsel of record.

*/s/ Adam T. Schramek*
Adam T. Schramek

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

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|---|---|---|
| REACH AIR MEDICAL SERVICES LLC, CALSTAR AIR MEDICAL SERVICES, LLC and GUARDIAN FLIGHT, LLC,<br><br>Plaintiffs,<br><br>v.<br><br>KAISER FOUNDATION HEALTH PLAN INC., and MEDICAL EVALUATORS OF TEXAS ASO, LLC,<br><br>Defendants. | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | CIVIL ACTION NO. 4:22-cv-03979 |

**DECLARATION OF ABRAHAM CHANG**

1. My name is Abraham Chang and I am an attorney duly admitted to practice before this Court. I am a senior associate with Norton Rose Fulbright US LLP, which is representing Plaintiffs REACH Air Medical Services LLC ("REACH"), CALSTAR Air Medical Services, LLC ("CALSTAR"), and Guardian Flight, LLC ("Guardian Flight") in the above captioned proceeding, for which I am counsel of record. I have personal knowledge of the facts set forth herein, unless stated on information and belief, and if called upon to testify to those facts, I could and would competently do so.

2. I attest that Exhibit A is a true and correct copy of the interrogatories and requests for production issued to Kaiser on January 25, 2023.

3. I attest that Exhibit B is a true and correct copy of the interrogatories and requests for production issued to MET on January 25, 2023.

4. I attest that Exhibit C is a true and correct copy of Kaiser's response and objections to Plaintiffs' January 25, 2023 interrogatories.

5. I attest that Exhibit D is a true and correct copy of Kaiser's response and objections to Plaintiffs' January 25, 2023 requests for production.

6. I attest that Exhibit E is a true and correct copy of the redacted transcript from Judge Timothy Corrigan's joint telephonic preliminary pretrial conference held on January 17, 2023 in the Middle District of Florida in the following captioned cases: *Med-Trans Corporation v. Capital Health Plan, Inc.* and *C2C Innovative Solutions, Inc.*, 3:22-cv-1077; *Med-Trans Corporation v. Blue Cross and Blue Shield of Florida, Inc.* and *C2C Innovative Solutions, Inc.*, 3:22-cv-1139; and *Reach Air Medical Services LLC v. Kaiser Foundation Health Plan, Inc.* and *C2C Innovative Solutions, Inc.*, 3:22-cv-1153.

7. I attest that Exhibit F is a true and correct copy of the transcript from Judge Alfred Bennett's preliminary pretrial conference held on March 3, 2023 in the Southern District of Texas in the following captioned case: *Guardian Flight, LLC v. Aetna Health, Inc.,* and *Medical Evaluators of Texas ASO, LLC*, 4:22-cv-3805.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 17, 2023

*/s/Abraham Chang*
Abraham Chang

# EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

| | | |
|---|---|---|
| REACH AIR MEDICAL SERVICES LLC, CALSTAR AIR MEDICAL SERVICES, LLC, and GUARDIAN FLIGHT LLC,<br><br>Plaintiff,<br><br>v.<br><br>KAISER FOUNDATION HEALTH PLAN INC. and MEDICAL EVALUATORS OF TEXAS ASO, LLC,<br><br>Defendants. | ) | Case No. 4:22-cv-3979 |

**PLAINTIFFS' FIRST SET OF DISCOVERY REQUESTS TO KAISER FOUNDATION HEALTH PLAN INC.**

Pursuant to Federal Rules of Civil Procedure 26, 33, and 34, Plaintiffs REACH Air Medical Services LLC, CALSTAR Air Medical Services, LLC, and Guardian Flight LLC submit their first discovery requests to Defendant Kaiser Foundation Health Plan Inc. ("Kaiser"). Kaiser is required to serve a written response and objections, if any, to these discovery requests and produce the documents to which no objection is asserted within thirty (30) days from the date of service to counsel of record for Plaintiffs. Kaiser is under a duty to supplement its responses to these requests for production in accordance with the Federal Rules of Civil Procedure.

Dated: January 25, 2023

Respectfully submitted,

*/s/ Adam T. Schramek*
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**CERTIFICATE OF SERVICE**

I certify that on January 25, 2023, the foregoing document was served by e-mail on counsel of record.

*/s/ Adam T. Schramek*
Adam T. Schramek

## INSTRUCTIONS

1. These discovery requests are governed by the Federal Rules of Civil Procedure.

2. Unless otherwise stated, these discovery requests seek documents and information regarding the period from January 17, 2022 through the present.

3. These discovery requests should be construed broadly, with the singular being construed to include the plural and vice versa. The conjunctive "and" should be construed to include the disjunctive "or" and vice versa. The word "any" should be construed to include "all" and vice versa. The word "each" should be construed to include "every" and vice versa. The word "including" should be construed to mean "including but not limited to." Verbs should be construed to include all tenses.

## DEFINITIONS

1. "MET" shall mean Medical Evaluators of Texas ASO, LLC.

2. The term "Communication" should be broadly construed to include any transmission of information, facts, data, thoughts, or opinion, whether written or oral, whether in-person or remote, including emails, letters, memoranda, legal or agency proceedings, meetings, discussions, conversations, telephone calls, agreements, text messages, instant messages, social media postings or comments, and blog posts or comments.

3. "Complaint" shall mean the complaint filed in the above captioned lawsuit.

4. "Defendants" shall mean Kaiser and MET.

5. The term "Document" should be broadly construed. It includes all "writings and recordings" and "photographs," as those terms are defined in Rule 1001 of the Federal Rules of Evidence. It also includes all materials encompassed by Federal Rule of Civil Procedure 34(a)(1)(A) and (B), including Comments to the rule and case law interpreting the rule.

6. "IDR Disputes" means the disputes between Kaiser and Plaintiffs arising from payment for the emergency air transport services as described in Paragraphs 17-22 of the Complaint. When not capitalized, the term "IDR disputes" refers to disputes arising under the No Surprises Act in general.

7. "IDR Determination" with a capital "D" means MET's determination of the IDR Disputes. When not capitalized, the term "IDR determinations" refers to determinations in general.

8. "QPA" means Qualifying Payment Amount as provided under the No Surprises Act.

9. "Person" shall mean any natural person as well as any form of public or private organization or entity, such as a corporation, partnership, limited liability company, firm, association or business.

10. The phrase "relating to" should be broadly construed to include anything discussing, describing, involving, concerning, containing, embodying, reflecting, constituting, defining, identifying, stating, analyzing, responding to, referring to, dealing with, commenting on, prepared in connection with, used in preparation for, appended to, pertaining to, having any relationship to, or in any way being factually, legally, or logically connected in whole or in part to, the stated subject matter.

11. "Representative" of a Person shall mean any Person who acts, or purports to act, on behalf of the Person, including any present or former agents, employees, independent contractors, attorneys, investigators, accountants, officers, directors, consultants and any other person or entity that can control or is controlled by the Person.

12. "You," "Your," and "Kaiser " shall mean Kaiser Foundation Health Plan Inc. and any of its Representatives.

## REQUESTS FOR PRODUCTION

**REQUEST FOR PRODUCTION NO. 1:**

Documents you submitted to MET relating to the IDR Disputes, including Your position statements.

**REQUEST FOR PRODUCTION NO. 2:**

Documents and Communications relating to the IDR Disputes or IDR Determinations.

**REQUEST FOR PRODUCTION NO. 3:**

For the transports at issue in the IDR Disputes, produce the network agreements You used to calculate (1) each QPA You submitted to MET and (2) each QPA You listed on the Explanation of Benefits or Payments.

## INTERROGATORIES

**INTERROGATORY NO. 1:**

Explain in detail and with reference to the agreements you produce in response to RFP No. 3 Your calculation of (1) each QPA you submitted to MET in each IDR Dispute, and (2) each QPA You claim You shared with Plaintiffs. Please show the calculation for each QPA separately with sufficient specificity that it can be replicated to reach each amount.

# EXHIBIT B

**IN THE UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

| | | |
|---|---|---|
| REACH AIR MEDICAL SERVICES LLC, CALSTAR AIR MEDICAL SERVICES, LLC, and GUARDIAN FLIGHT LLC,<br><br>Plaintiff,<br><br>v.<br><br>KAISER FOUNDATION HEALTH PLAN INC. and MEDICAL EVALUATORS OF TEXAS ASO, LLC,<br><br>Defendants. | ) | Case No. 4:22-cv-3979 |

**PLAINTIFFS' FIRST SET OF DISCOVERY REQUESTS TO MEDICAL EVALUATORS OF TEXAS ASO LLC**

Pursuant to Federal Rules of Civil Procedure 26, 33, and 34, Plaintiffs REACH Air Medical Services LLC, CALSTAR Air Medical Services, LLC and Guardian Flight LLC submit their first discovery requests to Defendant Medical Evaluators of Texas ASO, LLC ("MET"). MET is required to serve a written response and objections, if any, to these discovery requests and produce any documents to which no objection is asserted within thirty (30) days from the date of service to counsel of record for Plaintiffs. MET is under a duty to supplement its responses to these requests for production in accordance with the Federal Rules of Civil Procedure.

Dated: January 25, 2023

Respectfully submitted,

*/s/ Adam T. Schramek*
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*Of Counsel*

*Attorneys for REACH Air Medical Services LLC, CALSTAR Air Medical Services, LLC, and Guardian Flight LLC*

**CERTIFICATE OF SERVICE**

I certify that on January 25, 2023, the foregoing document was served by e-mail on counsel of record.

*/s/ Adam T. Schramek*
Adam T. Schramek

## INSTRUCTIONS

1. These discovery requests are governed by the Federal Rules of Civil Procedure.

2. Unless otherwise stated, these discovery requests seek documents and information regarding the period from January 17, 2022 through the present.

3. These discovery requests should be construed broadly, with the singular being construed to include the plural and vice versa. The conjunctive "and" should be construed to include the disjunctive "or" and vice versa. The word "any" should be construed to include "all" and vice versa. The word "each" should be construed to include "every" and vice versa. The word "including" should be construed to mean "including but not limited to." Verbs should be construed to include all tenses.

## DEFINITIONS

1. "Kaiser" shall mean Kaiser Foundation Health Plan Inc.

2. The term "Communication" should be broadly construed to include any transmission of information, facts, data, thoughts, or opinion, whether written or oral, whether in-person or remote, including emails, letters, memoranda, legal or agency proceedings, meetings, discussions, conversations, telephone calls, agreements, text messages, instant messages, social media postings or comments, and blog posts or comments.

3. "Complaint" shall mean the Complaint filed in the above captioned lawsuit.

4. "Defendants" shall mean Kaiser and MET.

5. The term "Document" should be broadly construed. It includes all "writings and recordings" and "photographs," as those terms are defined in Rule 1001 of the Federal Rules of Evidence. It also includes all materials encompassed by Federal Rule of Civil Procedure 34(a)(1)(A) and (B), including Comments to the rule and case law interpreting the rule.

6. "IDR Disputes" means the disputes between Kaiser and Plaintiffs arising from payment for the emergency air transports as described in Paragraphs 17-22 of the Complaint. When not capitalized, the term "IDR disputes" refers to disputes arising under the No Surprises Act in general.

7. "IDR Determinations" with a capital "D" means MET's determinations of the IDR Disputes. When not capitalized, the term "IDR determinations" refers to determinations in general.

8. "QPA" means Qualifying Payment Amount as provided under the No Surprises Act

9. "Person" shall mean any natural person as well as any form of public or private organization or entity, such as a corporation, partnership, limited liability company, firm, association or business.

10. The phrase "relating to" should be broadly construed to include anything discussing, describing, involving, concerning, containing, embodying, reflecting, constituting, defining, identifying, stating, analyzing, responding to, referring to, dealing with, commenting on, prepared in connection with, used in preparation for, appended to, pertaining to, having any relationship to, or in any way being factually, legally, or logically connected in whole or in part to, the stated subject matter.

11. "Representative" of a Person shall mean any Person who acts, or purports to act, on behalf of the Person, including any present or former agents, employees, independent contractors, attorneys, investigators, accountants, officers, directors, consultants and any other person or entity that can control or is controlled by the Person.

12. "You," "Your," and "MET" shall mean Medical Evaluators of Texas ASO, LLC and any of its Representatives.

## REQUESTS FOR PRODUCTION

**REQUEST FOR PRODUCTION NO. 1:**

Documents You received from Kaiser relating to the IDR Disputes, including Kaiser's position statement.

**REQUEST FOR PRODUCTION NO. 2:**

Communications relating to the IDR Disputes or IDR Determinations.

**REQUEST FOR PRODUCTION NO. 3:**

With respect to the Person(s) identified in Interrogatory No. 1, the materials used to train that Person(s) in determining which offer to select in air ambulance reimbursement disputes.

**REQUEST FOR PRODUCTION NO. 4:**

With respect to the Person(s) identified in Interrogatory No. 1, the resume(s) of such Person(s).

**REQUEST FOR PRODUCTION NO. 5:**

Documents provided to individuals handling IDR air ambulance disputes concerning the use or relevance of the QPA in determining which offer to select in air ambulance reimbursement disputes.

**REQUEST FOR PRODUCTION NO. 6**

With respect to the Person(s) identified in Interrogatory No. 1, the Communications with such Person(s) concerning the use or relevance of the QPA in determining which offer to select in air ambulance reimbursement disputes.

## INTERROGATORIES

**INTERROGATORY NO. 1:**

Identify each Person who participated in the IDR Determinations and explain his or her role.

**INTERROGATORY NO. 2:**

With respect to the IDR determinations issued in calendar year 2022 by MET that were made by each Person identified in Interrogatory No. 1, provide separately for each such Person the following categories of information (separating air ambulance reimbursement disputes from all other emergency out-of-network payment disputes):

a. Total number of disputes for which a determination was made;

b. Total number of disputes for which a determination was made that was contested (i.e. excluding defaults where the non-initiating party did not respond);

c. Total number of contested disputes for which a determination was made where the offer selected was the one submitted by the air ambulance provider.

# EXHIBIT C

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

| | |
|---|---|
| REACH Air Medical Services, LLC, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>Kaiser Foundation Health Plan Inc., et al.,<br><br>Defendants. | Case No. 4:22-cv-03979 |

**DEFENDANT KAISER FOUNDATION HEALTH PLAN INC.'S RESPONSES AND OBJECTIONS TO PLAINTIFFS' SPECIAL INTERROGATORIES, SET ONE**

Defendant Kaiser Foundation Health Plan Inc. ("Kaiser" or "Defendant") hereby submits its responses and objections to Plaintiffs REACH Air Medical Services, LLC, et al. (collectively, "Plaintiffs")'s Special Interrogatories, Set One, pursuant to Federal Rule of Civil Procedure 34.

## I. PRELIMINARY STATEMENT

These responses are made solely for the purpose of, and in relation to, this action. Each response is given subject to all appropriate objections (including, but not limited to, objections concerning competency, relevancy, materiality, propriety and admissibility) which would require the exclusion of any statement contained herein if the interrogatory were asked of, or any statement contained herein were made by, a witness present and testifying in court. All such objections and the grounds therefor are reserved and may be interposed at the time of trial.

Kaiser has not yet completed discovery in this action and has not yet completed preparation for trial. Consequently, the following responses are given without prejudice to Kaiser producing evidence of any subsequently discovered facts.

Except for the facts explicitly admitted herein, no admission of any nature whatsoever is to be implied or inferred. The fact that an interrogatory herein has been answered should not be taken as an admission of, or a concession of the existence of, any facts set forth or assumed by such interrogatory, or that such response constitutes evidence of any fact thus set forth or assumed. All responses must be construed as given on the basis or present recollection. Any interrogatory deemed as continuing is objected to as oppressive, overburdensome, improper and not in compliance with the provisions of Rule 33, and will not be regarded as continuing in nature.

Kaiser does not intend to waive the attorney-client privilege or the work product immunity in connection with its response to any interrogatory and expressly makes these objections to any interrogatory which could be construed to invade either of those privileges.

The preceding information is incorporated into each of the following responses as if set forth in full.

## II. GENERAL OBJECTIONS

1. Kaiser objects to these Interrogatories because they are the subject of Kaiser's Motion to Disallow Discovery in this Matter, or Alternatively, For a Stay of Discovery ("Motion to Disallow or Stay"), ECF. No 29. At the very least, Kaiser objects to responding to these Interrogatories until the Court rules on Kaiser's motion. Kaiser reserves the right to amend and/or supplement its answers after the Court rules.

2. Kaiser objects to each instruction, definition, and Interrogatory to the extent that it purports to impose any requirement or discovery obligation that are inconsistent with those imposed by Rule 26(e)(1) or other applicable law. Kaiser will supplement its responses, if appropriate, pursuant to the obligations imposed by Rule 26(e)(1).

3. Kaiser objects to each instruction, definition, and Interrogatory to the extent that it seeks information that is protected from disclosure by the attorney-client privilege, the work product doctrine, or any other applicable privilege. Any such disclosure by Kaiser is inadvertent and shall not constitute a waiver of any privilege.

4. Kaiser objects to each instruction, definition, and Interrogatory to the extent that it is overbroad, unduly burdensome, or not reasonably calculated to lead to the discovery of admissible evidence.

5. Kaiser objects to each instruction, definition, and Interrogatory to the extent that it is vague, ambiguous, and indecipherable.

6. Kaiser objects to each instruction, definition, and Interrogatory to the extent that discovery is continuing, which exceeds the obligations of Rule 26(e), and reserves the right to use documents that are later discovered.

7. Kaiser objects to each instruction, definition, and Interrogatory to the extent that it seeks disclosure of confidential trade secrets, and/or financial, commercial, strategic or proprietary information concerning Kaiser's business practices. Kaiser further objects to each Interrogatory to the extent that it seeks the disclosure of information that is subject to a confidentiality agreement or other restrictions or to a protective order entered in another action or proceeding, except in accordance with such confidentiality agreements, restrictions, or protective orders.

8. Kaiser objects to each instruction, definition, and Interrogatory to the extent that it seeks the disclosure of information that would violate the legitimate privacy rights and expectations of Kaiser employees, directors, officers, affiliates or subsidiaries, both current and former, or other individuals or entities, including consumers, to the extent that such privacy rights or expectations are protected by law, contract, or public policy. Kaiser also objects to each

Interrogatory to the extent it seeks information pertaining to a non-party that is protected from disclosure by applicable privacy law and other privacy privileges.

9. Kaiser objects to each instruction, definition, and Interrogatory to the extent that it would violate the legitimate privacy rights and expectations of Kaiser members.

10. Kaiser objects to each instruction, definition, and Interrogatory to the extent that it assumes disputed facts or legal conclusions. Kaiser hereby denies any disputed facts or legal conclusions assumed by each instruction, definition, and Interrogatory.

11. Kaiser objects to each instruction, definition, and Interrogatory to the extent that it exceeds the permissible scope of discovery, in that it seeks information that is neither relevant to any claims or defenses in this lawsuit nor reasonably calculated to lead to the discovery of admissible evidence.

12. Kaiser objects to each instruction, definition, and Interrogatory to the extent it seeks information that is obtainable from some other source that is more convenient, less burdensome, or less expensive. Kaiser further objects to each instruction, definition, and Interrogatory to the extent that it seeks information already in the possession, custody or control of Plaintiff.

13. Kaiser objects to each instruction, definition, and Interrogatory to the extent they are overlapping, redundant, and/or duplicative.

14. Kaiser objects to each Interrogatory to the extent it seeks to impose on Kaiser the burden of proving Plaintiffs' claims and defenses. Plaintiffs, not Kaiser, bear the burden of demonstrating that the IDR awards at issue in this case should be vacated. *See Trans Chem. Ltd. v. China Nat'l Mach. Import & Export Corp.*, 978 F. Supp. 266, 303 (S.D. Tex. 1997), *aff'd and adopted*, 161 F.3d 314 (5th Cir. 1998).

## II. RESPONSES AND OBJECTIONS TO INTERROGATORIES, SET ONE

**INTERROGATORY NO. 1:**

Explain in detail and with reference to the agreements you produce in response to RFP No. 3 Your calculation of (1) each QPA you submitted to MET in each IDR Dispute, and (2) each QPA You claim You shared with Plaintiffs. Please show the calculation for each QPA separately with sufficient specificity that it can be replicated to reach each amount.

**RESPONSE TO INTERROGATORY NO. 1:**

In addition to the foregoing General Objections and Objections to Certain Definitions, each of which is incorporated by this reference as though fully set forth herein, Kaiser objects to this Interrogatory to the extent that:

1. This Interrogatory is the subject of Kaiser's Motion to Disallow Discovery in this Matter, or Alternatively, For a Stay of Discovery ("Motion to Disallow or Stay"), ECF. No 29. At the very least, Kaiser objects to responding to this Interrogatory until the Court rules on this motion. Kaiser reserves the right to amend and/or supplement its answers after the Court rules.

2. It is overbroad, unduly burdensome, and harassing, because Kaiser's calculation of each QPA it submitted to MET in each IDR Dispute, and each QPA it claims it shared with Plaintiffs, are protected from disclosure by the Federal Arbitration Act and the No Surprises Act's IDR process. Further, Plaintiffs are well aware of the confidential nature of the documents sought. *See* ECF No. 1, ¶ 26.

3. It is vague and ambiguous in its use of the term "agreements."

4. It is vague and ambiguous in its use of the term "in response to RFP No. 3."

5. It seeks information that is not relevant to any parties' claims or defenses, nor proportional to the needs of the case.

6. It seeks disclosure of confidential trade secrets, and/or financial, commercial, strategic or proprietary information concerning Kaiser's business practices.

7. It is impermissibly compound.

8. It seeks information relating to the claims of non-party insureds, which is protected from disclosure by the right to privacy guaranteed by the Health Insurance Portability and Accountability Act of 1996.

9. It seeks to impose on Kaiser the burden of proving Plaintiffs' claims and defenses. Plaintiffs, not Kaiser, bear the burden of demonstrating that the IDR awards at issue in this case should be vacated. *See Trans Chem. Ltd. v. China Nat'l Mach. Import & Export Corp.*, 978 F. Supp. 266, 303 (S.D. Tex. 1997), *aff'd and adopted*, 161 F.3d 314 (5th Cir. 1998).

Dated: February 24, 2023

/s/Megan McKisson
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*Attorneys for Defendant KAISER FOUNDATION HEALTH PLAN, INC.*

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 333 South Hope Street, 43rd Floor, Los Angeles, CA 90071-1422.

On February 24, 2023, I served true copies of the following document(s) described as **DEFENDANT KAISER FOUNDATION HEALTH PLAN INC.'S RESPONSES AND OBJECTIONS TO PLAINTIFFS' SPECIAL INTERROGATORIES, SET ONE** on the interested parties in this action as follows:

Adam T. Schramek,
NORTON ROSE FULBRIGHT US LLP
98 San Jacinto Blvd. Ste.1100
Austin, TX 78701-4255
Telephone: (512) 474-5201
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**BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent from e-mail address ehwalters@sheppardmullin.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

**BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 24, 2023, at Los Angeles, California.

/s/Elisabeth Walters
Elisabeth Walters

# EXHIBIT D

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

| | |
|---|---|
| REACH Air Medical Services, LLC, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>Kaiser Foundation Health Plan Inc., et al.,<br><br>Defendants. | Case No. 4:22-cv-03979 |

**DEFENDANT KAISER FOUNDATION HEALTH PLAN INC.'S RESPONSES AND OBJECTIONS TO PLAINTIFFS' REQUESTS FOR PRODUCTION, SET ONE**

Pursuant to Fed. R. Civ. P. 34, Defendant Kaiser Foundation Health Plan Inc. ("Kaiser" or "Defendant") hereby submit its responses and objections to Plaintiffs REACH Air Medical Services, LLC, et al. (collectively, "Plaintiffs")'s Requests for Production, Set One, pursuant to Federal Rule of Civil Procedure 34.

## I. GENERAL OBJECTIONS

1. Kaiser objects to these Requests because they are the subject of Kaiser's Motion to Disallow Discovery in this Matter, or Alternatively, For a Stay of Discovery ("Motion to Disallow or Stay"), ECF. No 29. At the very least, Kaiser objects to responding to these Requests until the Court rules on Kaiser's motion. Kaiser reserves the right to amend and/or supplement its answers after the Court rules.

2. Kaiser objects to each instruction, definition, and Request to the extent that it purports to impose any requirement or discovery obligation that are inconsistent with those imposed by Federal Rule of Civil Procedure 26(e)(1), standing orders, case law, or any other

applicable law. Kaiser will supplement its responses, if appropriate, pursuant to the obligations imposed by Rule 26(e)(1).

3. Kaiser objects to each instruction, definition, and Request to the extent that it seeks information that is protected from disclosure by the attorney-client privilege, the work product doctrine, or any other applicable privilege. Any such disclosure by Kaiser is inadvertent and shall not constitute a waiver of any privilege.

4. Kaiser objects to each instruction, definition, and Request to the extent that it is overbroad, unduly burdensome, or not reasonably calculated to lead to the discovery of admissible evidence.

5. Kaiser objects to each instruction, definition, and Request to the extent that it is vague, ambiguous, and indecipherable.

6. Kaiser objects to each instruction, definition, and Request to the extent that discovery is continuing, which exceeds the obligations of Rule 26(e), and reserves the right to use documents that are later discovered.

7. Kaiser objects to each instruction, definition, and Request to the extent that it seeks disclosure of confidential trade secrets, and/or financial, commercial, strategic or proprietary information concerning Kaiser's business practices. Kaiser further objects to each Request to the extent that it seeks the disclosure of information that is subject to a confidentiality agreement or other restrictions or to a protective order entered in another action or proceeding, except in accordance with such confidentiality agreements, restrictions, or protective orders.

8. Kaiser objects to each instruction, definition, and Request to the extent that it seeks the disclosure of information that would violate the legitimate privacy rights and expectations of Kaiser employees, directors, officers, affiliates or subsidiaries, both current and former, or other

individuals or entities, including consumers, to the extent that such privacy rights or expectations are protected by law, contract, or public policy. Kaiser also objects to each Request to the extent it seeks information pertaining to a non-party that is protected from disclosure by applicable privacy law and other privacy privileges.

9. Kaiser objects to each instruction, definition, and Request to the extent that it would violate the legitimate privacy rights and expectations of Kaiser members.

10. Kaiser objects to each instruction, definition, and Request to the extent that it assumes disputed facts or legal conclusions. Kaiser hereby denies any disputed facts or legal conclusions assumed by each instruction, definition, and Request.

11. Kaiser objects to each instruction, definition, and Request to the extent that it exceeds the permissible scope of discovery, in that it seeks information that is neither relevant to any claims or defenses in this lawsuit nor reasonably calculated to lead to the discovery of admissible evidence.

12. Kaiser objects to each instruction, definition, and Request to the extent it seeks information that is obtainable from some other source that is more convenient, less burdensome, or less expensive. Kaiser further objects to each instruction, definition, and Request to the extent that it seeks information already in the possession, custody, or control of Plaintiff.

13. Kaiser objects to each instruction, definition, and Request to the extent they are overlapping, redundant, and/or duplicative.

14. Kaiser objects to each Request to the extent it seeks to impose on Kaiser the burden of proving Plaintiffs' claims and defenses. Plaintiffs, not Kaiser, bear the burden of demonstrating that the IDR awards at issue in this case should be vacated. *See Trans Chem. Ltd. v. China Nat'l*

*Mach. Import & Export Corp.*, 978 F. Supp. 266, 303 (S.D. Tex. 1997), *aff'd and adopted*, 161 F.3d 314 (5th Cir. 1998).

## II. OBJECTIONS TO CERTAIN DEFINITIONS

1. The term "Communication" should be broadly construed to include any transmission of information, facts, data, thoughts, or opinion, whether written or oral, whether in-person or remote, including emails, letters, memoranda, legal or agency proceedings, meetings, discussions, conversations, telephone calls, agreements, text messages, instant messages, social media postings or comments, and blog posts or comments.

**Objection**: Kaiser objects on the grounds that this purported definition is vague, ambiguous, and unintelligible. Kaiser further objects on the ground that the definition is overbroad, unduly burdensome, unreasonable, and oppressive. Kaiser further objects to this definition to the extent it purports to impose obligations on Kaiser different from or greater than those specified in the Federal Rules of Civil Procedure or other applicable law. Kaiser also objects to this definition to the extent it calls for the disclosure of information protected from discovery by the attorney-client privilege and/or work product doctrine.

2. "Person" shall mean any natural person as well as any form of public or private organization or entity, such as a corporation, partnership, limited liability company, firm, association or business.

**Objection**: Kaiser objects on the grounds that this purported definition is vague, ambiguous, and unintelligible. Kaiser further objects on the ground that the definition is overbroad, unduly burdensome, and unreasonable. Kaiser further objects to this definition to the extent it purports to impose obligations on Kaiser different from or greater than those specified in

the Federal Rules of Civil Procedure or other applicable law. Kaiser also objects to this definition to the extent it calls for the disclosure of information protected from discovery by the attorney-client privilege and/or work product doctrine.

3. The phrase "relating to" should be broadly construed to include anything discussing, describing, involving, concerning, containing, embodying, reflecting, constituting, defining, identifying, stating, analyzing, responding to, referring to, dealing with, commenting on, prepared in connection with, used in preparation for, appended to, pertaining to, having any relationship to, or in any way being factually, legally, or logically connected in whole or in part to, the stated subject matter.

**Objection**: Kaiser objects on the grounds that this purported definition is vague, ambiguous, and unintelligible. Kaiser further objects on the ground that the definition is overbroad, unduly burdensome, and unreasonable. Kaiser further objects to this definition to the extent it purports to impose obligations on Kaiser different from or greater than those specified in the Federal Rules of Civil Procedure or other applicable law. Kaiser also objects to this definition to the extent it calls for the disclosure of information protected from discovery by the attorney-client privilege and/or work product doctrine.

4. "Representative" of a Person shall mean any Person who acts, or purports to act, on behalf of the Person, including any present or former agents, employees, independent contractors, attorneys, investigators, accountants, officers, directors, consultants and any other person or entity that can control or is controlled by the Person.

**Objection**: Kaiser objects on the grounds that this purported definition is vague, ambiguous, and unintelligible. Kaiser further objects on the ground that the definition is overbroad, unduly burdensome, and unreasonable. Kaiser further objects to this definition to the

extent it purports to impose obligations on Kaiser different from or greater than those specified in the Federal Rules of Civil Procedure or other applicable law. Kaiser also objects to this definition to the extent it calls for the disclosure of information protected from discovery by the attorney-client privilege and/or work product doctrine.

5. "You," "Your," and "Kaiser " shall mean Kaiser Foundation Health Plan Inc. and any of its Representatives

**Objection**: Kaiser objects on the grounds that this purported definition is vague, ambiguous, and unintelligible. Kaiser further objects on the ground that the definition is overbroad, unduly burdensome, unreasonable, and oppressive, and renders the topics which use this term compound. Kaiser further objects to this definition to the extent it purports to impose obligations on Kaiser different from or greater than those specified in the California Code of Civil Procedure. Kaiser also objects to this definition to the extent it calls for the disclosure of information protected from discovery by the attorney-client privilege and/or work product doctrine. These responses are on behalf of Kaiser Foundation Health Plan, Inc., and not any other person or entity.

## III. RESPONSES TO REQUESTS FOR PRODUCTION, SET ONE

**REQUEST FOR PRODUCTION NO. 1:**

Documents you submitted to MET relating to the IDR Disputes, including Your position statements.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 1:**

In addition to the foregoing General Objections and Objections to Certain Definitions, each of which is incorporated by this reference as though fully set forth herein, Kaiser objects to this Request to the extent that:

1. This Request is the subject of Kaiser's Motion to Disallow Discovery in this Matter, or Alternatively, For a Stay of Discovery ("Motion to Disallow or Stay"), ECF. No 29. At the very least, Kaiser objects to responding to this Request until the Court rules on Kaiser's motion. Kaiser reserves the right to amend and/or supplement its answers after the Court rules.

2. It is overbroad, unduly burdensome, and harassing, because documents submitted to MET relating to the IDR disputes, including Kaiser's position statements, are protected from disclosure by the Federal Arbitration Act and the No Surprises Act's IDR process. Further, Plaintiffs are well aware of the confidential nature of the documents sought. *See* ECF No. 1, ¶ 26.

3. The defined term "Documents" is overbroad, unduly burdensome, and purports to seek privileged work product.

4. It seeks documents that are not relevant to any parties' claims or defenses, nor proportional to the needs of the case.

5. It seeks disclosure of confidential trade secrets, and/or financial, commercial, strategic or proprietary information concerning Kaiser's business practices.

6. It is vague and ambiguous in its use of the term "position statements."

7. It seeks information relating to the claims of non-party insureds, which is protected from disclosure by the right to privacy guaranteed by the Health Insurance Portability and Accountability Act of 1996.

8. It seeks to impose on Kaiser the burden of proving Plaintiffs' claims and defenses. Plaintiffs, not Kaiser, bear the burden of demonstrating that the IDR awards at issue in this case should be vacated. *See Trans Chem. Ltd. v. China Nat'l Mach. Import & Export Corp.*, 978 F. Supp. 266, 303 (S.D. Tex. 1997), *aff'd and adopted*, 161 F.3d 314 (5th Cir. 1998).

**REQUEST FOR PRODUCTION NO. 2:**

Documents and Communications relating to the IDR Disputes or IDR Determinations.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 2:**

In addition to the foregoing General Objections and Objections to Certain Definitions, each of which is incorporated by this reference as though fully set forth herein, Kaiser objects to this Request to the extent that:

1. This Request is the subject of Kaiser's Motion to Disallow Discovery in this Matter, or Alternatively, For a Stay of Discovery ("Motion to Disallow or Stay"), ECF. No 29. At the very least, Kaiser objects to responding to this Request until the Court rules on Kaiser's motion. Kaiser reserves the right to amend and/or supplement its answers after the Court rules.

2. It is overbroad, unduly burdensome, and harassing, because Documents and Communications relating to the IDR Disputes or IDR Determinations are protected from disclosure by the Federal Arbitration Act and the No Surprises Act's IDR process. Further, Plaintiff is well aware of the confidential nature of the documents sought. *See* ECF No. 1, ¶ 26.

3. The defined term "Documents" is overbroad, unduly burdensome, and purports to seek privileged work product.

4. The defined term "Communications" is overbroad, unduly burdensome, and purports to seek privileged work product.

5. It seeks documents that are not relevant to any parties' claims or defenses, nor proportional to the needs of the case.

6. It seeks disclosure of confidential trade secrets, and/or financial, commercial, strategic or proprietary information concerning Kaiser's business practices.

7. It is vague and ambiguous as to the specific Documents and Communications the Request purports to seek.

8. It seeks information relating to the claims of non-party insureds, which is protected from disclosure by the right to privacy guaranteed by the Health Insurance Portability and Accountability Act of 1996.

9. It seeks to impose on Kaiser the burden of proving Plaintiffs' claims and defenses. Plaintiffs, not Kaiser, bear the burden of demonstrating that the IDR awards at issue in this case should be vacated. *See Trans Chem. Ltd. v. China Nat'l Mach. Import & Export Corp.*, 978 F. Supp. 266, 303 (S.D. Tex. 1997), *aff'd and adopted*, 161 F.3d 314 (5th Cir. 1998).

**REQUEST FOR PRODUCTION NO. 3:**

For the transports at issue in the IDR Disputes, produce the network agreements You used to calculate (1) each QPA You submitted to MET and (2) each QPA You listed on the Explanation of Benefits or Payments.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 3:**

In addition to the foregoing General Objections and Objections to Certain Definitions, each of which is incorporated by this reference as though fully set forth herein, Kaiser objects to this Request to the extent that:

1. This Request is the subject of Kaiser's Motion to Disallow Discovery in this Matter, or Alternatively, For a Stay of Discovery ("Motion to Disallow or Stay"), ECF. No 29. At the very least, Kaiser objects to responding to this Request until the Court rules on Kaiser's motion. Kaiser reserves the right to amend and/or supplement its answers after the Court rules.

2. It is overbroad, unduly burdensome, and harassing, because the network agreements Kaiser used to calculate each QPA it submitted to MET and each QPA it listed on the Explanation of Benefits or Payments is protected from disclosure by the Federal Arbitration Act and the No Surprises Act's IDR process. are protected from disclosure by the Federal Arbitration Act and the No Surprises Act's IDR process. Further, Plaintiff is well aware of the confidential nature of the documents sought. *See* ECF No. 1, ¶ 26.

3. The term "network agreements" is vague and ambiguous.

4. The term "Explanation of Benefits or Payments" is vague and ambiguous.

5. It seeks documents that are not relevant to any parties' claims or defenses, nor proportional to the needs of the case.

6. It seeks disclosure of confidential trade secrets, and/or financial, commercial, strategic or proprietary information concerning Kaiser's business practices.

7. The term "transports at issue" is vague and ambiguous.

8. It seeks information relating to the claims of non-party insureds, which is protected from disclosure by the right to privacy guaranteed by the Health Insurance Portability and Accountability Act of 1996.

9. It seeks to impose on Kaiser the burden of proving Plaintiffs' claims and defenses. Plaintiffs, not Kaiser, bear the burden of demonstrating that the IDR awards at issue in this case should be vacated. *See Trans Chem. Ltd. v. China Nat'l Mach. Import & Export Corp.*, 978 F. Supp. 266, 303 (S.D. Tex. 1997), *aff'd and adopted*, 161 F.3d 314 (5th Cir. 1998).

Dated: February 24, 2023

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 333 South Hope Street, 43rd Floor, Los Angeles, CA 90071-1422.

On February 24, 2023, I served true copies of the following document(s) described as **DEFENDANT KAISER FOUNDATION HEALTH PLAN INC.'S RESPONSES AND OBJECTIONS TO PLAINTIFFS' REQUEST FOR PRODUCTION, SET ONE** on the interested parties in this action as follows:

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**BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent from e-mail address ehwalters@sheppardmullin.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

**BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 24, 2023, at Los Angeles, California.

/s/Elisabeth Walters
Elisabeth Walters

# EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

MED-TRANS CORPORATION,

Plaintiff,

v. CASE NO. 3:22-cv-1139-TJC-JBT

BLUE CROSS BLUE SHIELD OF FLORIDA & C2C INNOVATIVE SOLUTIONS, INC.,

Defendants.

---

MED-TRANS CORPORATION,

Plaintiff,

v. CASE NO. 3:22-cv-1077-TJC-JBT

CAPITAL HEALTH PLAN, INC. & C2C INNOVATIVE SOLUTIONS, INC.,

Defendants.

---

REACH AIR MEDICAL SERVICES, LLC,

Plaintiff,

v. CASE NO. 3:22-cv-1153-TJC-JBT

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

Defendants.

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TELEPHONIC PRELIMINARY PRETRIAL CONFERENCE
BEFORE THE HONORABLE TIMOTHY J. CORRIGAN
UNITED STATES DISTRICT JUDGE
Jacksonville, Florida
January 17, 2023
4:07 p.m.

(Proceedings recorded by mechanical stenography; transcript produced by computer.)

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P R O C E E D I N G S

January 17, 2023 4:07 p.m.

- - -

THE COURT: Counsel, we're having some feedback here. If you could put your phones on mute for now, let's see if that helps.

All right. We're going to try and go ahead and see if we can make it work. This is the case of *Med-Trans Corp. versus Capital Health*, *BSBC,* and *Kaiser*. The cases are numbered 3:22-cv-1077, 3:22-cv-1139, and 3:22-cv-1153.

I'm going to go through the attorneys that we have listed as making an appearance. I assume there will be a primary spokesperson for each party. And you can just identify yourself when you're speaking, please.

I've got Mr. Russell and Mr. Schramek for the plaintiff.

I've got Mr. Smith and Mr. Lehner for Capital Health.

I've got Mr. Conner, Ms. Mansfield, and Ms. Fleming for BCBS.

I've got Mr. Fackler, Mr. Giboney, Ms. Hanson, and Mr. Batla for C2C.

I've also got some corporate reps, Mr. Dodd for Kaiser, and Mr. Keshavarzi -- Keshavarzi, if I'm saying it correctly. I apologize if I'm not. And that's also for Kaiser.

We're here today for a preliminary pretrial conference. I have familiarized myself with the case enough to, I think, be able to get us where we need to go today.

I do have a couple of preliminary questions. I'll start with the plaintiff. And, again, if you -- when you speak, please identify yourself.

So I guess the question I have for the plaintiffs is: Why is this case brought as a complaint, as opposed to a proceeding under the FAA that would -- that would address the arbitration in that context?

MR. SCHRAMEK: This is Adam Schramek, Your Honor, arguing on behalf of the plaintiffs.

So, first of all, this case was not brought under the Federal Arbitration Act. We do not believe the FAA itself actually applies.

It was brought under the No Surprises Act, which sets forth a statutory scheme for what are known as IDR, independent dispute resolution determinations.

And the way the statute is worded, it says that judicial review shall be available in cases that would match/qualify the standard to vacate an arbitration award.

And the way that Congress did it, they specifically cited to one small section of the FAA, which is the standard to be applied, the legal standard.

They did not incorporate other sections of the FAA,

including Section 6, which would require this proceeding to be brought by motion rather than by complaint.

We also in our briefing go into great detail about why it is we do not believe the standard of review under the FAA is applicable here, because this is not an -- a proceeding based on an agreed arbitration procedure, where the parties can agree to the rules, they can agree to the scope of discovery, they can agree to how everything is done, so that at the end of the day, when you don't like the decision, you don't get to revisit any, really, substantive issues.

Here, we believe the scope of review must be broader, because under the No Surprises Act -- the way that the executive branch has implemented the No Surprises Act, they've made it to where we don't get to see the other side's pleading. We don't get to see the evidence they submit. There's no exchange or discussion.

And so the idea of the Federal Arbitration Act standard applying, or the motion practice applying, does not fit with the statutory scheme for the NSA.

If the Court were to simply say we're going to do this just like a Federal Arbitration Act proceeding, essentially we don't believe we would be receiving the due process that would be required of a compelled administrative proceeding under federal law.

And that's really the difference. It's -- and that's

one of the questions, Your Honor --

THE COURT: So are you saying -- so we're not going to decide the motion to dismiss, but I know I asked the question. But I guess that's what I would be deciding, or one of the things I would be deciding, is what's the proper format for a case to seek review of one of these awards.

But I was interested in something you said. What was -- how did it work? Because it's a baseball arbitration. So did you just submit a number and they submitted a number and some explanation and that's it, there's no -- there's no exchange of information during the process? Is that -- am I understanding that correctly?

MR. SCHRAMEK: Pretty much, Judge. That is -- that's similar to -- very similar to how the process works. So we submit an offer, a dollar offer, and then there are certain non-exclusive statutory factors of information we can provide, and then there's certain information we're prohibited from providing, such as Medicare rates.

We are -- each side is allowed to make a submission. The other side doesn't get to see the submission. And the decision that's rendered does not have to be reasoned.

So all we get at the end of the day is -- and, interestingly enough, one of the bases under the Federal Arbitration Act is a misrepresentation, you know, of -- to the decision-maker. And, in fact, the No Surprises Act says that

if you make a misrepresentation to the IDR entity, that that award is not going to be binding.

Well, Judge, how are we going to know if a misrepresentation was made if we don't get to see the other side's submission? That's kind of one of our, kind of, foundational due process arguments in the context of these particular decisions. But we don't get to see the other side's submission.

The only way we know about what we've alleged are misrepresentations in this proceeding is because the IDR entity happened to make reference to some of the information that has been submitted by the payors in these cases, including their -- what's known as a qualifying payment amount, a QPA.

So we believe judicial review is integral to the process of making this statute work, of making the process work. And I'll note that we had hundreds of IDR decisions -- and I'm talking about all my air ambulance clients in 2022, had hundreds of IDR decisions.

We're here today about three of them that we do not believe were appropriately -- decided under the wrong standard.

Yes, there have been regula- -- attacks to the regulations. Some of the regulations have been overturned. And, in fact, an illegal presumption was overturned by a court -- a federal court here in Texas.

That illegal presumption, we contend, continued to be

applied by C2C after that decision was rendered. And so that's also part of this due process judicial review.

It's not just a motion after an agreed process where you have all the discovery and exchange of information you expect and private agreements between the parties.

You have a federal compelled process where we have not -- to this day, we don't even know the person who made our decision.

THE COURT: Okay. So there's a lot in there. And, again, I'm trying to just -- I'm -- I want to understand a little bit, and then I'll -- of course, I'll hear from the defendants in a minute.

But I'm not -- so are you saying that since this -- because this law just went into effect about a year ago, right?

MR. SCHRAMEK: That's right.

THE COURT: Okay. Are you saying there have been hundreds of these awards that have happened since that time?

MR. SCHRAMEK: Yes. And to give a little bit of clarity, the law went into effect January 1st, but the actual process to submit claims and have a dispute resolution -- IDR, a dispute resolution, didn't happen until late April, when the federal government finally opened the portal, which is like a -- you know, an ECF portal, where you can make your filing.

So it's really between about late April, early May, and the end of December that my clients have had hundreds of

cases submitted, and a couple hundred decided.

THE COURT: All right. And out of those couple hundred decided, how many did you win and how many did you lose?

MR. SCHRAMEK: Your Honor, the year-end contract -- year-end, if you include defaults, we won [redacted] percent of the cases we submitted.

THE COURT: So I guess I'm not -- so is the only -- I guess I'm not understanding. If this is a flawed process, it denies you due process, it -- are you saying that these -- these particular decisions were handled differently than all the rest of those?

Or are you just saying -- are you just saying you lost these ones and now you want to say the process wasn't any good, but the process was okay for the [redacted] percent that you won?

MR. SCHRAMEK: Well, no, Judge, we -- we -- our issue has to do with these specific cases, and in particular, for example, C2C, which is one of the defendants. Our winning rate with C2C was zero percent. That's why this lawsuit got -- these lawsuits got filed, because we believe C2C is applying a legal presumption and not following the statutory standard, and that that was taken advantage of by misrepresentations in particular lawsuits with some of the providers.

THE COURT: How much money is involved in these three? Just so I'm clear -- I assumed when -- when these suits

04:17 1 came in, I assumed that these were like a test case or
04:17 2 something, so that it would be -- it wouldn't be just these
04:17 3 cases, but it would be trying to make a point, or trying to set
04:17 4 a precedent as to how these matters were going to be handled.
04:18 5 But now I'm hearing from you that it's really not that, because
04:18 6 you were okay in the [redacted] percent that you won.
04:18 7 So it's really just about these three cases? There's
04:18 8 not going to be 100 more of these?
04:18 9 MR. SCHRAMEK: I don't expect there to be 100 more,
04:18 10 Judge, but I do expect there to be continuing going forward
04:18 11 challenges to IDR decisions, not just by my clients, but this
04:18 12 applies to all out-of-network providers, including emergency
04:18 13 room physicians and the like.
04:18 14 And I've certainly spoken to my colleagues on this
04:18 15 side of the docket who are watching this case very closely
04:18 16 and -- and discussed about, you know, plans for how -- how do
04:18 17 you do these challenges? What are they subject to?
04:18 18 So it is going to have broader implications than
04:18 19 simply these particular claims. But these particular claims
04:18 20 are going to explain how the challenges proceed and what
04:18 21 court -- and what level of judicial review are going to be
04:19 22 allowed when we do have decisions or decision-makers, I should
04:19 23 also say, that we believe have acted inappropriately or
04:19 24 misapplied the law or ignored the rules of the NSA, and, you
04:19 25 know, they tossed a coin and said, "Well, we make more

money" -- "it's a lot easier if we just toss a coin and pick winners and losers than read all these papers."

Those are the substantive issues that will have repercussions, really across the country, because every -- every out-of-network provider in the United States is going to have these sorts of challenges.

THE COURT: Well, I guess what I'm trying to understand is this -- and, again, maybe we're getting too far in the weeds here.

But if -- if what you just told me was that your client was denied due process in this procedure, in which you submitted information, the other side submitted information, and neither one got to see what the other did, wouldn't that be true in every single one of these?

But yet you're not -- you're not actually seeking to hold the statute unconstitutional or seeking the regulations to be held unconstitutional. Or are you?

MR. SCHRAMEK: Judge, we are currently not seeking to hold the regulations unconstitutional. We think the system can work, but it needs to have checks and balances.

And one of those checks and balances is meaningful judicial review when -- in situations like this, which we believe would -- would qualify, and that with that meaningful review, the system can work.

But without it, if we're subject to just the Federal

Arbitration Act standard of file a motion and if you don't have the evidence yet, you don't -- we're not going to look, you know, any deeper than that, then we do think there would be a deeper problem.

So part of your decision, we believe, is going to counsel as to, you know, what is the next step? Are we -- you know, will we get meaningful judicial review when there's -- there's an issue with a decision?

THE COURT: Why is the arbitrator or the company that -- Innovative Solutions, why are they a necessary party to the case?

MR. SCHRAMEK: So, Judge, we thought long and hard about that, as you can imagine. And the problem we faced was that under the statute there is no procedure; and under the regulation, there is no procedure by which an IDR entity must rehear a case, may rehear a case. There is absolutely nothing new.

So the only way that we believe we can be afforded full relief -- which is, under the federal rules, the standard for a necessary party in order to allow, you know, full relief be accorded by the Court -- we concluded that they had to be a party right now.

We certainly are talking to the regulators. We hope that the CMS or the three departments that run the NSA will pass a regulation that says, you know, that the re-hearing can

occur upon -- you know, if a court orders a rehearing, that there's a process for it.

But right now, if you said, "Yeah, they -- they misapplied the law. They applied the illegal presumption. You get a rehearing," there's nowhere for me to go.

In a private arbitration proceeding, I can go down to the AAA or the JAMS any day of the week and submit it. And, in fact, both the AAA and the JAMS rules specifically have a rule that says arbitration pursuant to court order, when you get to go compel arbitration.

There's nothing like that in the NSA or the enacting regulations. And so we essentially concluded we needed the entities as parties, because this Court can order them to rehear the case and to apply the proper standard.

THE COURT: And is that the relief you're seeking in this case?

MR. SCHRAMEK: It is.

THE COURT: All right. For no other reason other than they're listed first on my sheet of paper here, who's going to speak for Capital Health?

MR. SMITH: Good afternoon, Your Honor. This is Ruel Smith. And I'll be speaking for Capital Health Plan, Incorporated.

THE COURT: All right. Again, I'm -- I'm mainly today going to -- I just want to kind of get a little sense of

what's going on here, and then I'm going to decide how to proceed here.

I mean, obviously we've got these motions pending and so forth. And I'm not going to be able to rule on them today. But I think we've got issues of whether discovery should go forward or not, and we've got maybe some issues of consolidation and other issues that we probably can talk about today.

But as long as I ask the plaintiffs a little bit, I want to give you a chance to say a little bit. Don't say everything, but say a little bit.

MR. SMITH: Okay, Your Honor. The -- one of the -- one of the -- one of the contentions on which the plaintiff challenges the notion that the -- that an action to vacate has to be initiated by motion is that -- they contend that this doesn't share certain essential characteristics that arbitration ought to have, they say.

They say, additionally, that due process would require more than the FAA provides in this circumstance, because the arbitral process here is compelled. And they sort of cast that as a -- as a unique feature of the NSA, but, in fact, it's -- it's not all that unique.

And we point this out in our briefings, that other -- other federal statutes require submission to arbitral bodies that are not governed by the -- the organization's rules

Mr. Schramek just cited, for example.

We cite in our reply brief one -- that is the Federal Insecticide, Fungicide, and Rodenticide Act. So -- of all things -- where parties providing data to the FDA, or providing data to the FDEPA, want to be federally compensated for the use of their data by people seeking pesticide permits, is a pricing dispute, not unlike what we have here, because the IDR was set up to settle -- the dispute resolution process was set up to settle pricing disputes between -- in this case, air ambulance or other non-network providers and health plans, like the three health plan defendants here.

Well, in a similar structure involving price disputes, the FIFRA, Federal Insecticide, Fungicide, and Rodenticide Act, allows for one party to initiate binding arbitration.

THE COURT: Okay. Okay. You're -- you're getting too far in the weeds for me here.

MR. SMITH: Understood. Sure.

THE COURT: I just wanted to give you a chance to give me the 30,000-feet view of what your position is, but I'm not going to be able to get into the Insecticide Act today.

MR. SMITH: Understood. It -- it essentially is that there are examples of federal statutory schemes that mandate arbitration and supply either less or no judicial review of this.

We point out that some of the relief sought by the plaintiff is actually in other sections of the FAA. And we discuss that -- that in sort of federal common law that sprung up around the FAA and other arbitration schemes. There are essential elements of arbitration that -- the main one of which is finality that this process does achieve.

And so it is an arbitration and it is governed by the FAA. It should have been brought by motion, and should be governed by the standards, which are very high, as Your Honor is well aware, I'm sure, concerning -- you know, when you talk about undue means by -- by the arbitral parties, you're talking about things that equate to bribery, corruption, et cetera. When you talk about partiality of the arbitrator, that is a very high standard to meet as well.

THE COURT: Okay.

MR. SMITH: And so those are the -- those are the main arguments that Capital Health Plan is advancing, Your Honor.

THE COURT: Thank you, sir.

Mr. Conner, Ms. Mansfield, Ms. Fleming, who's talking for Blue Cross?

MR. CONNER: This is Mr. Conner, Your Honor.

THE COURT: All right. Go ahead.

MR. CONNER: So, Judge, obviously we have some fundamental disagreements. One of the principal arguments

about why this should be a motion instead of a complaint is because we are relying on case law that dictates that the motion has to be brought under the Federal Rules of Civil Procedure. It's not dependent on the FAA provision that the other side is arguing about.

And we've cited that case law in our papers. So that's one of the sort of principal arguments about why this needs to be a motion.

I don't think there should really be a -- much of an argument about this is an arbitration or not an arbitration. It's called an arbitration in the way that it's set up. We've cited a lot of information in our papers about that.

The issue is what is the scope of judicial review going to be? Is it going to be that, you know, the -- the doors are thrown open to full-blown litigation of something that has been decided by an arbitrator already, intended to be --

THE COURT: Well, let -- let me just --

MR. CONNER: -- expedite the process -- okay.

THE COURT: Let me just stop you, Mr. Conner, because I was going to ask -- I was going to ask Mr. Fackler about this anyway, but -- so I have one of these arbitration -- I have one of these emails that -- I guess this was the actual decision of the -- of C2C, I guess.

And, you know, I'm not going to read the whole thing,

but it basically says, "We've reviewed this. You've asked for this. They've asked for this. Here -- here is some things we're supposed to consider. Here were the offers of the parties. And we -- we -- we agree with the -- with the insurance company."

And that's it. No reasoning, no -- no nothing, really. No -- I mean, I'm not entirely sure how you would have judicial review of something like this. I mean, unless -- so I guess when you're talking about an arbitration award and how -- the deference you have to give to it and all that, you know, that's -- that's under the FAA when you've had a -- when you've had due process and you've had -- you've had parties testing it, and the arbitrator at least usually says why they're doing what they're doing.

But as far as I can tell -- "As noted above, the IDRE must consider related and credible information submitted by the parties to determine the appropriate OON rate. As set forth in the regulation, additional credible information related to certain circumstances was submitted by both parties. However, the information submitted did not support the allowance of payment at a higher OON rate."

That's it as far as I can tell, in terms of reasoning. So how am I -- I mean, how would you even have judicial review of it, even under the FAA?

MR. CONNER: So -- so you're asking me instead of

Mr. Fackler? I just want to be clear.

THE COURT: All right. Okay. Okay. I'll -- that's fair. I'll ask -- I ask Mr. Fackler.

Mr. Fackler, how --

MR. FACKLER: Yes, Your Honor.

THE COURT: Yeah. How much did your client get paid for this?

MR. FACKLER: Yeah. As alleged in the complaint, I believe it's $349 --

THE COURT: Yeah.

MR. FACKLER: -- to set up as a system to expedite it and to have a -- encourage the parties to submit reasonable bids, incentivize them to lower their bids to try to work it out. And otherwise you're thrown into the system with a limited review. And my client does review the required factors and the submissions. One of the concerns or one of the factors --

THE COURT: You don't -- you don't really -- I guess what you're saying is, you shouldn't really expect much for $349.

MR. FACKLER: Right. Candidly, yes, Your Honor. You know, we are not -- we don't have a panel of attorneys who review them at $500 an hour to go through that. That just is impractical with the statutory scheme that was set up that we applied for and were approved to be IDREs or arbitrators.

And real quick on your point, Your Honor, about whether it's a reasoned opinion or not a reasoned opinion, you can get reasoned opinions -- you can sign up and pay extra for reasoned opinions in private arbitrations or you can get a simple decision, which is just, "You win X amount."

And there's a case by Judge Tjoflat that was cited in the papers that said, "Look, if we can't pierce through what they decided, then that is not evidence of a manifest disregard of the law, and, therefore, it is not subject to review under that -- that statute -- or under that case law and under the FAA, assuming we do operate under the FAA."

THE COURT: All right. I hear you. I didn't know you only got $349. So I guess -- I guess your client, by getting sued, is having to pay a lot more than that to -- for their attorneys.

MR. FACKLER: That conversation most definitely came up, Your Honor.

THE COURT: Yeah. I bet.

So, Mr. --

MR. FACKLER: While -- while I've got an opportunity, Your Honor, I do want to mention that we interpreted your preliminary pretrial conference, which stated the parties need not engage in discovery -- we received discovery last night from the plaintiffs, and at --

THE COURT: Yeah. We're going to --

MR. FACKLER: -- some point --
THE COURT: I'm going to take care of that.
MR. FACKLER: Okay. Thank you, Your Honor.
THE COURT: Yeah. We're going to take care of that.
MR. FACKLER: Yeah. Great. Thank you.
THE COURT: Mr. Dodd or Mr. -- tell me how to say your name, sir. I apologize.
MR. KESHAVARZI: That's okay, Your Honor. Keshavarzi.
THE COURT: Keshavarzi. Who's going to speak for Kaiser?
MR. KESHAVARZI: I will, Your Honor. I will, Your Honor.
Your Honor, I know that you want to --
THE COURT: So say -- identify yourself, please.
MR. KESHAVARZI: Mo Keshavarzi with Sheppard, Mullin for Kaiser Foundation Health Plan, Your Honor.
THE COURT: All right. Go ahead, sir.
MR. KESHAVARZI: Your Honor, I know there's been a lot of discussion about what the No Surprises Act says and, you know, whether -- to what extent it incorporates the FAA, and it does not. All of those will be briefed and a lot has been said. I'm not going to get into the weeds and try to stay above them, as Your Honor noted.
But it is important, Your Honor, to put everything

that's happening today and these types of cases and the NSA in context.

The NSA was adopted by Congress in a rare act of bipartisanship, because, prior to the NSA, air ambulance companies could bill whatever they wanted and nobody could tell them what they -- how much they were entitled to get because of a flaw in the Federal Arbitration Act.

So the -- so I'll give you an example. We had a patient that was transported from Cancun to San Diego and the air ambulance company billed a million dollars for it. Okay?

And so the NSA brought that to end. And what the NSA did was -- said there was going to be a lot of disputes between health plans and air ambulance companies.

And what the NSA wanted was that -- there's a quick mechanism for resolving this dispute. And there is a lot of built-in mechanisms to force the parties to come into a contract with each other; for example, you can only use certain batches of claims at a time.

And the idea is that if you make it painful for people to constantly have to do these arbitrations, they will eventually come to a contract. You win some, you lose some. At the end of the day, you decide it's better to be in a contract.

And the idea -- one of the essential parts of the arbitration process under the NSA is no discovery. And the NSA

makes that clear, that neither the plan nor the provider gets to have discovery of the other side.

What the air ambulance company is telling Your Honor is that even though Congress said absolutely no discovery during the arbitration process, if you file a lawsuit in federal court, you can have full-blown discovery.

That just doesn't make sense. And it's totally inconsistent with what Congress said about no discovery under the arbitration process. And they came up with an extremely narrow basis for appealing an IDRE decision. And that extremely narrow basis incorporates the Federal Arbitration Act.

Where the NSA -- what Congress said under the NSA was, "We want finality. What we don't want is federal courts to be inundated" -- and what they're asking you to do would cause federal courts to be inundated with challenges to arbitration awards.

So every time they lose, they come up with a reason they don't like it, they get to do full-blown discovery. And what was the reason for this lawsuit?

Ever since they filed this lawsuit, C2C has stopped arbitrating their claims. What do they tell you? They said they lost all C2C cases. So they bring these lawsuits and C2C stops taking their claims.

It's litigation in the strategy here. And it's

inconsistent with the NSA -- both the purpose of what the NSA -- the legislative history behind the NSA, and the specific terms of the NSA, and which we'll note for Your Honor.

If they have problems with due process, they can file a constitutional challenge to the NSA. That's not in this court. That's not in this case. And they don't have the right parties to do that.

They can sue CMS and have a constitutional challenge that, you know, they don't get to do discovery. But this Court, we respectfully submit, has the NSA instructing, you know, what should be done, and under what circumstances, and a decision made may be -- may be reviewed.

THE COURT: Okay. I appreciate it.

So one more question and then I'll -- then I'll tell you what we're going to do. I just want to give the plaintiff -- I'm inclined to stay discovery. I'm inclined to have a hearing on the motions to dismiss, figure this out. I mean, obviously it's kind of all first impression.

I'm inclined to determine whether the complaint is properly pled, whether we're in the right place or not, before we get into discovery. And I'm not really seeing any reason to -- to allow discovery, but I want to give the plaintiff an opportunity to tell me what -- what they're in such a hurry to get that -- before we actually know whether or not there's a lawsuit here or not.

MR. SCHRAMEK: Sure, Your Honor. On the discovery front, the reason I sent the discovery yesterday, the day before the hearing, and then served -- sent a copy to the Court is I wanted to show the Court what I think is a very narrow -- narrowly tailored -- narrowly tailored set of discovery.

We're talking about a handful of document requests, a couple of interrogatories. And it really goes to the heart of the matter on these issues we've been talking about.

And so, of course, we don't see any reason to -- to wait until after the motion to dismiss. In fact, I think that the discovery could very well enhance some of the arguments.

I know we're doing it on the pleadings, but, you know, we're talking a lot about public policy issues and -- and what can and can't be allowed. And I think discovery will provide some insight into that.

And I'll note that even under the Federal Arbitration Act cases, you can get discovery under the FAA. So it's not like if the Court were to decide, "Oh, yeah, the FAA applies, that means no discovery."

Not at all. In fact, we cited in our cases situations where the court remanded to the arbitration -- to the district court, I'm sorry -- remanded to the district court for an evidentiary hearing with the arbitrator over whether the arbitrator was biased; biased being one of the reasons of the Federal Arbitration Act to challenge it.

So you can get discovery in FAA challenges. And we believe even if you had to bring this under the FAA, that the Court is -- certainly can allow discovery in an FAA challenge, so that the party can get additional evidence supporting its allegations. So we don't think -- certainly not the issue of whether the FAA applies or doesn't is dispositive on the discovery front and discovery should proceed.

And I also wanted to mention the 349 a case. There are only a handful of companies, I think maybe 11 at this point in time -- it goes up and down every once in a while -- in the entire country that do these IDR proceedings. They do thousands, tens of thousands of these.

So 349 a pop times 10,000 is good money. So for C2C to have to come into court and defend its decision in its application of what we believe was an illegal presumption -- and like the Court said, to actually look behind the cut-and-paste job that we received, you know, in this decision -- I think that that's a fair position to put C2C in.

So we don't see any need to, you know, pause discovery. We think the Court can answer these questions in due course. And we think this matter can be on for a final resolution in due course, because discovery can be limited in these -- in these sorts of proceedings. And --

THE COURT: All right. Let me ask you this. Let me just ask you this and then we're going to move on here.

What about consolidation of these cases? Should -- is there any -- could the Court just carry them all three together and not consolidate them? Do they need to be consolidated? What is -- you didn't file them as a consolidated action. So what's the --

MR. SCHRAMEK: That's right.

THE COURT: What's the reason for that?

MR. SCHRAMEK: So we -- we completely agree with coordination, and certainly at the motion to dismiss stage, as all the parties are making the same basic arguments, because there is no guidance, there is no law on the proper procedure, and so we're all trying to figure out exactly what will be the law going forward. And so to have all the parties participate at the same hearing, motion to dismiss, if we have one, is -- I would request to the Court -- I think that makes sense.

But once we get back -- past that phase, I think the coordination really doesn't need to happen anymore. These are separate air ambulance claims. These are separate payors. That's one reason we divided it.

As far as what Blue Cross & Blue Shield of Florida did versus what Kaiser did -- I mean, their process and what they submitted, those are all going to be factually disparate, have no relationship to one another.

So I think coordination at this point makes sense, but then after this point it doesn't. And so that's why we

didn't file them as a consolidated proceeding.

THE COURT: Do any of the defendants wish to be heard on that issue?

MR. FACKLER: On the issue of consolidation, Your Honor?

THE COURT: Yes, sir, Mr. Fackler.

MR. FACKLER: Yeah. We would prefer consolidation, but we don't think it's a needle mover either way.

THE COURT: Okay. All right.

All right. I really -- I really feel like -- that we ought to go ahead and have a hearing on the motions that are pending before we move forward in this case.

By everyone's admission, you know, this is a new law, these are new issues. You know, I'm just -- today I was just poking around asking questions. I don't really -- I'm not really in depth on it. I haven't reviewed all the statutes in depth. I haven't read all the cases that you've cited. And so I -- I'm just trying to get a sense of what's going on here.

And -- but I think we just need to go ahead and set a hearing. And I'm prepared to do that. I think I am going to stay discovery. There's no reason to issue a case management scheduling order nor -- or to allow discovery until at least I have the hearing and I can figure out what I've got here, because I don't -- I don't know.

And -- and so I'm going to do that. We're not going

to have any discovery until -- until at least the hearing on the motion to dismiss, and then I'll decide at that point whether to allow it to go forward.

I looked at the proposed discovery. And, you know, it's not -- I guess it's narrow, but it's kind of like everything you would want if you were in the case. So I -- I don't think we're going to do that.

In terms of consolidation, I'm not going to consolidate at this time, but I am going to conduct a joint hearing in all three cases at the same time. It seems to make sense.

And I'll, of course -- to the extent that the defendants have -- to the extent the defendants have a common interest, you know, maybe you'll be able to coordinate your arguments a little bit so that I'm not just hearing the same thing over and over again.

So I'm looking at some dates here. And I was given some dates by my folks here. I've got a long criminal trial I'm getting ready to start in February, so -- so -- and we need some time to -- you know, we haven't really had a chance to study this stuff. So I'm looking at -- they gave me a couple of dates. I'm just looking to see which one is the best for me.

So I can do -- the best days of the week for me in April are going to be on Mondays. And so I'm looking at

Monday, April 24th, at 2 o'clock in my courtroom in person.

I'm not going to necessarily be able to accommodate everybody's schedule. But if somebody has a really big problem with that, now is your time to tell me.

MR. KESHAVARZI: Your Honor, this is Mo Keshavarzi for Kaiser. I can move anything around to make this hearing happen except for in April I have a trial starting on April 10 that -- it's an arbitration that we've confirmed is going. And it's going to be for three weeks. So I'll be right in the middle of my arbitration. And I'll be the lead counsel for Kaiser. So if there is any other date you could give me other than the time of my arbitration, I would be grateful.

THE COURT: Yeah. That seems like a good reason.

So my next offer is -- is in May. And -- because Mr. -- you said your arbitration starts on April 10th; is that correct?

MR. KESHAVARZI: Yes, Your Honor. And it goes to the end of April. So any time after the week of the -- starting the week of May 1, or even before my arbitration.

THE COURT: Yeah. I can't --

MR. KESHAVARZI: After my arbitration, the week of May 1 would --

THE COURT: Yeah. I can't do it before. I was going to offer April 17th, but you've got the same problem.

All right. My next offer is -- and I guess I

could -- I can do it either Monday or Tuesday of this week. And I guess I'll offer you Tuesday so people don't have to travel on the weekend.

Tuesday, May 16th, at 10 o'clock. Tuesday, May 16th, at 10 o'clock.

Everybody looked? Going once. Going twice.

All right. That's it.

So I'm going to issue a notice of hearing on all pending motions for May 16th, at 10 o'clock, here in my courtroom in Jacksonville for an in-person hearing on all pending motions. I believe all the briefing has been done.

Is there -- I'm sorry?

LAW CLERK: We're still waiting for some from Kaiser.

THE COURT: Okay. I think -- I'm told that Kaiser still has a pleading that's -- or briefing that's due; is that correct?

MR. KESHAVARZI: Your Honor, we filed our motion. We're awaiting the opposition. And then there will be a reply. But we filed our motion last week.

THE COURT: Okay. All right. Well, that will give you time to do all that, and we'll have enough time to review it, then.

Discovery is not going to go forward until we have a hearing on the motion -- the motions to dismiss. The cases will not be consolidated at this time; however, the hearing

is -- is in all three cases at the same time. And I'll try to resolve them at the same time as well.

All right. That's all I was planning on doing today. We got into a little bit of discussion of it, but that's helpful to me to start to educate me on what people are going to be saying.

But I'll start with the plaintiff. I'm not necessarily asking you to agree with me, but is there anything else we need to address today while I've got you on the phone?

MR. SCHRAMEK: Nothing for plaintiff, Judge.

THE COURT: All right. What about from Capital Health?

MR. SMITH: Your Honor, this is Ruel Smith of Capital Health. Nothing from us.

THE COURT: All right. What about from Blue Cross?

MR. CONNER: This is Tim Conner. Nothing from us, Your Honor.

THE COURT: What about from Kaiser?

MR. KESHAVARZI: Nothing, Your Honor. Thank you for your time today.

THE COURT: All right. What about from C2C?

MR. FACKLER: Michael Fackler. Nothing from us.

THE COURT: Okay. We'll issue a notice or an order -- I'm not sure which -- that sets this for hearing. And we'll get the briefing finished up. We'll review the matter

04:50 and be ready to talk to y'all about it on May 16th, at 10 a.m.

04:50 In the meantime, no discovery will occur.

04:50 All right. Thank you all. We're adjourned.

(The proceedings concluded at 4:50 p.m.)

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**CERTIFICATE**

UNITED STATES DISTRICT COURT )
)
MIDDLE DISTRICT OF FLORIDA )

I hereby certify that the foregoing transcript is a true and correct computer-aided transcription of my stenotype notes taken at the time and place indicated herein.

DATED this 19th day of January, 2023.

s/Shannon M. Bishop
Shannon M. Bishop, RDR, CRR, CRC

# EXHIBIT F

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

| | | |
|---|---|---|
| GUARDIAN FLIGHT, LLC | ) | NO. 4-22-CV-3805 |
| | ) | |
| VS. | ) | Houston, Texas |
| | ) | 9:39 a.m. |
| AETNA HEALTH, INC., AND MEDICAL EVALUATORS OF TEXAS ASO, LLC | ) | March 3, 2023 |

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**INITIAL PRETRIAL CONFERENCE**

**BEFORE THE HONORABLE ALFRED H. BENNETT**

**UNITED STATES DISTRICT JUDGE**

**VOLUME 1 OF 1**

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P R O C E E D I N G S

THE COURT: Cause Number 4-22-CV-3805, Guardian Flight vs. Aetna Health, Inc.

Counsel, your appearances -- first for the plaintiff, your appearances for the record.

09:39:11

MR. SCHRAMEK: Your Honor, Adam Schramek with Norton Rose Fulbright along with Abraham Chang and Dewey Gonsoulin.

THE COURT: Counselor, how are you?

09:39:23

MR. GONSOULIN: Doing well. How are you doing?

THE COURT: Doing well. Good to see you.

MS. STRAHAN: Good morning, Your Honor. Katherine Strahan and David Hughes for Defendant Aetna Life Insurance Company.

09:39:32

THE COURT: Anyone else? Very well. Counsel, I have your rule -- there is a microphone.

MR. LANZA: Your Honor, I apologize. I apologize. I thought you were calling for appearances for plaintiff's counsel first. I am here representing one of the defendants, MET.

09:39:51

THE COURT: And your name?

MR. LANZA: Joe Lanza, L-A-N-Z-A.

THE COURT: Very well. Thank you, sir.

MR. LANZA: Thank you.

THE COURT: Any other appearances? Very well.

09:40:00

If you are not talking to me, you're free to have a seat.

I do have your Rule 26 filing, so if the plaintiff would like to give me an overview from their perspective.

MR. SCHRAMEK: Yes, Your Honor. This is one of two related cases that have been filed in the Southern District having to do with a challenge to an award under the No Surprises Act. The No Surprises Act went into effect January 1 of '22, and it has to do with out-of-network payments to providers.

We represent air -- an air ambulance company that provides life-saving transports to patients across the country, and this concerns one award that we believe was secured through undue means under the statute and --

THE COURT: Under what?

MR. SCHRAMEK: Undue means and material misrepresentations by Aetna, and also the application of an illegal standard by MET, which was the federal contractor that makes the decision of how much the payment should be.

And in particular with respect to MET, they cited in their decision the regulation that had been overturned and held illegal by Judge Kernodle in the Eastern District of Texas. And they did this months after

the decision went into effect invalidating these regulations.

And what the regulations did was put the thumb on the scale and say, presume the insurer's offer is
09:41:16 the appropriate payment for the transport. Your Honor, that's not allowed under the statute. That's not how the statute is written. That regulation was invalid and inappropriate. So it was invalidated, and yet MET continued to apply it, resulting in our loss of the payment
09:41:33 that we believe was appropriate.

And so, Your Honor, that is what this case is about, and I'll say it's one of the first in the nation to look at these issues and to decide how will a challenge to an IDR award go forward? What are the rules? What's
09:41:45 the applicable standard? What's the scope of review?

Defendants, of course, don't want any discovery. We believe discovery is appropriate because under the process -- there are some due process issues we raised in our pleadings. Under the process, we did not get
09:41:59 to see Aetna's submission. We did not get to see Aetna's evidence. And so, of course, they don't want to have a judicial review of what they said or did in the proceeding.

We don't think the statute works unless we have meaningful judicial review, and that is what we're
09:42:13 here today for, Your Honor, to get a scheduling order and

to let the process go forward.

THE COURT: Couple of questions. You said one of two related cases. Where is the other case? What's the status of that case?

09:42:25 MR. SCHRAMEK: So, Your Honor, there is one of two in this district. So Judge Hanen has the other case. This was the first filed case, November 1st. Judge Hanen's was filed November 16th. We listed them as related in the pleadings. It says they're related on the electronic case

09:42:40 file. We thought they were --

THE COURT: I believe you do have the case number that you have included in that --

MR. SCHRAMEK: It's 4:22-CV-3979, is the second case.

09:42:55 THE COURT: And that is with Judge Hanen? Yes, I see it here.

Is there a reason that these two cases are separate?

MR. SCHRAMEK: Not that we know of, Your Honor.

09:43:03 THE COURT: So for judicial efficiency, should they be together?

MR. SCHRAMEK: Your Honor, I believe so.

THE COURT: All right. This payment that you were referring to, how much are we talking about?

09:43:14 MR. SCHRAMEK: Your Honor, I don't have it in

front of me. I'm not sure of the file. The transports typically range between 30 and 80. This would not be under diversity. It is not the amount in controversy. We're filing an action for judicial review under the No Surprises
09:43:28 Act which creates a statutory right to payment to an out-of-network provider because previously we don't have a contract.

All these tort theories, the federal government stepped in. They took away our right to balance
09:43:38 bill the patient, so we can't send that bill to the patient. You probably saw that in the news.

Instead, we have to have our dispute with Aetna here, and we have a staturtory right for payment from Aetna for this dispute and a statutory right for judicial
09:43:51 review.

THE COURT: I note that there are a number of motions pending. This is an initial conference, and so I am not going to do a deep, deep dive, but would it be helpful perhaps to set up a motion hearing sometime in the
09:44:11 near future to do a deeper dive?

MR. SCHRAMEK: Your Honor, I do think it's appropriate. I think the Court would benefit from oral argument on the motions to dismiss and the issues that it raises.

09:44:20 THE COURT: And to determine whether or not

it's appropriate, perhaps, to merge or consolidate this case with Judge Hanen's case?

MR. SCHRAMEK: Correct. And, Your Honor, I mentioned in this court there is two. Nationwide there are
09:44:31 five cases. Three are pending in the Middle District of Florida, which is where a different entity that makes decisions is headquartered; and two are here in Houston because MET is the defendant in these cases.

So the Houston cases, there is only two,
09:44:43 and I do believe they would benefit from coordination. And I only mention that because in the Middle District of Florida, they were all assigned to the same judge and we're having joint hearings on the motion to dismiss as well. That is not until May.

09:44:55 THE COURT: Very well. Anything else you need to bring to my attention?

MR. SCHRAMEK: That is all, Your Honor.

THE COURT: Thank you, Counselor. For the defense?

09:45:03 MS. STRAHAN: Thank you, Your Honor. I represent Aetna Life Insurance Company in this matter, and Aetna does not believe that the cases should be consolidated and would like to be fully heard on that issue, Your Honor.

09:45:16 With respect to the particular allegations

here, how --

THE COURT: Let me stop you.

MS. STRAHAN: Yes.

THE COURT: Why should two cases with similar facts, similar legal issues, proceed under two separate judges, which could result in two separate rulings on the same subject matter from the same Court?

MS. STRAHAN: Because, Your Honor, the only real issues here is, the way that Guardian Flight is trying to challenge these decisions and these cases is to try to wedge its allegations within the very narrow provision for judicial review in the Federal Arbitration Act.

So the No Surprises Act incorporates the Federal Arbitration Act for judicial review which is, of course, a very narrow scope of review. And so in order to obtain that judicial review, they have alleged that each of these defendants in all of these cases have committed fraud, and those are based on very specific factual allegations.

In our case we don't believe those are sufficient to state a claim, but they're factual distinctions.

THE COURT: But even if that is true, with respect, two learned judges could reach two different conclusions, could they not?

MS. STRAHAN: Certainly, Your Honor. But --

THE COURT: Okay. So to the extent that you have two cases where you're asking two judges of the same court to reach decisions, it could result in two different outcomes, and why wouldn't the two cases benefit from having one outcome as opposed to two, potentially?

MS. STRAHAN: Potentially, Your Honor, yes, because these are factual distinctions that have to be decided under unique facts.

So in this case, you know, Aetna was the administrator for the plan in this case. In the other case it was a different administrator, and the factual allegations, as I understand them, between the allegations against Aetna and the other defendant are different.

So while plaintiff's strategy is the same, the factual allegations are unique, and that's what this case turns on essentially in order to get them within the ambit of the Federal Arbitration Act.

THE COURT: Counsel said this was one of, I guess, first wave of cases. I don't want to say it's a case of first impression, but to the extent that we're going to be establishing guideposts, even if you're talking about two separate sets of facts, two different entities, the guideposts would be applicable perhaps to both cases.

It seems to me that logically you would

want one judge setting the guidepost such that as these cases are considered in this instance and in later instances the guideposts remain the same, would you not?

MS. STRAHAN: Well, Your Honor, I certainly think that with respect to the legal issues, the precedent in one court, you know, could apply to the other court, you know, obviously. But I guess where we belive that these aren't appropriate for consolidation is the facts are unique and the defendants are unique.

09:48:32 THE COURT: All right. Let's put a pin in that. I know I interrupted you, and there were some other issues you want to talk about, so I'll let you return to what you were discussing.

MS. STRAHAN: Thank you, Your Honor.

09:48:44 With respect to, just briefly, the allegations that are being made by the plaintiff, again, we believe that what they're trying to do is to argue that Aetna somehow committed fraud in order to come within the ambit of the very narrow judicial review provided by the 09:49:01 F.A.A.

For example, they have alleged that Aetna did not provide the plaintiff certain calculations that are required in the statute which, in fact, Aetna did provide those calculations. And then beyond that, there is just 09:49:14 complete insufficiency to satisfy the federal pleading

standards, and I might add this same strategy has been applied against all the defendants in terms of the factual allegations. They are all based upon fraud.

In essence, we belive plaintiff is just trying to challenge the merits of the decision, which is exactly what Congress set up the No Surprises Act to provide a remedy for, which is an arbitration. And that remedy plaintiff is not happy with, but that doesn't provide judicial review, and there is no, respectfully, jurisdiction on this pleading.

09:49:30

09:49:47

THE COURT: Let's do this. Ms. Edwards -- well, when does learned counsel believe that they would be prepared to come back, both counsel, and perhaps hold a motion hearing, and at that motion hearing take up the pending motions as well as an anticipated motion to consolidate the two cases, and so I can get specific -- a specific motion and a specific response to that concept? How long -- how far out do you think we need?

09:50:08

MR. SCHRAMEK: So, Your Honor, the motion to dismiss is fully briefed.

09:50:28

THE COURT: Right.

MR. SCHRAMEK: So that one is ready to go. On the motion to consolidate, you know, we can get something like that on file next week, no problem, and then, of course, just the fourteen day, or 21-day response. We are

09:50:38

going to cut it back.

THE COURT: I love partners. He said, I can get it done within a week and then look back at his associates.

09:50:49 (Laughter.)

MR. SCHRAMEK: Your Honor, out of fairness, my wife is due for a baby any day now, so I am going to rely heavily on them over the next 30 days. But again, about 30 to 45 days out, I think everything will be fully briefed.

09:51:01 MS. STRAHAN: Your Honor, that time frame is fine with Aetna. The only thing I would ask, too, Your Honor, is that I believe we may have a dispute about discovery while the motion to dismiss is pending, and even ultimately the scope of discovery. I don't know if you

09:51:14 would like for us to go ahead and file a motion to stay discovery, you know, in the same time frame. I just seek guidance on that.

THE COURT: Ms. Edwards, find a date about 45 days out.

09:51:24 In regards to discovery, what would make the Rules of Federal Procedure inoperative to this case such that discovery should not be allowed? Because the default is that discovery is allowed.

MS. STRAHAN: Your Honor, because of the unique

09:51:45 nature of the reviews under the F.A.A., that is what's

different here. It's certainly within the Court's discretion to stay discovery pending a motion to dismiss. And I think here it's even more --

THE COURT: Well, let me interrupt you for a moment.

MS. STRAHAN: Sure.

THE COURT: What specific discovery are we talking about?

MR. SCHRAMEK: So, Your Honor, we have very limited discovery that we will need for this. For example, we have asked and we have talked about this in our Rule 26, and we have listed it. It's a very narrow set of requests in our Rule 26 report, but things like the physician statement they provided, the calculation they provided of their average reimbursement, maybe some underlying information on that, but it is pretty minimal and for MET the first thing we are going to ask is who made the decision? Can I see their résumé? Very simple things like that. It's pretty narrow discovery, Your Honor.

THE COURT: So you are talking interrogatories?

MR. SCHRAMEK: Document requests. Certainly document requests. I will just note for the Court, as the Court is well aware, but there are many decisions saying that, you know, you don't automatically get a stay of discovery. It is a high burden. Exceptions should be

rare. Just because a motion to dismiss is filed, everyone files them.

We want to go forward and get this thing, you know, handled, and I actually think if we get a little bit of discovery done in the next 45 days, it might help on the consolidation issue as well on the motion we are going to be filing.

MR. LANZA: May I be heard on the discovery issue?

09:53:08 THE COURT: Yes.

MR. LANZA: I represent Medical Evaluators of Texas. We are essentially an arbitrator under the statute, and arbitrators are -- generally have arbitrator immunity from liability, but also arbitration proceedings are

09:53:21 confidential. And by ordering early discovery without the benefit of a ruling of whether or not we're going to be in this lawsuit or are entitled to immunity is forcing us to give up that confidentiality, and I don't think that is appropriate.

09:53:34 I think we should wait until the Court makes a decision on the motion to dismiss. Ours is based on arbitrator immunity. If you decide against us, then we look at the discovery.

THE COURT: Is the discovery that you are

09:53:44 seeking against the arbitrator or against the defendant?

MR. SCHRAMEK: So, Your Honor, I just want to add a little context here. We don't agree that they are an arbitrator. This is not under the Federal Arbitration Act. They are a federal contractor implementing a statutory
09:53:59 scheme and regulatory requirements. They are acting in the place of the regulator adjudicating the dispute, but they are not an arbitrator.

And under the Federal Arbitration Act, all the decisions that you have seen about how -- I know how
09:54:09 hard it is to vacate an award under the Federal Arbitration Act, but the premise of all that is it is based on the agreement of the parties to arbitrate, the scope that they agree to arbitrate, the rules they agree to arbitrate.

This has been forced upon us by the
09:54:21 federal government, and implemented through their contracting party. They are not an arbitrator. They are not entitled to immunity, Your Honor. And that is one of the things we will be talking about in our motion to dismiss. We have only asked -- we are not getting into
09:54:32 the --

THE COURT: What say you in regards to your posture in the case as not an arbitrator, as he has outlined?

MR. LANZA: We say if you look at the
09:54:43 legislative history of the act, if you look at the agency

commentary on the act, if you look at what some of the other courts have said, they all talk in terms of arbitration. And this is cited in our motion to dismiss. Legislative history, for example, says this is what is called a baseball style of arbitration.

09:54:57

THE COURT: All right. Let's do this. Out of abundance of caution, in regards to discovery from --

What was the name of your party again? I apologize.

09:55:09

MR. LANZA: Medical Evaluators of Texas.

THE COURT: -- Medical Evaluators of Texas, any discovery is stayed pending ruling on the motion to dismiss.

In regards to any discovery from Aetna

09:55:25

Health, if there is limited discovery that will assist you prior to the motion hearing specifically as to the motion to consolidate, that can go forward.

In regards to position statements that may have been offered to Medical Evaluators of Texas, that will

09:55:47

be included in the stay. So I'm not sure what that might cover for you, but I am going to try to get you a quick hearing, so I can rule on this motion to dismiss, make a determination as to whether or not they are in or out, and I can get a fuller picture of their role as quote/unquote

09:56:04

an arbitrator to make a determination as to whether or not

discovery should be allowed against them.

So by way of a timing, you gave me two dates, just -- both are available?

(Discussion off the record.)

09:56:25 THE COURT: Okay. Either April the 21st or April the 28th. Any objections to either of those dates?

MR. LANZA: No, Your Honor.

MR. SCHRAMEK: No objection, Your Honor.

MS. STRAHAN: Your Honor, the 21st -- I am

09:56:40 traveling on the 28th, so if we could do it on the 21st, I would appreciate that.

THE COURT: Very well. April the 21st, 9:00. That will be your motion hearing on the pending motions as well as an anticipated motion to consolidate.

09:56:56 Let Judge Hanen know, to the extent you are seeking that, and obviously our chambers will confer about that before that such that I can have his input. With that being said, Counsel, anything else?

MR. SCHRAMEK: Your Honor, I just want to ask

09:57:11 what the setting will be on the 21st, how long we will have on your calendar, as it impacts preparation.

THE COURT: I would anticipate no more than 90 minutes to two hours. I believe -- Ms. Edwards, what day of the week is that?

09:57:30 THE CASE MANAGER: That's a Friday, sir.

THE COURT: But you said that was clear, right?
THE CASE MANAGER: Yes.
THE COURT: Okay. And by 90 minutes, let's just call it 90 minutes for now. I mean judge 90 minutes, not lawyer 90 minutes.
MR. SCHRAMEK: Understood.
THE COURT: I will sign the proposed scheduling order in the meantime, and if there are any modifications we can take that up at the hearing as well.
Counsel, anything else?
MR. SCHRAMEK: Nothing, Your Honor.
THE COURT: Counselor?
MS. STRAHAN: No, Your Honor, just except for just clarification with respect to the discovery against Aetna, I just want to make sure I am complying with the orders.
THE COURT: Well, let me restate it better.
MS. STRAHAN: Okay.
THE COURT: There will be no discovery as to Medical Evaluators of Texas, or information submitted to Medical Evaluators of Texas. Other discovery may go forward.
MS. STRAHAN: Your Honor, if there is something that they are requesting from Aetna that is also protected by statute in terms of confidentiality, may we raise that

issue with Your Honor?

THE COURT: I think if it is raised by confidentiality, obviously.

MS. STRAHAN: Thank you, Your Honor.

09:58:33 MR. SCHRAMEK: And, Your Honor, Aetna was going to provide us with a protective order before today to look at so we could resolve that issue. We didn't get it, but I assume we will be able to agree to it and get it filed shortly.

09:58:45 MS. STRAHAN: Your Honor, I'm sorry, I was referring to the confidentiality in the statute, the No Surprises Act statute. We obviously will agree to certainly produce anything that is HIPPA related under the protective order. It's the statute that I was concerned 09:58:58 with.

MR. SCHRAMEK: I am unaware of any confidentiality provisions in the statute, and I know it pretty well, Your Honor, so I don't know what they're talking about.

09:59:05 MS. STRAHAN: Well, there are some confidentiality provisions in the statute.

THE COURT: Why don't you -- both learned counsel confer, and if there is any issue, reach out back to me and I'll be happy to take a phone call, if necessary, 09:59:15 to sort that out.

MS. STRAHAN: Thank you, Your Honor.
MR. SCHRAMEK: Thank you.
THE COURT: Anything else, Counselor?
MS. STRAHAN: No, Your Honor. Thank you.
09:59:18 THE COURT: Counselor?
MR. LANZA: No, Your Honor. Thank you.
THE COURT: Very well. Counsel, have a good weekend.
(Concluded at 9:59 a.m.)

COURT REPORTER'S CERTIFICATE

I, Kathleen K. Miller, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: March 15, 2023 /s/ Kathleen K. Miller

**Kathleen K. Miller, RPR, RMR, CRR**

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