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June 16, 2025

VIA CM/ECF

Hon. Jill A. Pryor
Hon. Britt C. Grant
Hon. Stanley Marcus
U.S. Court of Appeals for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Re: *REACH Air Med. Services LLC v. Kaiser Found. Health Plan Inc., et al.*
Case No. 24-10135
Defendant-Appellee Kaiser Foundation Health Plan, Inc.'s Citation of Supplemental Authorities Under Federal Rule of Appellate Procedure 28(j)

Dear Judges Pryor, Grant, and Marcus:

Kaiser Foundation Health Plan, Inc. submits this letter to notify the Court of two new opinions by the Fifth Circuit.

***Guardian Flight LLC v. Med. Evaluators of Texas ASO, LLC* (Exhibit A)**

In the first case, REACH Air Medical Services LLC and its affiliates made exactly the same allegations and arguments that REACH makes here. As here, REACH and its affiliates argued they were entitled to judicial review of independent dispute resolution ("IDR") awards issued under the No Surprises Act ("NSA") because Kaiser misrepresented its qualifying payment amount ("QPA") in the IDR process by reporting two different QPAs.

The Fifth Circuit rejected these arguments. It explained that the NSA "explicitly bars judicial review" of IDR awards except in the "extraordinarily narrow" circumstances identified in the FAA. Exhibit A at 2 & n.4. It then held that the allegations by REACH and its affiliates did not satisfy this standard, explaining that they "allege[d] no facts supporting an inference that Kaiser's action was intentional" and, at most, alleged "an inadvertent error, as opposed to an intentional scheme to mislead about its QPA." *Id*. at 8-10. The same is true here. REACH's allegations here are no more detailed than those before the Fifth Circuit. For example, the complaints in both cases did not allege intent, or even use the word "intent." ECF 1. Indeed, here, REACH *admitted* to the district court that it had not yet ascertained whether any error was intentional. *See, e.g.*, ECF 37 at 11.

This Court should reach the same result because it is correct and because doing so serves the purposes of the collateral estoppel doctrine: to avoid inconsistent decisions, end duplicative litigation, and conserve judicial resources. *Montana v. United States*, 440 U.S. 147, 153-54 (1979).

***Guardian Flight LLC v. Health Care Service Corp.* (Exhibit B)**

In the second case, the Fifth Circuit rejected the argument, made by REACH here, that 42 U.S.C. § 300gg-111(c)(5)(E)(i)(I) provides a private right of action to challenge IDR awards, and confirmed that it supplies only an administrative remedy. Exhibit B at 7. This result is correct, too.

Respectfully submitted,

/s/ Moe Keshavarzi

Moe Keshavarzi
for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

SMRH:4936-7805-4222.2

EXHIBIT A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
June 12, 2025
Lyle W. Cayce
Clerk

No. 24-20051

GUARDIAN FLIGHT, L.L.C.,

Plaintiff—Appellee,

versus

MEDICAL EVALUATORS OF TEXAS ASO, L.L.C.,

Defendant—Appellant,

CONSOLIDATED WITH

No. 24-20204

GUARDIAN FLIGHT, L.L.C.; REACH AIR MEDICAL SERVICES, L.L.C.; CALSTAR AIR MEDICAL SERVICES, L.L.C.,

Plaintiffs—Appellants,

versus

AETNA HEALTH, INCORPORATED; KAISER FOUNDATION HEALTH PLAN, INCORPORATED,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC Nos. 4:22-CV-3805, 4:22-CV-3805,
4:22-CV-3979

Before SMITH, CLEMENT, and DUNCAN, *Circuit Judges*.

STUART KYLE DUNCAN, *Circuit Judge*:

We address challenges by emergency air medical providers to award determinations made under the No Surprises Act ("NSA" or "Act"). *See* 42 U.S.C. §§ 300gg-111, 300gg-112. We are guided by a related decision, issued simultaneously with this one, which addresses some of the same issues. *See Guardian Flight, L.L.C v. Health Care Serv. Corp.*, No. 24-10561, --- F.4th --- (5th Cir. _____, 2025) [*Guardian Flight I*].

Enacted in 2022, the NSA protects patients from surprise bills incurred when they receive emergency services from out-of-network providers. The NSA does so by, *inter alia*, relieving patients from liability and creating an Independent Dispute Resolution ("IDR") process for resolving billing disputes between providers and insurers. *Id.* § 300gg-111(c)(1)–(5); *see generally Tex. Med. Ass'n v. United States Dep't of Health & Human Servs.*, 110 F.4th 762, 767–78 (5th Cir. 2024) (discussing the NSA).

In *Guardian Flight I*, we decide that the NSA does not provide a general private right of action to challenge award determinations. Instead, the NSA incorporates Federal Arbitration Act ("FAA") provisions that allow courts to vacate awards only for specific reasons. *See Guardian Flight I*, at 7. Applying that decision here, we AFFIRM the district court's dismissal of the providers' claims against Aetna Health, Inc. ("Aetna") and Kaiser Foundational Health Plan, Inc. ("Kaiser").

Finally, we address an additional issue not presented in *Guardian Flight I*. Here, the providers sued not only the insurers but also Medical Evaluators of Texas ("MET"), the neutral third party who made the award determinations. The district court denied MET's invocation of arbitral immunity and MET cross-appealed. We agree with MET that it enjoys the immunity from suit typically enjoyed by arbitrators. Accordingly, we REVERSE the district court's judgment on that point and REMAND with instructions to dismiss the providers' claims against MET.

I

This appeal involves two consolidated cases. We briefly sketch their background and procedural history.

A

In February 2022, Guardian Flight transported a patient in Nebraska to a hospital 225 miles away. The patient's insurer was Aetna, but Guardian Flight is out of Aetna's network. A dispute arose over the value of the services: Guardian Flight submitted a claim to Aetna for $56,742.20, but Aetna countered that the services were worth only $31,965.53.

The dispute involves what the NSA calls the "qualifying payment amount" or "QPA." This refers to the "median of the contracted rates recognized by the plan or issuer" for the relevant service in the same insurance market and geographic area. *Id.* § 300gg-111(a)(3)(E)(i). Under the NSA and its regulations, the insurer must tell a provider its QPA for the service and explain how it was calculated. *See generally* 45 C.F.R. §§ 149.140, 149.510.

Guardian Flight asked Aetna how it calculated its QPA for the services in question but alleges Aetna offered no explanation. After negotiations over the amount failed, the parties entered the IDR process.

They selected MET as their "certified independent dispute resolution entity" or "CIDRE." *See* 42 U.S.C. § 300gg-112(b)(2)(A). After each submitted a number for payment, MET selected Aetna's number.

Guardian Flight then sued Aetna and MET, seeking to vacate the award and to get a new CIDRE. Guardian Flight alleged Aetna misrepresented its QPA and failed to make required disclosures about how the QPA was calculated.

B

In January and February 2022, Guardian Flight and two of its affiliates, Reach Air Medical Services, L.L.C. ("REACH") and Calstar Air Medical Services, L.L.C. ("CALSTAR") (together, with Guardian Flight, "Providers"), provided emergency air-ambulance services to six patients insured by Kaiser. Providers are all out of Kaiser's network. For all six claims, Kaiser sent Providers an explanation of benefit ("EOB") that included a payment offer. For three of the claims, the EOB stated the offer reflected the QPA; for the other three, the EOB did not. Unable to agree on any claim, the Providers and Kaiser entered IDR. MET, as the CIDRE, chose Kaiser's number for all six claims.

The Providers sued Kaiser and MET, seeking vacatur of the awards. In essence, the Providers claimed Kaiser cheated the IDR process by initially offering the Providers one payment amount and then submitting to MET a lower number purporting to be its QPA.

C

The district court consolidated Guardian Flight's suit against Aetna and MET with the Providers' suit against Kaiser and MET. Aetna and MET moved to dismiss on the grounds that Guardian Flight failed to plead

facts sufficient to trigger vacatur and that MET was entitled to arbitral immunity. Kaiser and MET moved to dismiss on the same grounds.[1]

The district court granted Aetna's motion to dismiss Guardian Flight's claims and Kaiser's motions to dismiss Guardian Flight and CALSTAR's claims. But the court denied MET's motion to dismiss based on arbitral immunity.

The Providers now appeal the dismissals, while MET cross-appeals the denial of arbitral immunity.[2]

II

We review *de novo* the dismissal of a complaint for failure to state a claim. *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004). To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp.*

---

[1] The district court was then notified of a similar case in the Middle District of Florida in which REACH (and other emergency providers) had sued Kaiser and others. After REACH's claims were dismissed, *Med-Trans Corp. v. Cap. Health Plan, Inc.*, 700 F. Supp. 3d 1076, 1087 (M.D. Fla. 2023), *appeal dismissed*, No. 24-10134, 2024 WL 3402119 (11th Cir. May 30, 2024)., the court ruled REACH was collaterally estopped from suing Kaiser and MET. Guardian Flight and CALSTAR, however, were not similarly estopped from suing Kaiser and MET. The Providers, Kaiser, and Aetna do not appeal these collateral estoppel rulings. REACH appealed the dismissal of its claims in *Med-Trans* to the Eleventh Circuit. Here, Providers argue that if the Eleventh Circuit reverses, then the *Med-Trans* decision will lack preclusive effect. *See* 18A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4433 (3d ed. 2025). We need not decide that question, however, because we affirm the dismissal of REACH's claims against Kaiser for the same reasons we affirm the dismissal of Guardian Flight and CALSTAR's claims against Kaiser. *See infra* III(A)–(B).

[2] MET also appeals the district court's denial of collateral estoppel as to Guardian Flight and CALSTAR's claims against it. Because we hold MET enjoys arbitral immunity, we do not reach this issue. *See infra* IV.

v. Twombly, 550 U.S. 544, 570 (2007)). We accept factual allegations as true, construing them in the light most favorable to the plaintiffs. *Causey*, 394 F.3d at 288.

When asserting a claim based on fraud, "a party must state with particularity the circumstances constituting fraud or mistake." FED. R. CIV. P. 9(b). To do so, plaintiffs must "specify the statement contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent." *Herrmann Holdings Ltd. v. Lucent Techs. Inc.*, 302 F.3d 552, 564–65 (5th Cir. 2002) (quoting *Nathenson v. Zonagen Inc.*, 267 F.3d 400, 412 (5th Cir. 2001)).

III

Providers seek to vacate the awards, alleging that during the IDR process Aetna and Kaiser misrepresented their QPAs and failed to disclose required information about how they were calculated.

A

Providers first argue that the NSA gives them a private right to seek vacatur by providing that IDR determinations "shall be binding upon the parties involved, in the absence of a fraudulent claim or evidence of misrepresentation of facts presented to the IDR entity involved regarding such claim." 42 U.S.C. § 300gg-111(c)(5)(E)(i)(I).

We have already decided, however, that this provision creates no private right of action to challenge IDR awards. In *Guardian Flight I*, we explained that the NSA explicitly *bars* judicial review of those awards, except with respect to four scenarios incorporated from the FAA. *Guardian Flight I*, at 4; *see also id.* § 300gg-111(c)(5)(E)(i)(II) (providing IDR determinations "shall not be subject to judicial review, except in a case described in any of paragraphs (1) through (4) of section 10(a) of title 9"). Instead of providing a

general private right of action to challenge awards, the NSA employs an administrative remedy. *See Guardian Flight I*, at 8.

Providers argue they are not seeking "review" of an IDR award but rather "vacatur" of one. But we rejected a similar argument in *Guardian Flight I*. There, we saw no distinction between judicial "review" and judicial "enforcement." *Guardian Flight I*, at 6. For similar reasons, we see no distinction between "review" and "vacatur." A court's exercise of "review" includes the power "to remand, modify, *or vacate*" orders by a subordinate body. *Review*, BLACK'S LAW DICTIONARY (12th ed. 2024) (emphasis added); *see also Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008) ("The Federal Arbitration Act . . . provides for expedited judicial review to confirm, vacate, or modify arbitration awards.").

B

Accordingly, if Providers wish to seek vacatur of the awards, they must do so through the FAA paragraphs explicitly incorporated for that purpose. *See id.* § 300gg-111(c)(5)(E)(i)(II) (incorporating "paragraphs (1) through (4) of section 10(a) of title 9").

Relevant here is paragraph one, providing an arbitral award may be vacated "where the award was procured by corruption, fraud, or undue means." 9 U.S.C. § 10(a)(1). Pursuant to this provision, Providers argue Aetna and Kaiser procured their awards by misrepresenting their QPAs and refusing to explain how they were calculated. They argue the district court erred by ruling they had not alleged facts sufficient to trigger § 10(a)(1). We disagree.

Because the NSA explicitly incorporates the FAA provisions, we interpret "fraud or undue means" to have the same meaning in the NSA as

in the FAA.[3] Under the FAA, "[f]raud requires a showing of bad faith during the arbitration proceedings, such as bribery, undisclosed bias of an arbitrator, or willfully destroying or withholding evidence." *Trans Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Corp.*, 978 F. Supp. 266, 304 (S.D. Tex. 1997), *aff'd and adopted by* 161 F.3d 314 (5th Cir. 1998). "Undue means" "connotes behavior that is immoral if not illegal." *A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1403 (9th Cir. 1992) (per curiam).[4]

Providers first claim Aetna and Kaiser acted in bad faith by failing to explain how they calculated the QPA, as required by 45 C.F.R. § 149.140(d)(2). But that alleged failure, standing alone, does not establish "bad faith" because it does not approach "bribery, undisclosed bias of an arbitrator, or willfully destroying or withholding evidence." *Trans Chem. Ltd.,* 978 F. Supp. at 304; *cf. France v. Bernstein*, 43 F.4th 367, 378 (3d Cir. 2022) (explaining that "knowingly concealing evidence" constitutes arbitration fraud (quoting *Biotronik Mess-Und Therapiegeraete GmbH & Co. v. Medford Med. Instrument Co.*, 415 F. Supp. 133, 138 (D.N.J. 1976))).

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[3] Accordingly, we reject Providers' argument that "fraud" and "undue means" should be given their "ordinary" meaning, as opposed to their meaning under the FAA. *See Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary."); *see also Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("[When] . . . judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.").

[4] Moreover, judicial review of an arbitration award under the FAA is "extraordinarily narrow." *Antwine v. Prudential Bache Sec., Inc.*, 899 F.2d 410, 413 (5th Cir. 1990). And "review under § 10 focuses on misconduct rather than mistake." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350–51 (2011).

Next, Providers argue Aetna and Kaiser fraudulently misrepresented their QPAs for Providers' services. We again disagree that the allegations satisfy the FAA's bad faith standard.

Start with Aetna's representation to Guardian Flight. Guardian Flight only speculates that Aetna's reported QPA was inaccurate, but let's assume *arguendo* that it was. Guardian Flight alleged no facts supporting an inference that the misstatement was intentional. *See AT&T Mobility LLC*, 563 U.S. at 350–51 ("[R]eview under § 10 focuses on misconduct rather than mistake."). Accordingly, Guardian Flight's allegations fall short of fraud. *Nat'l Cas. Co. v. First State Ins. Grp.*, 430 F.3d 492, 499 (1st Cir. 2005) (explaining vacatur under the FAA requires "intentional malfeasance"); *see also Mitchell v. Ainbinder*, 214 F. App'x 565, 568 (6th Cir. 2007) ("[F]raud require[s] proof of some sort of willful intent to give false testimony.").

Next, consider Kaiser's representation of its QPA as to the six claims. For three of those, Kaiser's EOB did not state whether the offer was its QPA. Although Kaiser later told MET that its QPA was a number lower than its original offer, Providers again only speculate that Kaiser misstated its QPA at the outset. *See U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997) (allegations that "amount to nothing more than speculation" "fail to satisfy Rule 9(b)"). And even assuming Kaiser did so, Providers allege no facts supporting an inference that Kaiser's action was intentional.[5]

For the other three claims, Kaiser allegedly told Providers that its initial offer was its QPA, but then told MET that its QPA was a lower

[5] *See Dogherra v. Safeway Stores, Inc.*, 679 F.2d 1293, 1297 (9th Cir. 1982) (explaining that only "intentionally giving a false statement" constitutes fraud); *see also Nat'l Cas. Co.*, 430 F.3d at 499 (only "intentional malfeasance" justifies vacatur).

number. But Providers allege nothing to show that this was anything other than an inadvertent error, as opposed to an intentional scheme to mislead about its QPA.[6] Because Providers' allegations are consistent with either scenario, they fail to meet the Rule 9(b) pleading standard. *See United States ex rel. Integra Med Analytics, L.L.C. v. Baylor Scott & White Health*, 816 F. App'x 892, 897 (5th Cir. 2020) (per curiam) ("A claim is merely conceivable and not plausible if the facts pleaded are consistent with both the claimed misconduct and a legal and obvious alternative explanation." (cleaned up)).

For similar reasons, Providers fail to plead Aetna and Kaiser procured the IDR awards through "undue means." Their allegations do not plausibly suggest Aetna or Kaiser engaged in "behavior that is immoral if not illegal." *A.G. Edwards & Sons,* 967 F.2d at 1403; *see also Am. Postal Workers Union, AFL–CIO v. U.S. Postal Serv.*, 52 F.3d 359, 362 (D.C. Cir. 1995) (explaining "undue means . . . is equivalent in gravity to corruption or fraud, such as a physical threat to an arbitrator"); *PaineWebber Grp., Inc. v. Zinsmeyer Trusts P'ship,* 187 F.3d 988, 991 (8th Cir. 1999) ("[C]ircuits have uniformly construed the term undue means as requiring proof of intentional misconduct.").

In sum, because Providers have not "state[d] with particularity the circumstances constituting fraud" to trigger review under the pertinent

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[6] *See U.S. ex rel. Digit. Healthcare, Inc. v. Affiliated Comput. Servs., Inc.*, 778 F. Supp. 2d 37, 50 (D.D.C. 2011) (noting distinction between inadvertent errors and fraud); *see also Iqbal*, 556 U.S. at 681 (plaintiff fails to "plausibly establish" theory where "more likely explanation[ ]" exists).

provision of the NSA, *see* FED. R. CIV. P. 9(b), the district court did not err in dismissing their claims.

IV

Finally, we consider whether the district court erred in denying MET's claim of arbitral immunity.

Recall that MET is the CIDRE chosen to make the award determinations for all payment disputes underlying this appeal. Providers sued MET to obtain a remedy if MET's awards were, in fact, vacated. Citing arbitral immunity, MET moved to dismiss Providers' suits, which the district court rejected on the grounds that the NSA does not call IDRs arbitrations and does not call CIDREs arbitrators.

MET argues that because it is a quasi-judicial entity that functions like an arbitrator, it is entitled to the immunity from suit normally enjoyed by arbitrators. We agree.

"Because an arbitrator's role is functionally equivalent to a judge's role, courts of appeals have uniformly extended judicial and quasi-judicial immunity to arbitrators." *New England Cleaning Servs., Inc. v. Am. Arb. Ass'n*, 199 F.3d 542, 545 (1st Cir. 1999) (quoting *Olson v. Nat'l Ass'n of Sec. Dealers*, 85 F.3d 381, 382–83 (8th Cir. 1996)). "[A]rbitral immunity is essential to protect decision-makers from undue influence and protect the decision-making process from reprisals by dissatisfied litigants." *Ibid*.

Like judges and arbitrators, CIDREs are neutral arbiters of payment disputes with no stake in the underlying controversy. They receive competing offers for payment, consider information supporting the offers, and then choose one of the offers, which is binding on the providers and insurers. 42 U.S.C. § 300gg-112(b)(4), (b)(5). CIDREs, in sum, function more or less exactly like arbitrators.

It is true that the NSA does not refer to CIDREs as "arbitrators," nor does it call the IDR process "arbitration." That is not determinative, however. What matters in assessing whether an official has immunity is his function, not his title. *See Cleavinger v. Saxner*, 474 U.S. 193, 201 (1985) ("[I]n general our cases have followed a functional approach to immunity law. Our cases clearly indicate that immunity analysis rests on functional categories, not on the status of the defendant." (cleaned up)).

Additionally, Providers and MET both point out that there is no need to name CIDREs as parties because CIDREs must accept remand orders in the event that a court determines an IDR determination should be vacated. That is of course true (and no one argues to the contrary). If a federal court determines an IDR award must be vacated under the relevant NSA provisions, the awarding CIDRE must vacate the award on remand. *See Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 511 (2001) ("Even when the arbitrator's award may properly be vacated, the appropriate remedy is to remand the case for further arbitration proceedings.").

We conclude MET is protected by arbitral immunity for its role in the IDR process and the district court erred by ruling otherwise.

V

Accordingly, we AFFIRM the district court's order dismissing Guardian Flight, CALSTAR, and REACH's claims against Aetna and Kaiser.

We REVERSE the district court's order denying MET's motion to dismiss, and REMAND with the direction that Guardian Flight, CALSTAR, and REACH's claims against MET be dismissed.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
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NEW ORLEANS, LA 70130

June 12, 2025

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 24-20051 Guardian Flt v. Med Evaluators
c/w 24-20204 USDC No. 4:22-CV-3805
USDC No. 4:22-CV-3805
USDC No. 4:22-CV-3979

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and Fed. R. App. P. 39, 40, and 41 govern costs, rehearings, and mandates. **Fed. R. App. P. 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. Fed. R. App. P. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that

this information was given to your client, within the body of your motion to withdraw as counsel.

The judgment entered provides that Plaintiff-Appellee Guardian Flight, L.L.C. and Plaintiff-Appellants Guardian Flight, L.L.C.; Reach Air Medical Services, L.L.C.; Calstar Air Medical Services, L.L.C. pay to Defendant-Appellees Aetna Health, Incorporated; Kaiser Foundation Health Plan, Incorporated; Medical Evaluators of Texas ASO, L.L.C. the costs on appeal. A bill of cost form is available on the court's website www.ca5.uscourts.gov.

Sincerely,

LYLE W. CAYCE, Clerk

Rebecca Andry

By:_____
Rebecca Andry, Deputy Clerk

Enclosure(s)

Ms. Alexa Baltes
Mr. John Burns
Mr. Dewey Jude Gonsoulin III
Ms. Sarah Clark Griffin
Mr. Matthew G. Halgren
Mr. David Watson Hughes
Ms. Hyland Hunt
Mr. Mohammad Keshavarzi
Mr. Joseph Leo Lanza
Ms. Megan Kathleen McKisson
Mr. Adam T. Schramek
Mr. John Bruce Shely
Mrs. Mary Katherine Strahan
Ms. Charlotte Taylor

EXHIBIT B

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
June 12, 2025
Lyle W. Cayce
Clerk

No. 24-10561

GUARDIAN FLIGHT, L.L.C.; MED-TRANS CORPORATION,

Plaintiffs—Appellants,

versus

HEALTH CARE SERVICE CORPORATION,

Defendant—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:23-CV-1861

Before SMITH, CLEMENT, and DUNCAN, *Circuit Judges*.

STUART KYLE DUNCAN, *Circuit Judge*:

Appellants Guardian Flight, LLC, and Med-Trans Corporation, two air ambulance providers ("Providers"), appeal the dismissal of their complaint against Appellee Health Care Service Corporation ("HCSC") for HCSC's alleged failure to timely pay dispute resolution awards under the No Surprises Act ("NSA"). Because we agree with the district court that the NSA does not contain a private right of action, and because Providers have failed to allege facts sufficient to state a derivative claim under the Employee Retirement Income Security Act ("ERISA") or for quantum meruit under Texas law, we affirm.

I

A

Congress enacted the NSA in 2022 to protect patients from surprise medical bills incurred when they receive emergency medical services from out-of-network healthcare providers. *See* 42 U.S.C. §§ 300gg-111, 300gg-112. The NSA achieves this by, *inter alia*, relieving patients from financial liability for surprise bills and creating an Independent Dispute Resolution ("IDR") process for billing disputes between providers and insurers. *Id.* § 300gg-111(c)(1)–(5); *see generally Tex. Med. Ass'n v. United States Dep't of Health & Hum. Servs.*, 110 F.4th 762, 767–78 (5th Cir. 2024) (discussing the NSA).[1]

Under the IDR provisions, the provider and insurer first try to agree on a price for the services. *Id.* § 300gg-111(c)(1)(A). If the negotiation fails, the provider or payor has four days to initiate IDR proceedings. *Id.* § 300gg-111(c)(1)(B). If the parties pursue IDR, either the parties or the Department of Health and Human Services ("HHS") selects a certified independent dispute resolution entity ("CIDRE") to referee. *Id.* § 300gg-111(c)(4).

The CIDRE determines the amount the payor owes the provider. *Id.* § 300gg-111(c)(5). The CIDRE sets that amount via "baseball-style" dispute resolution where the provider and insurer each submit an offer, and the CIDRE selects one party's offer as the award. *Id.* §§ 300gg-112(b)(5). In selecting which offer to award, the CIDRE must consider the insurer's "qualifying payment amount," a heavily regulated rate that reflects the "median of the contracted rates recognized by the plan or issuer . . . for the

[1] The regulations invalidated by *Texas Medical Association* have no effect on this case.

same or a similar item or service" offered in the same insurance market and geographic area. *Id.* § 300gg-111(a)(3)(E)(i).

In the absence of a fraudulent claim or evidence of a misrepresentation of facts to the CIDRE, the IDR award "shall be binding upon the parties involved," and payment of the award "shall be made . . . not later than 30 days after the date on which such determination is made." *Id.* § 300gg-112(b)(5)(D) (incorporating 42 U.S.C. § 300gg-111(c)(5)(E)); *id.* § 300gg-112(b)(6). Patients are not involved in open negotiations or the IDR process, and payors are directed to issue any IDR award payments directly to the provider. *See id.* § 300gg-112(b)(1)(A), (b)(5)(B), (b)(6).

The NSA also provides that an IDR award "shall not be subject to judicial review, except in a case described in any of paragraphs (1) through (4) of section 10(a)" of the Federal Arbitration Act ("FAA"). *Id.* §§ 300gg-112(b)(5)(D), 300gg-111(c)(5)(E). HHS has the authority to enforce provider and payor non-compliance with the NSA's provisions. *Id.* § 300gg-22(b)(2)(A) (providing for HHS enforcement against some payors for NSA non-compliance); *id.* § 300gg-134(b) (providing for HHS enforcement against providers for NSA non-compliance).

B

In this case, Providers initiated IDR under the NSA to resolve their billing disputes with HCSC. After IDR concluded, Providers sued HCSC alleging it (1) failed to timely pay Providers thirty-three IDR awards in violation of the NSA; (2) improperly denied benefits to HCSC's beneficiaries in violation of ERISA by failing to pay Providers; and (3) was unjustly enriched because Providers conferred a benefit on HCSC that HCSC has never paid.

The district court granted HCSC's motion to dismiss the complaint under Rule 12(b)(1) and 12(b)(6). It dismissed the NSA claim after

concluding that the NSA contains no private right of action. The court dismissed the ERISA claim for lack of standing because Providers, as assignees of HCSC's individual plan beneficiaries, did not show the beneficiaries suffered injury given that the NSA shields them from liability and removes them from the IDR process. Finally, the court dismissed Providers' quantum meruit claim because they did not perform their air ambulance services for HCSC's benefit. The district court also ruled that granting Providers leave to amend would be futile. Providers timely appealed.

II

We review *de novo* a district court's "dismissal for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) or for failure to state a claim pursuant to Rule 12(b)(6)." *Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co.*, 704 F.3d 413, 421 (5th Cir. 2013). "Legal questions relating to standing and mootness are also reviewed de novo," *ibid.*, as are questions of statutory interpretation. *Seago v. O'Malley*, 91 F.4th 386, 389 (5th Cir. 2024).

III

Providers argue that the district court erred in dismissing their NSA, ERISA, and quantum meruit claims. We address each claim in turn.

A

The district court correctly dismissed Providers' claim against HCSC for its failure to timely pay dispute resolution awards obtained under the NSA because the NSA provides no private right of action.

First, as the district court correctly observed, the NSA contains no express right of action to enforce or confirm an IDR award. The only right of action provided derives from the incorporated vacatur sections of Section 10(a) of the FAA—none of which applies to this dispute, as Providers concede. So, we begin with the presumption that Congress did not intend to

create any private cause of action. *Sigmon v. Sw. Airlines Co.*, 110 F.3d 1200, 1205 (5th Cir. 1997).

To overcome this presumption, Providers must show "that Congress affirmatively contemplated private enforcement when it passed the relevant statute." *Ibid.* (cleaned up); *see also Casas v. Am. Airlines, Inc.*, 304 F.3d 517, 521–22 (5th Cir. 2002) (noting plaintiffs' "heavy burden" to "overcome the familiar presumption that Congress did not intend to create a private right of action"); *see also* Anthony J. Bellia, Jr., *Justice Scalia, Implied Rights of Action, and Historical Practice*, 92 NOTRE DAME L. REV. 2077, 2090 (2017) ("[H]istorically federal courts did not supply private rights of action for federal statutory violations independently of congressional authority.").

Providers do not carry their heavy burden of showing Congress contemplated a private right of action in the NSA. Indeed, the NSA's text and structure point in the opposite direction. The NSA expressly *bars* judicial review of IDR awards *except* as to the specific provisions borrowed from the FAA (sections which, again, Providers concede are inapplicable). *See* 42 U.S.C. § 300gg-111(c)(5)(E)(i)(II) (IDR awards "*shall not be subject to judicial review*, except in a case described" in 9 U.S.C. § 10(a) (emphasis added)); *id.* § 300gg-112(b)(5)(D) (incorporating the same).[2] The district

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[2] Those provisions authorize a court to vacate an arbitral award:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

court correctly reasoned that this bar on judicial review strongly suggests Congress did not insert a private right of action into the statute.

Providers counter that they seek only judicial *enforcement* of an IDR award, not judicial *review* of one. That is a distinction without a difference. The term "judicial review" is broad enough to include a court's order to enforce an IDR award. "Review" includes "[p]lenary power *to direct and instruct an agent or subordinate*, including the right to remand, modify, or vacate any action by the agent or subordinate, or to act directly in place of the agent or subordinate." *Review*, BLACK'S LAW DICTIONARY (12th ed. 2024) (emphasis added).[3]

Furthermore, courts interpreting other statutes, including the FAA, have held that "judicial review" includes actions that seek to confirm or enforce a dispute resolution award. *See, e.g.*, *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 611 (1993) (explaining ERISA "provides for judicial *review* of the arbitrator's decision by an action in the district court to *enforce*, vacate, or modify the award" (emphases

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> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a)(1)–(4).

[3] It follows that judicial review also encompasses the power to *vacate* IDR determinations. *See Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008) ("The Federal Arbitration Act . . . provides for expedited judicial review to confirm, vacate, or modify arbitration awards."). That disposes of the slightly different argument made in the other NSA case we decide today. *See Guardian Flight, L.L.C. v. Med. Evaluators of Tex. ASO, L.L.C.*, No. 24-20051, --- F.4th --- (5th Cir. ___, 2025). As we explain in that case, the provider there asserts that the NSA's bar on judicial review does not touch a court's power to declare an IDR determination *void*. We reject that argument for the same reason we reject the Providers' argument here: it artificially narrows the term "judicial review" that Congress used in the NSA.

added)).[4] And Congress uses the term "judicial review" when referring to private causes of action. *See*, *e.g.*, 33 U.S.C. § 2236(b)(2) (creating private right of "action to seek judicial review"); 42 U.S.C. § 10139(c) (referring to a "civil action for judicial review").

In sum, Providers' enforcement action depends on the availability of a private right of action not present in the NSA. As a result, the NSA's plain text bars this suit. We will not find an implied right of action where Congress expressly forecloses it. *See Sigmon*, 110 F.3d at 1206 (holding a statute's "express bar" on lawsuits "compel[led] the conclusion that Congress did not intend to provide a private remedy").

Congress could have done otherwise. Section 9 of the FAA empowers courts to confirm or enforce arbitration awards, *see* 9 U.S.C. § 9, but Congress chose not to incorporate § 9 into the NSA. It incorporated only parts of § 10. *See* 42 U.S.C. § 300gg-111(c)(5)(E)(i)(II). By contrast, in other statutes, Congress *has* incorporated § 9 to create a private right of action. *See* 5 U.S.C. § 580(c) ("A final award is binding on the parties to the arbitration proceeding, and may be enforced pursuant to *sections 9 through 13* of" the FAA (emphasis added)).[5] So, Congress knew how to create a private right of

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[4] *See also Hall St. Assocs.*, 552 U.S. at 578 (interpreting "judicial review" in the FAA to include "confirm[ing]" an arbitral award); *Mid Atl. Cap. Corp. v. Bien,* 956 F.3d 1182, 1194 (10th Cir. 2020) (same); *Med. Shoppe Int'l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485, 488 (8th Cir. 2010) (same).

[5] In a 28(j) letter, Providers point out that a federal district court recently found an implied private right of action in the NSA, reasoning it would be absurd to interpret the statute otherwise. *See Guardian Flight LLC v. Aetna Life Ins. Co.*, No. 3:24-cv-680-MPS, 2025 WL 1399145, at *8–9 (D. Conn. May 14, 2025). The court also tried to explain Congress's decision to omit the FAA's express private right of action from the NSA: Unlike "binding" IDR awards, FAA arbitration awards are not self-enforcing, so an express private right of action is necessary to confirm them. *Id.* at *8. We are unconvinced. We follow the NSA's plain text and structure in concluding Congress created no general private right of action in the NSA. *See* 42 U.S.C. § 300gg-111(c)(5)(E)(i)(II). We are

action in the NSA—and has done so elsewhere—but declined to do so. *Howard Univ. Hosp. v. D.C. Dep't of Emp. Servs.*, 952 A.2d 168, 174 (D.C. 2008) ("Where a statute, with reference to one subject, contains a given provision, the omission of such [a] provision from a similar statute concerning a related subject . . . is significant to show [that] a different intention existed." (alterations in original) (quoting *Smith v. D.C. Dep't of Emp. Servs.*, 548 A.2d 95, 100 n.13 (D.C. 1988)); *Turtle Island Restoration Network v. Evans*, 284 F.3d 1282, 1296 (Fed. Cir. 2002) ("When Congress omits from a statute a provision found in similar statutes, the omission is typically thought deliberate." (citing *I.N.S. v. Phinpathya*, 464 U.S. 183, 190 (1984))); 2B NORMAN SINGER & SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 51:2 (7th ed. 2024) ("[C]ourts presume a different intent when a legislature omits words used in a prior statute on a similar subject.").

Instead, Congress took a different tack: it empowered HHS to assess penalties against insurers for failure to comply with the NSA. *See* 42 U.S.C. § 300gg-22(b)(2)(A); 45 C.F.R. § 150.301 *et seq.* The Centers for Medicare and Medicaid Services (CMS), an agency within HHS, has acted on that authority by soliciting provider complaints and compelling payors to pay IDR awards where appropriate.[6] CMS maintains an online portal through which providers may submit complaints regarding the IDR process. *See No Surprises Complaint Form*, CMS, https://perma.cc/HHD2-8HW7.

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likewise unpersuaded by the district court's ERISA analysis; like Providers, the court relied on precedent that predates the NSA's enactment. *See infra* Section III.B; *N. Cypress Med. Ctr. Operating Co. v. Cigna Healthcare*, 781 F.3d 182 (5th Cir. 2015).

[6] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-106335, PRIVATE HEALTH INSURANCE: ROLL OUT OF INDEPENDENT DISPUTE RESOLUTION PROCESS FOR OUT-OF-NETWORK CLAIMS HAS BEEN CHALLENGING 35 (2023).

The inference from the NSA's broader structure, then, is plain. The "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001); *Sigmon*, 110 F.3d at 1206 (holding the "existence of [an] administrative scheme of enforcement is strong evidence that Congress intended the administrative remedy to be exclusive" (quotations omitted)). The NSA's structure conveys Congress's policy choice to enforce the statute through administrative penalties, not a private right of action.

Providers insist that without a private right of action, "not only would the purpose of the NSA be frustrated, the very structure of the NSA would fall apart." But our interpretation is compelled by the NSA's text and structure, both of which exclude a general private right of action. Nor does that interpretation obviously "frustrate" the NSA's purpose. Congress may have had good reasons to provide only a general administrative remedy, together with a strictly limited form of judicial review.

For example, in the first calendar year the NSA was operational, providers filed more than *thirty times* the number of IDR disputes HHS anticipated. *See* Brief for America's Health Insurance Plans as Amicus Curiae Supporting Appellee at 5–7, *Guardian Flight, L.L.C. v. Health Care Serv. Corp.*, No. 24-10561 (5th Cir. argued Feb. 24, 2025). By 2023, providers had initiated nearly 680,000 disputes. *Ibid.* Congress may have judged it better to have an administrative enforcement mechanism handle most award disputes instead of throwing open the floodgates of litigation. Understandably, Providers would prefer a different mechanism for resolving

provider-insurer disputes. But the wisdom of Congress's policy choice is beyond our judicial ken.[7]

In sum, Providers have not shown that, despite the NSA's express bar on judicial review in cases like this, Congress "affirmatively contemplated" a private right of action to enforce IDR awards.

B

We turn next to Providers' ERISA claim, which the district court dismissed for lack of standing.

To demonstrate standing for a derivative ERISA claim as healthcare providers, Providers must first obtain an assignment of benefits from individual plan beneficiaries. *See N. Cypress Med. Ctr. Operating Co.*, 781 F.3d at 191–92. Providers satisfy this requirement, as several HCSC beneficiaries assigned their rights to Appellants.

Providers must also show, however, that the individual plan beneficiaries for whom they are assignees suffered a concrete injury, had those beneficiaries brought the claim themselves. *See Quality Infusion Care, Inc. v. Health Care Serv. Corp.*, 628 F.3d 725, 729 (5th Cir. 2010) ("[A]n assignee . . . stands in the same position as its assignor stood." (ellipses in original) (quoting *Houk v. Comm'r of Internal Revenue*, 173 F.2d 821, 825 (5th Cir. 1949))); *see also Thole v. U.S. Bank N.A.*, 590 U.S. 538, 547 (2020) ("There is no ERISA exception to Article III.").

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[7] Amici American Hospital Association, *et al.*, suggest that declining to find an implied private right of action in the NSA "raises the question whether it is constitutional to wholly abrogate a core common-law right without providing a reasonable alternative remedy." But amici fail to present any authority that directly addresses this concern beyond mere suggestion, and, in any case, neither amici nor HCSC has explained why the NSA's administrative remedy is so inadequate as to violate the Constitution.

Providers claim the beneficiaries suffered concrete injuries when HCSC refused to provide them with out-of-network coverage benefits under the parties' contracts. We disagree. The NSA shields the beneficiaries from liability for any out-of-network coverage costs, so the beneficiaries have not suffered—and could not suffer—any concrete injury from HCSC's failure to cover medical bills that fall within the scope of the NSA.[8] Further, the beneficiaries had nothing to gain or lose in the IDR proceedings between Appellants and HCSC. That process exists entirely outside and independent of ERISA.

Providers argue the injury to beneficiaries is nonetheless cognizable because the beneficiaries have suffered a breach of contract and so have been denied a benefit of their bargain with HCSC. We disagree. This technical violation, if it amounts to one, does no actual harm to the beneficiaries and is consequently an abstract theory insufficient for Article III injury. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 427 (2021) ("Article III grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions." (quoting *Casillas v. Madison Ave. Assocs.*, 926 F.3d 329, 332 (7th Cir. 2019)); *Thole*, 590 U.S. at 541 ("If [plaintiffs] were to *win* this lawsuit, they would still receive the exact same monthly benefits that they are already slated to receive, not a penny more. The plaintiffs therefore have no concrete stake in this lawsuit.").

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[8] *See* 42 U.S.C. § 300gg-135 (non-participating air ambulance providers "shall not bill, and shall not hold liable, [the] participant, beneficiary, or enrollee for a payment amount for such service furnished by such provider" beyond the patient's cost-sharing for the service).

In short, because the beneficiaries would lack Article III standing if they brought an ERISA claim on their own, Providers lack standing to bring a derivative ERISA claim as their assignees. *See Thole*, 590 U.S. at 547.[9]

C

Finally, the district court correctly dismissed Providers' quantum-meruit claim because they failed to allege that they provided a direct benefit to HCSC. Providers admit that Texas courts have held in other contexts that because healthcare services are undertaken for the patient's benefit, not the insurer's, the patient is the proper target of a healthcare provider's quantum-meruit claim. *See Tex. Med. Res., LLP v. Molina Healthcare of Texas, Inc.*, 659 S.W.3d 424, 437 (Tex. 2023). Providers merely argue that this is "a debatable proposition," and that the district court was "too hasty" in dismissing their quantum-meruit claim because it leaves them without a judicial remedy.

The district court was right. Providers did not render any services for HCSC's benefit. Instead they provided "air ambulance transports for [HCSC's] beneficiaries." Those beneficiaries are not plaintiffs in this case, so Providers plainly fail to allege facts that could satisfy the elements of a quantum-meruit claim under Texas law. *See Tex. Med. Res., LLP*, 659 S.W.3d at 436 ("[I]t is not enough to show that [the plaintiff's] efforts benefited [the defendant]. Rather, the plaintiff's efforts must have been undertaken *for* the person sought to be charged." (cleaned up) (emphasis and second and third

[9] Providers contend that every circuit to consider this ERISA issue, including this court, has determined that the beneficiary suffered a concrete injury. Not so. Each of Providers' cited cases predates the NSA and is therefore inapposite. *See, e.g.*, *Springer v. Cleveland Clinic Emp. Health Plan Total Care*, 900 F.3d 284 (6th Cir. 2018).

alterations in original) (quoting *Bashara v. Baptist Mem'l Hosp. Sys.*, 685 S.W.2d 307, 310 (Tex. 1985))).[10]

IV

The district court's judgment is AFFIRMED.

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[10] The district court did not abuse its discretion in denying Providers' request for leave to amend. Providers have no cause of action under the NSA and do not explain which facts they could allege in an amended complaint to satisfy the elements of their ERISA or quantum-meruit claims. *See Porretto v. City of Galveston Park Bd. of Trs.*, 113 F.4th 469, 491 (5th Cir. 2024) ("[A] 'bare bones' request to amend pleadings 'remains futile when it "fail[s] to apprise the district court of the facts that [the plaintiff] would plead in an amended complaint."'" (quoting *Edionwe v. Bailey*, 860 F.3d 287, 295 (5th Cir. 2017))).