No. 24-20051

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GUARDIAN FLIGHT, LLC, *et al.*,

Plaintiffs-Appellees,

v.

MEDICAL EVALUATORS OF TEXAS ASO, LLC,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Texas, Hon. Alfred H. Bennett
Case Nos. 4:22-cv-03805 & 4:22-cv-03979

PLAINTIFFS-APPELLEES' MOTION TO HOLD THE APPEAL IN ABEYANCE

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CERTIFICATE OF INTERESTED PERSONS

No. 24-20051, *Guardian Flight, LLC, et al., v. Medical Evaluators of Texas ASO, LLC*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Defendant-Appellant: **Medical Evaluators of Texas ASO, LLC**
2. Plaintiff-Appellee: **Guardian Flight, LLC,** is a wholly-owned subsidiary of Global Medical Response, Inc. through a holding company, Air Medical Group Holdings Company LLC.
3. Plaintiff-Appellee: **CALSTAR Air Medical Services, LLC**, is a wholly-owned subsidiary of Global Medical Response, Inc. through a holding company, Air Medical Group Holdings Company LLC.
4. Plaintiff (in the district court): **REACH Air Medical Services, LLC**, is a wholly-owned subsidiary of Global Medical Response, Inc. through a holding company, Air Medical Group Holdings Company LLC.
5. Defendants (in the district court): **Aetna Health, Inc.; Kaiser Foundation Health Plan, Inc.**
6. Amicus Curiae Movant (in the district court): **America's Health Insurance Plans**

The following law firms and counsel have participated in this case, either in the district court or on appeal:

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Dated: March 1, 2024	*/s/ Charlotte H. Taylor* Charlotte H. Taylor *Counsel for Plaintiffs-Appellees*

MOTION TO HOLD THE APPEAL IN ABEYANCE

Plaintiffs-Appellees Guardian Flight, LLC and CALSTAR Air Medical Services, LLC ("Plaintiffs-Appellees") respectfully request that the Court hold this appeal in abeyance, including briefing deadlines, pending the District Court's resolution of Plaintiffs-Appellees' motion to partially reconsider dismissal against Insurers Aetna Health, Inc. ("Aetna") and Kaiser Foundation Health Plan, Inc. ("Kaiser," collectively "Insurer Defendants") and to certify a dismissal order for appeal. D. Ct. Doc. 79 (hereinafter "Reconsideration Motion").

The pending interlocutory appeal filed by Defendant-Appellant Medical Evaluators of Texas ASO, LLC ("MET") involves a single issue impacting one defendant in the case: whether entities that perform independent dispute resolution ("IDR") under the new federal No Surprises Act ("NSA") are entitled to "arbitrator immunity." Plaintiffs-Appellees' pending request before the District Court will ripen interrelated issues involving the Insurer Defendants in the same case. Specifically, it will allow this Court to consider the *grounds* for vacatur or judicial review of payment determinations made through the NSA's mandatory dispute-resolution process at the same time that it considers appropriate *remedies—i.e.*, whether the entities making determinations are immune from suit. Judicial efficiency, as well as preservation of the parties' resources, will be served by holding MET's appeal in abeyance until the District Court resolves Plaintiffs-Appellees'

motion. If the District Court does not grant Plaintiffs-Appellees relief that will allow them to present the related issues to this Court for review, Plaintiffs-Appellees will proceed with the above-captioned appeal on arbitrator immunity. Undersigned counsel contacted counsel for MET for their position on this motion on Tuesday, February 27, but did not receive a response.

I. Background

While the abeyance standard is straightforward, a summary of the somewhat complicated history of this case is necessary to understand the basis for Plaintiffs-Appellants' motion.

The No Surprises Act. In 2020, Congress enacted the No Surprises Act ("NSA"), codified in 42 U.S.C. §§ 300gg-111–12. As relevant here, the NSA imposes a regulatory scheme for the resolution of disputes between air ambulance providers and health insurance companies over payment for transport services for out-of-network patients covered by commercial insurance. *See* D. Ct. Doc. 76 at 2 (hereinafter "Dismissal Order"). Under this scheme, if the provider and insurer cannot agree upon payment, they must engage in an independent dispute resolution process before an IDR entity, which is a federal contractor. *See id.* at 2-3.

The IDR entity chooses between the parties' proposed payment amounts without a hearing or exchange of written submissions between the parties. *See id.* at 3. The IDR entity's decision is binding on the parties unless there has been a

misrepresentation of fact to the IDR entity or the case meets the requirements for vacatur under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10(a). 42 U.S.C. §§ 300gg-111(c)(5)(E)(i).[1]

The NSA requires IDR entities to consider certain categories of information in determining the appropriate out-of-network rate. One relevant piece of information is the "qualifying payment amount" submitted by the insurer ("QPA"). This payment amount is subject to federal regulations and represents "the equivalent

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[1] The NSA states:

> A determination of a certified IDR entity under subparagraph [§ 300gg-111(c)(5)(A)] (I) 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; and (II) shall not be subject to judicial review, expect in a case described in any of paragraphs (1) through (4) of section 10(a) of Title 9.

42 U.S.C. § 300gg-11 l(c)(5)(E)(i).

Paragraphs 1 through 4 of Section 10(a) of Title 9, the Federal Arbitration Act (the "FAA"), states as follows:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

median in-network reimbursement rate or, if the insurer has no equivalent in-network data, the median in-network rate for the geographic area." *Id.* at 3 (internal quotation marks omitted). The IDR entity is not permitted to attach presumptive weight to the QPA. *LifeNet, Inc. v. United States Dep't of Health & Hum. Servs.*, 617 F. Supp. 3d 547, 555, 562–63 (E.D. Tex. 2022) (vacating the Interim Rule requiring that additional information submitted by parties "demonstrate that the [QPA] is materially different from the appropriate out-of-network rate").

Plaintiffs' Claims. Plaintiffs-Appellees are providers of air medical transport services. As required by the No Surprises Act, they engaged in IDR in front of Defendant-Appellant MET, which serves as an IDR entity under the statute. Dismissal Order at 4-5. Plaintiffs-Appellees brought suit seeking to vacate several IDR determinations that disfavored them, naming both MET and the Insurers who were parties to those IDR proceedings as defendants. *Id.* Plaintiffs-Appellees alleged, in sum, that (1) the Insurer Defendants violated the NSA by misrepresenting facts about their QPAs in their submissions to MET and (2) that MET violated the NSA by applying an illegal presumption in favor of the Insurer Defendants' payment calculation in making the determination. *Id.* Plaintiffs-Appellees sued both the Insurer Defendants and MET because all are necessary parties to the resolution to their claims that the relevant IDR determinations contravene federal law and should be vacated or reheard by the IDR entity. Both the Insurer Defendants and MET

violated the rules of the IDR process under the NSA, and both are necessary parties for remedial purposes—the Insurer Defendants as the adverse party in the IDR proceedings and MET as the IDR entity that should rehear the claim.

The District Court's Resolution of Defendants' Motions to Dismiss. All Defendants moved to dismiss. *Id.* at 1-2. The Insurer Defendants contended that Plaintiffs-Appellees' Complaints should be dismissed because they failed to sufficiently allege corruption, fraud, or undue means to trigger judicial review of the IDR determinations. *Id.* at 11-12. The District Court agreed, interpreting the NSA to provide that misrepresentations of fact (including allegations that the Insurer Defendants misrepresented their payment calculations) do not trigger judicial review. *Id.* at 12-13. It dismissed all claims against the Insurer Defendants.[2]

MET argued that it should be entitled to arbitrator's immunity and that Plaintiffs-Appellees' allegations did not trigger judicial review of the determination

[2] The District Court also granted Kaiser and MET's motion to dismiss as applied to another Plaintiff's (REACH Air Medical Services, LLC) on the separate ground that REACH's claims are barred by collateral estoppel because it brought similar claims against an IDR entity and insurers in suits filed in the Middle District of Florida and that judge had already ruled on similar issues. Dismissal Order at 9-11; *see also Med-Trans Corp. v. Capital Health Plan, Inc.*, Nos. 3:22-cv-1077-TJC-JBT, 3:22-cv-1153-TJC-JBT, 2023 WL 7188935, at *1 (M.D. Fla. Nov. 1, 2023). REACH's claims were dismissed with prejudice. Dismissal Order at 11. REACH did not ask the District Court to reconsider this conclusion in the Reconsideration Motion, though it reserved the right to appeal on that issue when there is a final judgment disposing of it. Reconsideration Motion at 8 n.1.

under the NSA. *Id.* at 14-15. The District Court disagreed, concluding that IDR entities do not have arbitrator immunity and that Plaintiffs-Appellees plausibly alleged a claim that MET exceeded its powers under the NSA by applying an illegal presumption in selecting the Insurer Defendants' payment calculations. *Id.* at 14-16. As a result, Plaintiffs-Appellees' claims against MET remain in the case.

In sum, in its Dismissal Order, the District Court dismissed all claims against the Insurer Defendants but denied MET's motion to dismiss. MET then appealed.

Plaintiffs-Appellees' Reconsideration Motion. As set forth more fully below, Plaintiffs-Appellees believe that judicial efficiency would be furthered by allowing this Court to review this case's multiple, interrelated issues of first impression in a single appeal. Plaintiffs-Appellees also believe, however, that the district court erred in dismissing all claims against the Insurer Defendants, because they are also necessary parties to Plaintiffs-Appellees' claim that the IDR determinations at issue should be vacated where MET applied an illegal presumption. The Insurer Defendants have a concrete, monetary interest in the determinations and so should participate in litigation over the determinations' validity.

Accordingly, Plaintiffs-Appellees filed the Reconsideration Motion with the District Court asking it to take the following steps to facilitate an immediate appeal: *first*, reconsider its dismissal of the Insurer Defendants because Plaintiffs-Appellees'

claim that vacatur is called for where MET exceeded its powers is a claim against *all* Defendants, not just MET; and *second*, certify the Dismissal Order for appeal under 28 U.S.C. § 1292(b). On the latter point, Plaintiffs-Appellees argued that the Dismissal Order involves a controlling question of law as to which there is substantial ground for difference of opinion regarding whether and when review or vacatur of an IDR determination is available under 42 U.S.C. § 300gg-111(c)(5)(E)(i) if a party alleges that a misrepresentation of fact was made to the IDR entity.

In the alternative, if the District Court declines to reconsider its dismissal of all claims against the Insurer Defendants, Plaintiffs-Appellees asked the district court to enter a final judgment with respect to the Insurer Defendants under Rule 54(b). This would also facilitate immediate appeal of the District Court's dismissal of Plaintiffs-Appellees' claims against the Insurer Defendants.

Plaintiffs-Appellees filed their Reconsideration motion on February 15, 2024. It will be fully briefed as of March 14, 2024.

II. Argument

The Court has discretion to stay an appeal based on the interests of judicial economy and preservation of the parties' resources. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with

economy of time and effort for itself, for counsel, and for litigants."); *see also Patterson v. Aker Sols. Inc.*, 826 F.3d 231, 233 (5th Cir. 2016) (appeal stayed pending the district court's determination of plaintiff's Rule 54(b) motion); *Warfield v. Fid. & Deposit Co.*, 904 F.2d 322, 324 (5th Cir. 1990) (same); *Nefertiti Risk Cap. Mgmt., LLC v. Nat'l Futures Ass'n, LLC*, 2023 WL 9057492, at *1 (2d Cir. Sept. 21, 2023) (appeal held in abeyance pending the district court's resolution of Rule 54(b) and 28 U.S.C. § 1292(b) motions).

MET's appeal brings before this Court only one piece of the case—the availability of arbitrator immunity for IDR entities—even though the Dismissal Order *also* ruled on other interrelated issues of first impression regarding the NSA. In particular, the District Court addressed whether Plaintiffs-Appellees' allegations that the Insurer Defendants had made misrepresentations of fact state a legally valid claim under the NSA for vacatur of the IDR determination. That question also bears on the immunity issue, because the court must interpret the statute as a whole and consider what remedies are available if Plaintiffs-Appellees do make out a claim. Plaintiff-Appellees seek an efficient resolution of both novel, interrelated issues arising from the Dismissal Order.

If the District Court grants Plaintiffs-Appellees one of the alternative forms of relief they have sought—either (1) reconsidering its dismissal of the claim that MET exceeded its authority against the Insurer Defendants and certifying an interlocutory

appeal under 28 U.S.C. § 1292(b) or (2) entering final judgment under Rule 54(b)—then this Court will be able to consider both questions in one appeal. Indeed, because this Court already will be considering the facts of this case and the relevant portions of the NSA in connection with this appeal from the MET arbitrator immunity issue, now is the appropriate time for it to consider all of the District Court's dismissal rulings from the same order. Clarity on these issues would benefit future proceedings in the District Court and help shape the proper scope of the proceeding, the proper parties, the discovery needed, and which issues need to be tried. An abeyance of the current appeal while the District Court considers Plaintiffs-Appellees' Reconsideration Motion would therefore serve the interests of judicial economy and preservation of the parties' resources.

Plaintiffs-Appellees only seek abeyance of the appeal while the Reconsideration Motion is pending in the District Court. Plaintiffs-Appellees will notify this Court of the District Court's eventual decision on the Reconsideration Motion (including any 1292(b) certification made by the district court) as well as any additional notices of appeal. At that point, this Court could restore this appeal to active status and enter an order to govern future proceedings. If this Court so directs, Plaintiffs-Appellees will also file status reports with this Court at 60-day intervals, or on a schedule that would be helpful to this Court.

For the reasons stated above, Plaintiffs-Appellees respectfully request that the Court grant this Motion.

March 1, 2024

Respectfully submitted,

/s/ Charlotte H. Taylor

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CERTIFICATE OF CONFERENCE

In accordance with Fifth Circuit Rule 27.4, the undersigned hereby certifies that counsel contacted counsel for MET for their position on this motion on Tuesday, February 27, but did not receive a response.

Dated: March 1, 2024

/s/ Charlotte H. Taylor
Charlotte H. Taylor

Counsel for Plaintiffs-Appellees

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that on this date, the foregoing document was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

I further certify that this document complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2) because it contains 2,197 words. This document complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in 14-point Times New Roman, a proportionally spaced typeface.

And I certify that: (1) any required privacy redactions have been made; (2) the electronic submission of this document is an exact copy of any corresponding paper document; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free from viruses.

Dated: March 1, 2024

/s/ Charlotte H. Taylor
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Counsel for Plaintiffs-Appellees