**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF TEXAS**
**TYLER DIVISION**

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| TEXAS MEDICAL ASSOCIATION, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,<br><br>Defendants. | Civil Action No. 22-cv-00372-JDK<br><br>LEAD CONSOLIDATED CASE |

**DEFENDANTS' COMBINED OPPOSITION TO EAST TEXAS AIR ONE'S MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT AS TO EAST TEXAS AIR ONE**

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## INTRODUCTION

East Texas Air One is an air ambulance provider who joined this lawsuit amid the parties' summary judgment briefing. Like the other Plaintiffs (the Texas Medical Association, Dr. Adam Corley, Tyler Regional Hospital LLC, and LifeNet Inc.) in this consolidated matter, East Texas Air One challenges a final rule issued by Defendants—the Departments of the Treasury, Labor, and Health and Human Services (the "Departments")—establishing a process under which arbitrators will resolve payment disputes between health care providers or facilities and group health plans or health insurance issuers under the No Surprises Act (the "NSA" or the "Act"). *See Requirements Related to Surprise Billing*, 87 Fed. Reg. 52,618 (Aug. 26, 2022) ("Final Rule").

East Texas Air One, as an out-of-network provider of air ambulance services, participates in the independent dispute resolution ("IDR") process the NSA established. It alleges that the Final Rule providing procedural and methodological guidance to help arbitrators evaluate the information before them in selecting an appropriate out-of-network payment amount will injure it by leading arbitrators not to select its offer. But East Texas Air One offers no evidence to show that the portions of the Final Rule it chose to challenge in this lawsuit will injure it in any concrete way. Moreover, Defendants' previous merits arguments apply to East Texas Air One and, as Defendants' prior briefing illustrates, the Final Rule is fully consistent with the Departments' statutory authority and entirely reasonable. This Court should award summary judgment in Defendants' favor as to East Texas Air One.

## BACKGROUND

### I. Factual Background

East Texas Air One, which appears to also be known as "East Texas Air 1," "UT Health East Texas Air 1" "UT Health Air 1," or "Air 1," provides emergency medical transport services in East Texas. Am. Compl. ¶ 11, ECF No. 64; UT Health East Texas EMS and Air 1, https://uthealtheasttexas.com/emsair1 (last visited Jan. 17, 2023). East Texas Air One began providing emergency helicopter services in 1985 under the name ETMC. *See* UT Health East Texas

Air 1 reveals new helicopter design, uniforms New way to transmit patient data and new tracking system, (July 23, 2018), https://uthealtheasttexas.com/news/ut-health-east-texas-air-1-reveals-new-helicopter-design-uniforms-new-way-transmit-patient-data (last visited Jan. 19, 2023). It uses three EC-135 helicopters stationed in Athens, Texas, Henderson, Texas, and Pittsburg, Texas, as well as one reserve helicopter, and employs flight nurses and flight paramedics. *Id.*, *see also* UT Health East Texas EMS and Air 1, https://uthealtheasttexas.com/emsair1 (last visited Jan. 17, 2023).

All of East Texas Air One's aircraft are operated by Metro Aviation, Inc., which maintains exclusive operational control over all aircraft and provides pilots and maintenance technicians for the fleet. *Id.* Metro Aviation is based in Shreveport, Louisiana. *Id.* East Texas Air One is just one of Metro Aviation's partners—Metro Aviation currently operates more than 150 aircraft for 39 programs in the United States. Metro Aviation, 2022 Comprehensive Brochure, https://www.metroaviation.com/wp-content/uploads/2022/03/2022-Comprehensive-Brochure-web.pdf (last visited Jan. 17, 2023).[1]

East Texas Air One is a member of the Association of Critical Care Transport ("ACCT"). ACCT is a non-profit patient advocacy organization comprised of "air and ground critical care transport providers, business organizations, associations, and individuals" committed to "ensuring that critically ill and injured patients have access to the safest and highest quality critical care transport system possible." About ACCT, https://acctforpatients.org/about/ (last visited Jan. 17, 2023).

[1] Until recently, Metro Aviation was a member of the Association of Air Medical Services ("AAMS"), which participated actively in the comment process and even filed a lawsuit challenging provisions of the July 2021 Interim Final Rule and the October 2021 Interim Final Rule in the United States District Court for the District of Columbia. *See Ass'n of Air Med. Servs., v. Dep't Health & Human Servs.*, No. 21-cv-3031-RJL (D.D.C); *see also Requirements Related to Surprise Billing Part I*, 86 Fed. Reg. 36,872 (July 13, 2021) and *Requirements Related to Surprise Billing Part II*, 86 Fed. Reg. 55,980 (Oct. 7, 2021) (collectively, the "Interim Final Rules"). However, disagreements over litigation relating to the NSA evidently caused Metro Aviation to leave AAMS last year. Metro Aviation Splits from AAMS Over No Surprises Lawsuit (Mar. 24, 2022), https://www.metroaviation.com/2022/03/14/metro-aviation-splits-from-aams-over-no-surprises-lawsuit/ (explaining that "[t]he air ambulance industry had become notorious for such surprise 'balance bills,' with the highest charges associated with independent providers such as Air Methods and Global Medical Response, which are owned by private equity firms").

ACCT filed an amicus brief in partial support of the Government in the AAMS case. *See* Brief of Association of Critical Care Transport as Amicus Curiae in Partial Support of the Government, No. 21-cv-3031-RJL, ECF No. 27 (D.D.C. Jan. 26, 2022). ACCT also submitted comments during the rulemaking process. *See* Letter from ACCT to Sec'ys Becerra, Buttigieg, and Yellen, Sept. 7, 2021 at 2 (AR 012250) ("On behalf of ACCT's members and the patients we collectively represent, we thank you in advance for your consideration of our recommendations."). Among ACCT's comments on the Interim Final Rules was a suggestion that the Departments adopt an "Offer Assessment Framework" consisting of a "Payment Evaluation Tool" developed by ACCT, "with fields and weights that may be populated to generate a final adjusted amount to help evaluate the reasonableness of each offer[.]" *Id.* at 10-11 (AR 012258-59). ACCT viewed its proposal as providing an "interactive tool to help guide the IDR entity in objectively evaluating the offers." *Id.* at 11 (AR 012259).

East Texas Air One bills for its services and collects reimbursement for the transports conducted on Metro Aviation's helicopters. *See* Declaration of John A. Smith ("Smith Decl."), ECF No. 64-2. East Texas Air One also participates in IDR proceedings established by the NSA, 42 U.S.C. § 300gg-112, to determine an out-of-network payment amount when it when it is unable to agree on an out-of-network payment amount through open negotiation for services covered by the Act. *Id.*

## II. Procedural History

LifeNet, Inc., filed its complaint challenging the Final Rule on September 23, 2022. *See LifeNet, Inc. v. U.S. Dep't of Health & Hum. Servs.*, No. 6:22-cv-00373-JDK, Compl., ECF No. 1 (E.D. Tex. Sept. 23, 2022). The parties conferred on a briefing schedule and moved jointly to consolidate the LifeNet case and the Texas Medical Association case and to set a briefing schedule to resolve the parties' anticipated cross-motions for summary judgment. *See* Joint Mot. to Consolidate & to Set an Expedited Summ. J. Briefing Schedule, ECF No. 3, Order on Summ. J. Briefing & Setting Hr'g, ECF No. 7 ("Order").

Under that schedule, LifeNet moved for summary judgment first, on October 12, LifeNet's Mot. for Summ. J. & Mem. in Supp., ECF No. 42, and Defendants followed with a combined opposition and cross-motion for summary judgment on November 9, Defs.' Cross-Mot. for Summ. J. & Mem. in Opp'n to Pls.' Summ. J. Mots., ("Defs.' Mem."), ECF Nos. 62, 63.

The next day, on November 10, East Texas Air One sought to be added as a plaintiff in this matter. *See* Am. Compl. of LifeNet, Inc. & East Texas Air One, LLC for Declaratory & Injunctive Relief, ECF No. 64. Because Plaintiffs had already moved for summary judgment, East Texas Air One sought to join Plaintiffs' motion for summary judgment and clarified that it would not separately move for summary judgment. *See* Notice of Joinder by East Texas Air One LLC to LifeNet's Mot. for Summ. J., ECF No. 66. At the time that East Texas Air One filed the Amended Complaint, Defendants' counsel had never heard of East Texas Air One and did not know whether it was a proper plaintiff in this action, whether it had standing to pursue any of its claims, or whether it had previously taken positions on the claims at issue in this lawsuit.

On December 20, 2022, this Court granted LifeNet's and East Texas Air One's motion for leave to file an amended complaint and allowed for the parties to conduct additional briefing specific to the newly added plaintiff. ECF No. 91.

## LEGAL STANDARD

"As the party invoking federal jurisdiction, the plaintiffs bear the burden of demonstrating that they have standing." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021). That burden "becomes gradually stricter as the parties proceed through 'the successive stages of the litigation.'" *In re Deepwater Horizon*, 739 F.3d 790, 799 (5th Cir. 2014) (quoting *Lewis v. Casey*, 518 U.S. 343, 358 (1996)). "'[A]t the summary judgment stage, such a party can no longer rest on . . . mere allegations, but must set forth . . . specific facts' that adequately support their contention." *California v. Texas*, 141 S. Ct. 2104, 2117 (2021) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 411-12 (2013)).

When evaluating a challenge to an agency's interpretation of a statute, a court should first ask "whether Congress has directly spoken to the precise question at issue." *Chevron, USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If it has, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. Where Congress has not spoken directly to the issue at hand, the court should defer to the agency's interpretation so long as it is "based on a permissible construction of the statute." *Id.* at 843. That is true "even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

When evaluating whether an agency action is invalid under the Administrative Procedure Act, a court may set aside agency action when it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *United States v. Johnson*, 632 F.3d 912, 928 (5th Cir. 2011) (quoting 5 U.S.C. § 706(2)(A)). This standard is "narrow and highly deferential." *Sierra Club v. U.S. Dep't of Interior*, 990 F.3d 909, 913 (5th Cir. 2021). "[T]he court is not to substitute its judgment for that of the agency." *Id.* (quoting *FCC v. Fox Television Stations*, 556 U.S. 502, 513 (2009)). Rather, the court "consider[s] whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* (citation omitted). In short, the arbitrary-and-capricious standard simply "requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021).

## ARGUMENT

### I. East Texas Air One Lacks Standing to Challenge the Final Rule's Arbitration Procedures.

East Texas Air One has not made an adequate showing of standing to challenge the Final Rule. To establish Article III standing, a plaintiff must show that they have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016); *see also Ortiz*

*v. Am. Airlines, Inc.*, 5 F.4th 622, 628 (5th Cir. 2021). To establish an injury in fact, Plaintiffs must show they have suffered "an invasion of a legally protected interest [that] is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Kitty Hawk Aircargo, Inc v. Chao*, 418 F.3d 453, 458 (5th Cir. 2005) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). East Texas Air One falls short of that standard here: it offers nothing but speculation and generalities to suggest that the provisions it challenges actually affect which offer an arbitrator would ultimately select or would injure them in any way.

First, there is no injury here. As Defendants argued in their earlier cross-motion, Plaintiffs lack standing to challenge the portions of the Final Rule at issue in this lawsuit because they will suffer no injury on account of those provisions. *See* Defs.' Mem. at 17-18. East Texas Air One, like other Plaintiffs, does not challenge the portion of the Final Rule that determines which offer the arbitrator will actually select—instead it challenges ancillary evidentiary rules that it admits will cause it no harm.

Moreover, East Texas Air One, like the other Plaintiffs, lacks standing because it has not demonstrated that it is likely to suffer an injury in fact as a result of the challenged provisions. Rather, the new allegations in the Amended Complaint assert only speculation and generalities about the possibility that East Texas Air will be disadvantaged in future arbitrations in a way that will injure them and be traceable to the Final Rule. *See* Am. Compl. ¶ 91. These statements do not bear on whether the *arbitrator* might be more likely to select the insurer's offer over the provider's offer, since Plaintiffs' speculation about what *insurers* will do does not affect what an *arbitrator* will do. Plaintiffs' burden cannot be satisfied by a conclusory statement or unsupported speculation. *Kitty Hawk Aircargo*, 418 F.3d at 459.

These generalities are particularly notable given that East Texas Air One—unlike the other air ambulance plaintiff LifeNet—alleges that it "is currently participating in the IDR process to resolve disputes with insurers over appropriate reimbursement rates." Am. Compl. ¶ 90. John A. Smith,

President and Chief Executive Officer of East Texas Air One, avers that East Texas Air One "has submitted offers, and expects to continue to submit offers, in the IDR process that are higher than the qualifying payment amount ("QPA")." Yet he does not explain how, exactly, those offers do not best represent the value of the service, such that an arbitrator would not select their offer under the Final Rule. Smith Decl., ECF 64-2 ¶ 4.

Additionally, East Texas Air One, like the other Plaintiffs, challenges the portions of the Final Rule that instruct arbitrators not to give weight to information that is not credible or not relevant to the arbitrator's task of selecting an offer of payment. None of these Plaintiffs argue that they intend to submit noncredible or irrelevant information to the arbitrators, or that they will be harmed by the arbitrators' failure to give that information weight. Instead, they offer nothing more than speculation that challenged portions of the Final Rule that provide procedural and methodological instruction to arbitrators will affect which offer the arbitrator ultimately selects.

## II. Defendants' Previous Merits Arguments Apply to East Texas Air One As Well.

East Texas Air One has not filed a separate motion for summary judgment, instead adopting LifeNet's arguments as its own. ECF No. 66. Defendants' arguments in their Cross-Motion for Summary Judgment and Memorandum in Opposition to Plaintiffs' Summary Judgment Motions, Defs.' Mem. at 22-42, and Reply Memorandum in Support of Their Cross-Motion for Summary Judgment, ECF No. 86, similarly apply to East Texas Air One as well and are hereby incorporated by reference. Specifically:

- The Departments had the authority and the obligation to issue rules establishing procedures and guidance for IDR proceedings, Defs.' Mem. at 22-26; and
- The Departments used their regulatory authority to reasonably instruct arbitrators to apply consistent methodology in selecting the offer that best represents the value of the qualified IDR item or service, *id.* at 26-41.

Likewise, any potential relief as to East Texas Air One should be appropriately limited for the reasons explained as to the other Plaintiffs in this matter. *Id.* at 41-42.

## CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment should be granted, and East Texas Air One's motion for summary judgment should be denied.

Dated: January 19, 2023

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 19, 2023, I electronically filed the foregoing document through the Court's CM/ECF system which will send notification of such filing to all counsel of record.

*/s/ Anna Deffebach*
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